



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT
2005 SEP 15 P 2: 12

September 15, 2005

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *J.A.P.*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel
Rosemary C. Smith *RCS*
Associate General Counsel
Brad C. Deutsch *BCD*
Assistant General Counsel
Jonathan Levin *JL*
Senior Attorney
Ron B. Katwan *RK*
Attorney

SUBJECT: Notice of Proposed Rulemaking: Definitions of "Solicit" and "Direct"
(11 CFR 300.2(m) and (n)).

AGENDA ITEM
For Meeting of: 09-22-05

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that revisits the definitions of "solicit" and "direct" at 11 CFR 300.2(m) and (n), respectively, in order to comply with the decisions of the District Court and the Court of Appeals in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) (pet. for reh'g *en banc* filed Aug. 29, 2005).

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 Part 300**

3 **[Notice 2005 –]**

4 **Definitions of “Solicit” and “Direct”**

5 **AGENCY:** Federal Election Commission.

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

7 **SUMMARY:** The Federal Election Commission requests comments on proposed
8 revisions to its definitions of the terms “to solicit” and “to direct”
9 for its regulations on raising and spending Federal and non-Federal
10 funds. Current Commission regulations define “to solicit” as “to
11 ask that another person make a contribution, donation, transfer of
12 funds, or otherwise provide anything of value.” The regulations
13 define “to direct” as “to ask a person who has expressed an intent
14 to make a contribution, donation, or transfer of funds, or to provide
15 anything of value, to make that contribution, donation, or transfer
16 of funds, or to provide that thing of value.” These rules were
17 challenged in Shays v. FEC. Upholding a District Court decision,
18 the Court of Appeals held that the Commission’s definitions of “to
19 solicit” and “to direct” were invalid because they violated
20 Congress’s intent. The Commission has filed a petition for a
21 rehearing en banc of the Court of Appeals decision. At the same
22 time, to comply with the decisions of the District Court and the
23 Court of Appeals, the Commission is issuing this Notice of

1 Proposed Rulemaking regarding its definitions of “to solicit” and
2 “to direct.” No final decision has been made by the Commission
3 on the issues presented in this rulemaking. Further information is
4 provided in the supplementary information that follows.

5 **DATES:**

6 Comments must be received on or before [INSERT DATE 30
7 DAYS AFTER THE DATE OF PUBLICATION IN THE
8 FEDERAL REGISTER]. The Commission will hold a hearing on
9 the proposed rules on November 14 or 15, 2005, or both, at 10:00
10 a.m. Anyone wishing to testify at the hearing must file written
11 comments by the due date and must include a request to testify in
the written comments.

12 **ADDRESSES:**

13 All comments must be in writing, must be addressed to Mr. Brad
14 C. Deutsch, Assistant General Counsel, and must be submitted in
15 either e-mail, facsimile, or paper copy form. Commenters are
16 strongly encouraged to submit comments by e-mail or fax to
17 ensure timely receipt and consideration. E-mail comments must be
18 sent to either solicitdirect@fec.gov or submitted through the
19 Federal eRegulations Portal at <www.regulations.gov>. If e-mail
20 comments include an attachment, the attachment must be in either
21 Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed
22 comments must be sent to (202) 219-3923, with paper copy
23 follow-up. Paper comments and paper copy follow-up of faxed
comments must be sent to the Federal Election Commission, 999 E

1 Street, NW, Washington, DC 20463. All comments must include
2 the full name and postal service address of the commenter or they
3 will not be considered. The Commission will post comments on its
4 website after the comment period ends. The hearing will be held
5 in the Commission’s ninth-floor meeting room, 999 E Street, NW,
6 Washington, DC.

7 **FOR FURTHER**
8 **INFORMATION**
9 **CONTACT:**

Mr. Brad C. Deutsch, Assistant General Counsel, Mr. Jonathan
10 Levin, Senior Attorney, or Mr. Ron B. Katwan, Attorney, 999 E
11 Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-
12 9530.

13 **SUPPLEMENTARY**

14 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L.

15 107-155, 116 Stat. 81 (2002), amended the Federal Election Campaign Act of 1971, as

16 amended, 2 U.S.C. 431 et seq. (the “Act”), by adding to the Act new restrictions and

17 prohibitions on the receipt, solicitation, and use of certain types of non-Federal funds

18 (i.e., funds that do not comply with the amount limits, source prohibitions, and reporting

19 requirements of the Act),¹ which are commonly referred to as “soft money.” The terms

20 “to solicit” and “to direct” are central to three core provisions of BCRA. First, national

21 parties “may not solicit . . . or direct” soft money. 2 U.S.C. 441i(a)(1). Second, national,

22 State, district, and local party committees may not solicit any non-Federal funds or direct

23 any donations to certain entities organized under chapter 501(c) or 527 of the Internal

24 Revenue Code. 2 U.S.C. 441i(d); 11 CFR 300.11 and 300.37. Third, Federal candidates

¹ See 11 CFR 300.2(k).

1 and officeholders “shall not . . . solicit” or “direct” funds in connection with any election
2 unless the funds comply with the Act’s contribution limits and prohibitions. 2 U.S.C.
3 441i(e)(1)(A) and (B); see also 2 U.S.C. 441i(e)(2)-(4). In addition, BCRA added
4 prohibitions on soliciting contributions or donations from foreign nationals and on
5 fraudulent solicitations. 2 U.S.C. 441e(a)(2) and 441h(b). However, neither BCRA nor
6 FECA contains a definition of either “to solicit” or “to direct.”

7 On July 29, 2002, the Commission promulgated regulations implementing
8 BCRA’s new limits on raising and spending of non-Federal funds by party committees,
9 and Federal candidates and officeholders. Final Rules and Explanation and Justification
10 for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR
11 49064 (July 29, 2002) (“Soft Money Final Rules”). These regulations for the first time
12 defined the terms “to solicit” and “to direct.” Section 300.2(m) defines “to solicit” as “to
13 ask that another person make a contribution, donation, transfer of funds, or otherwise
14 provide anything of value, whether the contribution, donation, transfer of funds, or thing
15 of value, is to be made or provided directly, or through a conduit or intermediary.” 11
16 CFR 300.2(m). The Commission defined “to direct” as “to ask a person who has
17 expressed an intent to make a contribution, donation, or transfer of funds, or to provide
18 anything of value, to make that contribution, donation, or transfer of funds, or to provide
19 that thing of value, including through a conduit or intermediary.” 11 CFR 300.2(n).

20 **I. Overview of Court Decisions**

21 In Shays v. FEC, 337 F. Supp.2d 28 (D.D.C. 2004) (“Shays District”), aff’d,
22 Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (pet. for reh’g en banc filed Aug. 29, 2005),
23 the District Court held that the Commission’s definitions of “to solicit” and “to direct”

1 did not survive the second step of Chevron review.² Shays District at 77, 79. The Court
2 of Appeals for the D.C. Circuit affirmed the District Court’s decision but instead held that
3 the Commission’s definitions of “to solicit” and “to direct” did not survive the first step
4 of Chevron review.³ Shays v. FEC, 414 F.3d 76, 105-07 (D.C. Cir. July 15, 2005)
5 (“Shays Appeal”).

6 The Court of Appeals held that the Commission’s definition of “to solicit” was
7 limited to explicit, direct requests for money and, consequently, left “unregulated ‘a wide
8 array of activity’ . . . that the term ‘solicit’ could plausibly cover.” Id. at 104.

9 Specifically, the Court of Appeals determined that the Commission’s definition excluded
10 indirect requests for money, “coded statements,” and “winks and nods.” Id. The Court
11 of Appeals concluded that by limiting “to solicit” to explicit, direct requests for money,
12 and thus permitting indirect requests for funds, the Commission’s definition allows
13 candidates and parties to circumvent BCRA’s prohibitions and restrictions on non-
14 Federal funds and thereby violates “Congress’s intent to shut down the soft-money
15 system.” Id. at 105-06.

16 The Court of Appeals also concluded that the narrow definition of “to solicit” was
17 inconsistent with BCRA’s rejection of the “magic words” standard for advocacy
18 advertisements. Id. at 106. The court explained that “whereas pre-BCRA law permitted
19 unregulated financing of ads lacking ‘explicit words of advocacy of election or defeat of

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

³ See note 2.

1 a candidate,’ BCRA adopts more robust standards for communication oriented towards
2 elections – a change understood to reflect Congress’s judgment that the old standard was
3 ‘functionally meaningless.’” Id. (internal citations omitted). The Court of Appeals
4 agreed with the District Court’s observation that the Commission’s “interpretation of
5 ‘solicit’ and ‘direct’ is similar to the pre-BCRA express advocacy test and would allow
6 candidates and parties to avoid regulation by simply refraining from using certain ‘magic
7 words.’” Id.

8 As to the term “to direct,” the District Court held that the Commission’s definition
9 was not a permissible construction of the statute on two grounds. First, the District Court
10 determined that the term “to direct” had more than one meaning but that the
11 Commission’s definition of “to direct” did not comport with any dictionary definition of
12 the term. Shays District at 76. Second, the District Court held that the Commission’s
13 definition of “to direct” was subsumed under its definition of “to solicit” because “[t]he
14 Commission’s definition of ‘solicit’ covers all requests, regardless of what expressions a
15 requestee may or may not have made.” Id. at 77. The District Court concluded that, as
16 defined by the Commission, the term “to direct” had no meaningful function in the
17 regulations. Id. Subsequently, the Court of Appeals held that the Commission’s
18 definition of “to direct” was invalid because it effectively defined “to direct” as “to ask”
19 (namely, to ask someone who has expressed an intent to make a contribution or donation)
20 and thus, like the definition of “to solicit” and contrary to Congress’s intent, limited “to
21 direct” to explicit requests for funds. The Court of Appeals did not reach the question of
22 whether “to avoid statutory redundancy, ‘direct’ must mean more than ‘ask in response,’
23 when ‘solicit’ means ‘ask’ plain and simple.” Shays Appeal at 107.

1 The Court of Appeals affirmed the District Court’s order that had remanded both
2 definitions to the Commission for further action consistent with its opinion. Id. The
3 Commission has filed a petition for a rehearing en banc of the Court of Appeals decision.
4 In the event the Commission prevails on rehearing, the Commission may terminate this
5 rulemaking proceeding prior to adoption of final rules.

6 **II. 11 CFR 300.2(m) – Definition of “To Solicit”**

7 This NPRM proposes a revised definition of “to solicit” in section II-A below.
8 The Commission is also considering several other alternatives, which are presented in
9 section II-B below.

10 **A. Proposed Revised Definition**

11 To comply with the Shays decisions, the Commission proposes to revise 11 CFR
12 300.2(m) by defining “to solicit” as “to ask, suggest, or recommend that another person
13 make a contribution, donation, transfer of funds, or otherwise provide anything of value,
14 whether it is to be made or provided directly or through a conduit or intermediary. A
15 solicitation is a written or oral communication, whether explicit or implicit, construed as
16 a reasonable person would understand it in context.”

17 By including the terms “suggest” and “recommend” and by explicitly
18 incorporating a reasonable person standard into the revised definition of “to solicit,” the
19 Commission seeks to clarify that “to solicit” covers not only communications that
20 explicitly and directly request contributions or donations, but also communications that
21 implicitly or indirectly attempt to motivate another person to make a contribution or
22 donation and also covers all such communications regardless of whether they use certain
23 “magic words.” Thus, the proposed amendments to the definition would make clear that

1 the following communications cited by the Court of Appeals as examples of
2 communications that would escape regulation under the current definition of “solicit,”
3 are, in fact, solicitations under the current rules: (1) “It’s important for our State party to
4 receive at least \$100,000 from each of you in this election;” (2) “X is an effective State
5 party organization; it needs to get as many \$100,000 contributions as possible.” Shays
6 Appeal at 103.

7 The revised definition explicitly embodies two principles that already form the
8 basis of the Commission’s current definition of “to solicit”: (1) a solicitation must
9 involve an affirmative verbalization (whether written or oral) and (2) a communication is
10 a solicitation only if a reasonable person would understand the communication to be
11 asking another person to make a contribution or donation. First, as the Commission
12 explained in the BCRA rulemaking on foreign national contributions and donations, “[b]y
13 using the term ‘ask,’ the Commission defined ‘solicit’ to require some affirmative
14 verbalization or writing, thereby providing members of Congress, candidates and
15 committees with an understandable standard.” Final Rules and Explanation and
16 Justification for Contribution Limitations and Prohibitions, 67 FR 69928, 69942 (Nov.
17 19, 2002) (“Foreign National Final Rules”). Under the current regulation, the focus of
18 any determination as to whether a communication is a solicitation is the plain meaning of
19 the words used in the communication. Similarly, in assessing which communications
20 constitute solicitations for purposes of determining whether the funds received in
21 response to the communication are contributions, the Commission focuses on “the plain
22 meaning of the words used in the communication.” Final Rules and Explanation and
23 Justification for Political Committee Status, Definition of Contribution, and Allocation

1 for Separate Segregated Funds and Nonconnected Committees, 69 FR 68056, 68057
2 (Nov. 23, 2004) (“Political Committee Status Final Rules”).

3 Second, while requiring some affirmative verbalization, the Commission clarified
4 in the Foreign National Final Rules that it does not intend to restrict the current definition
5 of “to solicit” only to communications explicitly asking for contributions or donations but
6 rather “intended to include ‘a[ny] palpable communication reasonably understood to
7 convey a request for some action’” Foreign National Final Rules at 69942.

8 However, the current rule is limited to communications that ask another person to make a
9 contribution or donation, and does not include any other type of political speech, such as
10 statements of political support.

11 Thus, in determining whether a communication constitutes a solicitation, the
12 Commission currently looks to whether, in context, the communication would be
13 reasonably understood to ask that another person make a contribution or donation. The
14 Commission believes that the Court of Appeals interpreted the current rule more
15 narrowly than is warranted. The Commission does not regard the term “ask” as requiring
16 the use of only certain specified “magic words.” Last year, in the Explanation and
17 Justification for new rules regarding contributions received in response to solicitations,
18 the Commission stated that solicitations are not limited to communications “that use
19 specific words or phrases that are similar to a list of illustrative phrases.” Political
20 Committee Status Final Rules at 68057.

21 The Commission emphasizes that the reasonable person standard is an objective
22 test that does not turn on subjective interpretations of a communication. Thus, focusing
23 on the plain meaning of the words used in the communication as reasonably understood

1 leaves the person making the communication with substantial control over whether the
2 communication comes within the definition of “solicit.”

3 By revising the definition of “to solicit” to reflect explicitly these two principles,
4 the proposed rule would address the Court of Appeal’s concern that the Commission’s
5 current definition permits circumvention of the Act’s limits and prohibitions by allowing
6 solicitation through indirect requests for contributions or donations. The Commission
7 seeks comment on this proposal. Would the proposed definition be too broad or too
8 narrow? Would it reduce the opportunities for circumvention of the Act or the actuality
9 or appearance of corruption? Would it properly effectuate Congressional intent? Would
10 it provide sufficient guidance to candidates, their authorized committees, and political
11 party committees, or their agents? Would it affect the exercise of political activity, and if
12 so, how? Would it be practical to enforce?

13 The proposed regulation defines “to solicit” as “to ask, suggest, or recommend.”
14 This list is not intended to be comprehensive but, as explained above, is merely intended
15 to make clear that “to solicit” encompasses both direct and indirect requests for
16 contributions or donations. Nevertheless, the Commission seeks comment on whether
17 additional terms should be added to the definition of “to solicit” or whether one or more
18 of the terms included in the proposed definition should be removed.

19 The Commission notes that the proposed rule at 11 CFR 300.2(m) would retain
20 the statement, included in the current rule, that merely providing information or guidance
21 as to the requirements of particular law is not solicitation.

22

1 B. Alternative Proposals

2 The Commission also seeks comment on the following five alternatives to the
3 definition proposed above. First, the Commission seeks comment on whether to modify
4 the definition of “to solicit” proposed in section II-A by not including an explicit
5 reasonable person standard. Alternative One would thus revise the second sentence of
6 the definition proposed in section II-A to provide that “a solicitation is a written or oral
7 communication, whether explicit or implicit.”

8 Second, the Commission seeks comment on whether, instead, to begin with the
9 current definition of “to solicit” (i.e. current 11 CFR 300.2(m)) and to modify the current
10 definition to make clear that the regulation applies not only to explicit requests or
11 communications that use certain “magic words” but also to indirect, implied requests for
12 contributions or donations. Alternative Two would provide that “to solicit means to ask,
13 explicitly or implicitly, that another person make a contribution, donation, transfer of
14 funds, or otherwise provide anything of value.” Alternative Two, like the current rule,
15 would not include the terms “suggest” or “recommend” or an explicit reasonable person
16 standard. The Explanation and Justification for Alternative Two would also make clear
17 that a solicitation requires an actual request for funds and does not in any way apply to
18 other types of political speech, such as statements of political support for an organization.

19 The third alternative on which the Commission seeks comment would not change
20 the current definition of “to solicit” at all. Instead, Alternative Three would revise the
21 Explanation and Justification for the current definition to clarify that the current
22 definition embodies the two principles set out above. Under Alternative Three, the
23 Explanation and Justification would state that to qualify as a solicitation, a

1 communication (1) must involve an affirmative verbalization (whether written or oral)
2 and (2) must be reasonably understood in context to be asking another person to make a
3 contribution or donation. The Commission seeks comment on whether this is a proper
4 interpretation of the current rule and is otherwise appropriate. Would revising the
5 Explanation and Justification for the current definition, without amending the definition
6 itself, be consistent with the decision of the Court of Appeals in Shays? Would the
7 current definition of “to solicit,” if explained with reference to these two principles, be
8 too broad or too narrow? The Commission seeks comments on whether other statements
9 should be added to the Explanation and Justification for the current definition to explain
10 better what communications are covered by the current rules. Is there any evidence that
11 the current definition of “to solicit” has led to circumvention of the Act or the actuality or
12 appearance of corruption? Would the current definition, along with a revised
13 Explanation and Justification, provide a standard that is sufficiently clear to make
14 enforcement of the Commission’s BCRA rules practical?

15 Fourth, as indicated above, the Commission has filed a petition for a rehearing en
16 banc of the Court of Appeals decision. In the event the Commission should prevail on
17 rehearing, the Commission seeks comment on whether it should adopt a definition that
18 limits solicitations to explicit requests for contributions or donations. Alternative Four
19 would define “to solicit” to mean “to ask explicitly, by oral or written communication,
20 that another person make a contribution, donation, transfer of funds, or otherwise provide
21 anything of value.” Would such an alternative definition be consistent with, and should it
22 draw on, the approach adopted when the Commission promulgated 11 CFR 100.57(a),
23 which provides that funds received in response to certain communications must be treated

1 as contributions under the Act? As indicated above, the Explanation and Justification for
2 11 CFR 100.57(a) stated that the regulation “requires an examination of only the text of a
3 communication. The regulation turns on the plain meaning of the words used in the
4 communication and does not encompass implied meanings or understandings. It does not
5 depend on reference to external events, such as the timing or targeting of a solicitation,
6 nor is it limited to solicitations that use specific words or phrases” Political
7 Committee Status Final Rules, 69 FR at 68057.

8 The fifth alternative would be to provide no definition for “to solicit.” Several
9 Commission regulations concerning corporate and labor organization activity in 11 CFR
10 Part 114 use the terms “solicit” and “solicitation” without defining them. See, e.g., 11
11 CFR 114.5(g), 114.6, 114.7, and 114.8. The Commission is considering whether, instead
12 of revising its definition of “to solicit,” it should repeal that definition and leave the term
13 undefined for purposes of 11 CFR Part 300, allowing the meaning of “to solicit” to
14 develop on a case-by-case basis through the advisory opinion and enforcement processes.
15 The Commission seeks comment on whether the meaning of the term “to solicit” is
16 sufficiently understandable to candidates, their authorized committees, political party
17 committees, and others governed by BCRA such that a definition by regulation is
18 unnecessary. Does the discussion of the meaning of “to solicit” in the Court of Appeals
19 decision provide sufficient guidance to candidates, their authorized committees, and
20 political party committees so that a definition through regulation is not needed?⁴ If the
21 Commission decides not to define “to solicit,” should it provide additional guidance by
22 including examples of what would and would not be a solicitation in the Explanation and
23 Justification?

⁴ See Shays Appeal at 105-07.

1 C. Conduct

2 The Court of Appeals observed that solicitations include indirect requests through
3 conduct such as “winks and nods.” Shays Appeal at 104-05 (relying on Wisconsin Dep’t
4 of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 223 (1992) for the proposition that
5 the term “solicitation of orders” “includes, not just explicit verbal requests for orders, but
6 also any speech or conduct that implicitly invites an order”). The Commission notes that
7 while the proposed definition retains the principle that a solicitation must involve an
8 affirmative verbalization, it also takes into account the context in which the
9 communication is made. Thus, words that would not by their plain meaning convey a
10 solicitation, may in some contexts be reasonably understood as one when, for example,
11 they are accompanied by “winks and nods.” Similarly, words that would by their plain
12 meaning normally be understood as a solicitation, may not constitute one when taken in
13 context, for example, when the words are used as part of a joke or parody. The
14 Commission seeks comment on whether, in determining if a communication is a
15 solicitation, it is appropriate to consider the non-verbal context of that communication.
16 Does BCRA require the Commission to consider the non-verbal aspects of a
17 communication in determining whether a solicitation has occurred? If the Commission
18 includes the non-verbal aspects of a communication in its definition of “to solicit,” will
19 Federal officeholders, candidates, their authorized committees, political party
20 committees, and their agents have adequate notice of the range of statements and actions
21 that are covered by the definition?

22 The Commission seeks comment on whether it should modify the definition of “to
23 solicit” proposed in section II-A, above, by including solicitations conveyed largely

1 through conduct. This modification would revise the second sentence of the rule
2 proposed in section II-A to provide that “a solicitation is a written or oral communication
3 or conduct, whether explicit or implicit, construed as a reasonable person would
4 understand it in context.” Is the inclusion of conduct in the definition of “to solicit”
5 necessary to comply with the decision of the Court of Appeals? Is it necessary to prevent
6 circumvention of the Act, or actual or apparent corruption? The Commission seeks
7 examples of communications largely conveyed through conduct that should constitute
8 solicitations.

9 If the Commission does not adopt the proposed definition of “to solicit” discussed
10 in section II-A, but rather decides to adopt one of the alternatives discussed in section II-
11 B, should it also include solicitations largely conveyed through conduct in that
12 alternative?

13 The Commission also invites comment regarding a Federal candidate or
14 officeholder’s appearance at a fundraising event (other than an event held by a State,
15 district, or local party) where non-Federal funds are being raised. The Commission
16 raised this issue in a related rulemaking, in which it decided to revise the Explanation and
17 Justification for the Commission’s rules at 11 CFR 300.64(b). These rules permit Federal
18 candidates and officeholders to attend and speak at State, district, and local party
19 fundraising events “without restriction or regulation.”⁵ See Revised Explanation and
20 Justification for Final Rules on Candidate Solicitation at State, District, and Local Party
21 Fundraising Events, 70 FR 37649 (June 30, 2005).

⁵ 11 CFR 300.64 implements 2 U.S.C. 441i(e)(3).

1 In certain advisory opinions, the Commission has permitted attendance and
2 participation by Federal candidates and officeholders at fundraising events for non-
3 Federal funds held by State and local candidates, or by non-Federal political
4 organizations, so long as the solicitations included, or were accompanied by, a disclaimer
5 adequately indicating that the Federal candidate or officeholder was only asking for
6 Federally permissible funds. See Advisory Opinions 2003-03, 2003-05, and 2003-36.⁶
7 The Commission requests comment on whether these advisory opinions, allowing
8 attendance and limited participation at such functions, subject to various restrictions and
9 disclaimer requirements, struck the proper balance. Alternatively, are these advisory
10 opinions inconsistent with BCRA's language or Congressional intent and should they
11 therefore be superseded? Does the explicit permission granted in 2 U.S.C. 441i(e)(3) to
12 attend, speak, or be a featured guest at State, district, and local party fundraising events,
13 by implication, indicate that Congress sought to prohibit Federal candidates and
14 officeholders from doing so at other fundraising events unless such events are exclusively
15 raising Federal funds?⁷

16 Should attendance by Federal candidates and officeholders at fundraising events
17 (other than events held by State, district, or local party committees) where non-Federal
18 funds are being raised constitute a solicitation in and of itself? Alternatively, should the
19 disclaimer and other requirements set forth in Advisory Opinions 2003-03, 2003-05, and
20 2003-36 be incorporated into the Commission's regulations? If a Federal candidate or

⁶ Copies of these advisory opinions can be found at <http://www.fec.gov/law/advisoryopinions.shtml>.

⁷ See 2 U.S.C. 441i(e)(1)(B) (permitting solicitations by Federal candidates for State candidates so long as such solicitations comply with the source prohibitions and amount restrictions under the Act for Federal candidates). See also 2 U.S.C. 441i(e)(4) (permitting certain solicitations, with restrictions, by Federal candidates and officeholders for funds to be used by certain tax-exempt organizations for certain types of Federal election activity).

1 officeholder does not comply with the “disclaimer” requirements set forth in Advisory
2 Opinions 2003-03, 2003-05 and 2003-36, does mere attendance at these fundraising
3 events where non-Federal funds are being raised constitute a solicitation of non-Federal
4 funds in and of itself? In the absence of any “disclaimers,” would a “pure policy” speech
5 delivered by a Federal officeholder or candidate at an event raising non-Federal funds be
6 a solicitation if the Federal candidate or officeholder stands under a banner reading
7 “Support the 2005 State Democratic ticket tonight”?

8 D. Examples of Solicitation

9 The Commission recognizes that the proposed definition of “solicit,” like the
10 current definition, may require the Commission to determine what constitutes solicitation
11 on a case-by-case basis in enforcement matters or advisory opinion requests. In order to
12 provide candidates and political party committees with additional guidance on how the
13 proposed standard would be applied, the Commission is also considering whether to
14 incorporate, either into the Explanation and Justification accompanying the final rule or
15 into the regulation itself, two sets of examples – one of types of communications that
16 would constitute solicitations, and one of types of communications that would not
17 constitute solicitations.

18 As indicated above, several Commission regulations concerning corporate and
19 labor organization activity in 11 CFR Part 114 use the terms “solicit” and “solicitation”
20 without defining them. See, e.g., 11 CFR 114.5(g), 114.6, 114.7, and 114.8. However,
21 several advisory opinions explain what would or would not constitute a solicitation of
22 contributions to a corporation’s separate segregated fund (“SSF”). See, e.g., Advisory
23 Opinions 2003-14, 2000-07, 1999-06, 1991-03, 1988-02, 1983-38, 1982-65, and 1979-

1 13. In those advisory opinions, the Commission generally concluded that the mere
2 publication of the activities conducted by an SSF was not in and of itself a solicitation if
3 the publication did not encourage the recipient of the message to support the SSF, or if
4 the information conveyed in the message did not facilitate the making of contributions to
5 the SSF.

6 Drawing in part on these advisory opinions and the broader principles expressed
7 in them, the Commission is considering whether to include the following as examples of
8 types of communications that would constitute solicitations:

- 9 1. Informing a person how to contribute to a candidate, committee, or organization.

10 For example:

- 11 • “Send all contributions to the following address:”
12 • “I am not permitted to ask for contributions, but unsolicited contributions
13 can be accepted at the following address:”

- 14 2. Informing a person of who, or how many persons, have contributed to a
15 candidate, political committee, or organization, along with a favorable description
16 of the candidate, political committee, or organization, or the goals or purposes of
17 the candidate, committee, or organization.

- 18 3. Informing a person of a fundraising event and recommending that the person
19 attend, even where a contribution or donation is not required for admission.

- 20 4. Informing a person at a fundraising event,⁸ or at some other event sponsored by a
21 candidate, political committee, or organization, that the person is able to

⁸ The Commission has interpreted section 441i(e)(3) to permit candidates and Federal officeholders to solicit non-Federal funds at State party fundraising events. See 11 CFR 300.64; Revised Explanation and Justification for Final Rules on Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 FR 37649.

1 contribute to that candidate, political committee, or organization or to some other
2 candidate, political committee, or organization. For example:

- 3 • “You are at the limit of what you can directly contribute to my campaign,
4 but you can further help my campaign by assisting the State party.”

5 5. A statement that those who contribute may incur some kind of benefit, however
6 intangible. For example:

- 7 • “I will not forget those who contribute at this crucial stage.”
- 8 • “The Senator will be very pleased if we can count on you for \$10,000.”

9 6. Expressing to a person the need of the candidate, committee, or organization for
10 funds or something of value. For example:

- 11 • “It’s important for our State party to receive at least \$100,000 from each
12 of you in this election.”
- 13 • “X is an effective State party organization; it needs to get as many
14 \$100,000 contributions as possible.”

15 7. Stating that (or how) a candidate, committee, or organization will benefit from a
16 contribution or donation. For example:

- 17 • “The money we raise will allow us to communicate our strategy through
18 Labor Day.”
- 19 • “Your immediate commitment to this project would mean a great deal to
20 the entire party and to me personally.”
- 21 • “All contributions will help the party’s election prospects in November.”

22 8. Expressing hope that the donor will continue to support the donee financially. For
23 example:

1 • “I appreciate all you’ve done in the past for our party in this State.
2 Looking ahead, we face some tough elections. I’d be very happy if you
3 could maintain the same level of commitment to (or support for) our State
4 party this year.”

5 9. A written communication that provides a method of making a contribution or
6 donation regardless of the text of the communication. For example, providing an
7 addressed envelope and a reply card allowing contributors to select the dollar
8 amount of their contribution or donation to the candidate, political party
9 committee or organization.

10 The Commission is also considering whether to include the following as examples of
11 types of communications that would not constitute “solicitations:”

12 1. Describing or praising the activities of a candidate, committee, or organization in
13 and of itself. For example:

14 • “Our Senator has done a great job for us this year. The policies she has
15 vigorously promoted in the Senate have really helped the economy of this
16 State.”

17 2. Identifying the candidates a committee supported with past contributions it
18 received, in and of itself. For example:

19 • “Thanks to your contributions we have been able to support our President,
20 Senator, and Representative during the past election cycle.”

21 3. Expressing gratitude for contributions and donations without expressing hope that
22 the donor will make subsequent contributions or donations. For example:

23 • “Thank you for your support.”

1 The Commission seeks comment on a number of issues related to the above
2 examples. Should examples of what does or does not constitute a solicitation appear in
3 the Explanation and Justification that would accompany the final rule containing a
4 definition of “to solicit” or should they be incorporated into the rule itself? Would such a
5 list of examples be helpful in providing guidance to candidates, political party
6 committees, and other political organizations?

7 The Commission also seeks comment on whether any of the above-listed
8 examples should not be incorporated into either the Explanation and Justification or the
9 rule. Are there other examples not included above, that should be incorporated into the
10 Explanation and Justification or into the rule itself? With respect to the ninth example of
11 communications that would constitute solicitations, should the rule or the Explanation
12 and Justification specify that providing an addressed envelope and a reply card allowing
13 contributors to select the dollar amount of their contribution or donation to the candidate,
14 political party committee or organization is always a solicitation, regardless of the
15 content of the written communication because it already constitutes facilitation of the
16 making of a contribution under 11 CFR 114.2(f)(2)(ii)? Should the rule or Explanation
17 and Justification also specify that providing the address of a webpage that is specifically
18 dedicated to facilitating the making of contributions or donations online, or a phone
19 number that is specifically dedicated to facilitating the making of contributions or
20 donations, would always constitute a solicitation? Regarding the third example of
21 communications that would not constitute solicitations, comment is also sought on
22 whether a slightly modified version of that example would also not be a solicitation:

1 “Thank you for your continued/continuing support.” In contrast, should the following be
2 included as an example of what is not a solicitation: “Thank you for your past support.”

3 As explained above, some of the principles underlying the examples set out above
4 are derived from advisory opinions addressing corporate solicitations for contributions to
5 SSFs under 11 CFR Part 114. The Court of Appeals concluded that the fact that these
6 advisory opinions construed “solicit” broadly as covering indirect requests “reinforces
7 our sense that Congress anticipated a similarly broad construction of that term here [*i.e.*,
8 BCRA’s provisions regarding solicitation].” Shays Appeal at 106. However, the Court
9 of Appeals also noted that “‘solicit’ could carry different meanings in different contexts.”
10 Id. Thus, solicitations of contributions from employees to a corporate SSF can raise
11 concerns about the voluntariness of the solicited contributions that may differ from
12 situations covered by 11 CFR Part 300, which generally do not raise such concerns. The
13 Commission seeks comment on the general issue of whether there are differences
14 between these two types of situations that would make it inappropriate to apply principles
15 derived from situations involving corporate solicitations to other solicitations by
16 candidates, political parties, their agents, or entities directly or indirectly established,
17 financed, maintained, or controlled by them. Alternatively, are these two contexts
18 sufficiently similar such that it would be appropriate to apply the same principles to both?

19 E. 11 CFR Part 114 – Corporate and Labor Organization Activity

20 As indicated above, certain Commission regulations concerning corporate and
21 labor-organization activity in 11 CFR Part 114 use the terms “solicit” and “solicitation”
22 without defining them. See, e.g., 11 CFR 114.5(g), 114.6, 114.7, and 114.8; see also 11
23 CFR 104.7(b)(2). Should the Commission continue to leave the term “to solicit”

1 undefined in the regulations governing corporate and labor-organization activity? In the
2 alternative, should it incorporate the proposed definition of “to solicit” for the regulations
3 regarding non-Federal funds in 11 CFR Part 300 into the corporate and labor-
4 organization regulations in 11 CFR Part 114?

5 F. 11 CFR 110.20(a)(6) – Foreign Nationals

6 The Commission notes that its regulations prohibiting contributions, donations,
7 expenditures, independent expenditures, and disbursements by foreign nationals currently
8 incorporate the definition of “to solicit” in the regulations regarding non-Federal funds.
9 See 11 CFR 110.20(a)(6). The Commission proposes to continue to use the same
10 definition of “to solicit” for both the regulations regarding non-Federal funds and the
11 foreign national prohibitions, but also invites comments on whether there are reasons for
12 providing two different, independent definitions of the term.

13 **III. 11 CFR 300.2(n) – Definition of “To Direct”**

14 The Commission proposes to revise 11 CFR 300.2(n) by defining “to direct” as
15 “to guide a person who has expressed an intent to make a contribution, donation, transfer
16 of funds, or otherwise provide anything of value, by identifying a candidate, political
17 committee or organization, for the receipt of a contribution, donation, transfer of funds,
18 or thing of value. The contribution, donation, transfer, or thing of value may be made or
19 provided directly or through a conduit or intermediary.”

20 As indicated above, although the Court of Appeals held that the Commission’s
21 definition of “to direct” was invalid because it effectively defined “to direct” as “to ask”
22 and thus, like the definition of “to solicit,” limited “to direct” to explicit requests for
23 funds, the court did not provide guidance on how “to direct” should be defined.

1 However, the District Court did provide such guidance. Specifically, the District Court
2 observed that the term “to direct” has more than one meaning. It “can mean ‘[t]o guide
3 (something or someone),’ as in to inform someone of where he or she can make a
4 donation. The word can also mean ‘[t]o instruct someone with authority,’ as in to order
5 someone to make a donation.” Shays District at 76 (quoting Black’s Law Dictionary 471
6 (7th ed. 1999)).

7 The Commission proposes to amend the definition of “to direct” to use the
8 meaning, “to guide.” This meaning is consistent with BCRA’s statutory language, which
9 states in relevant part that the national committee of a political party may not “direct to
10 another person a contribution, donation, or transfer of funds or anything of value.” 2
11 U.S.C. 441i(a)(1) (emphasis added). See also 2 U.S.C. 441i(d) (“A national, State,
12 district, or local committee of a political party ... shall not solicit any funds ... or direct
13 any donations to an entity”) (emphasis added). The preposition “to” following the
14 term “to direct” in these statutory provisions would appear to indicate that Congress
15 intended the use of “to direct” in BCRA to mean “to guide.” The Commission seeks
16 comment on whether this is a correct interpretation of the statute.

17 Moreover, the second meaning of “to direct” as “to instruct with authority” would
18 appear to be a form of asking, suggesting, or recommending – the terms proposed rule
19 300.2(m) uses to define “to solicit.” In other words, the definition of “to solicit”
20 proposed in this NPRM already covers all forms of asking, suggesting, or recommending,
21 regardless of whether they are backed by authority. Accordingly, to the extent that
22 “instructing someone with authority” to make a contribution or donation is reasonably
23 understood to be asking, suggesting, or recommending someone to make such a

1 contribution or donation, it is already encompassed by the definition of “to solicit”
2 proposed in this NPRM. Thus, defining “to direct” as to “instruct someone with
3 authority” would appear to deprive the term of a meaningful role in the regulation by
4 subsuming it under the meaning of “to solicit.”⁹

5 By making clear that “to direct” applies to different actions, the proposed revision
6 is responsive to the holding in Shays District that the current definition of “to direct” is
7 subsumed under the current definition of “to solicit,” and is therefore redundant.

8 Specifically, under the proposed rule, “to direct” would encompass situations where a
9 person has already expressed an intent to make a contribution or donation that would
10 advance a particular interest, but lacks the identity of an appropriate candidate or
11 organization to which to make that contribution or donation. The act of direction would
12 consist of providing the contributor with the identity of an appropriate recipient for the
13 contribution or donation. These actions are not covered by the term “to solicit” because
14 soliciting, under both the current and the proposed definition, is an attempt to motivate a
15 person to contribute or donate, but would not apply to a person who merely provides
16 information about possible recipients to another person who has already expressed intent
17 to contribute or donate.

18 The proposed definition of “to direct” depends upon “identification” of a
19 candidate, political committee, or organization. Examples of such “identification” would
20 include providing the names of such candidates, political committees, or organizations, as
21 well as providing any other sufficiently detailed contact information such as a web or
22 mail address, phone number, or the name or other contact information of a committee's
23 treasurer, campaign manager, or finance director.

⁹ See Shays District at 77.

1 The Commission notes that the proposed rule at 11 CFR 300.2(n) would retain the
2 statement, included in the current rule, that merely providing information or guidance on
3 the requirements of particular law is not direction.

4 The Commission invites comments on the proposed definition of “direct.” Is the
5 definition too broad or too narrow? Would the proposed revision reduce the
6 opportunities for circumvention of the Act or actual or apparent corruption? Does it
7 provide sufficient guidance to candidates and political party committees? Would it affect
8 the exercise of political activity, and if so, how?

9 The Commission also seeks comment on whether providing a person who has
10 expressed intent to contribute or donate with a long list of candidates, political
11 committees, or organizations constitutes direction. Specifically, is there a point at which
12 a list might identify so many candidates, political committees, or organizations from
13 which the person may choose that the list would no longer constitute “direction?”

14 Alternatively, understanding that “to direct” means “to guide,” the Commission is
15 also considering whether to leave the term undefined for purposes of 11 CFR Part 300,
16 allowing the meaning of “to direct” to develop further through the advisory opinion and
17 enforcement processes. The Commission seeks comment on this alternative proposal.
18 As long as it is made clear that “to direct” means “to guide,” is the term “to direct”
19 sufficiently clear to candidates, their authorized committees, and political party
20 committees such that a definition by regulation is unnecessary?

21 The Commission notes that the words “directed” and “direction” appear in the
22 Commission’s earmarking rules regarding contributions directed through a conduit or
23 intermediary under 2 U.S.C. 441a(a)(8). See 11 CFR 110.6(a),(d). Neither the Act nor

1 the Commission’s regulations implementing the earmarking rules defines the words
2 “directed” and “direction” as they are used in these provisions. However, the
3 Explanation and Justification for 11 CFR 110.6 states that in determining whether a
4 person has direction or control, “the Commission has considered such factors as whether
5 the conduit or intermediary controlled the amount and timing of the contribution, and
6 whether the conduit selected the intended recipient.” Final Rules for Affiliated
7 Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and
8 Earmarked Contributions, 54 FR 34098, 34108 (August 17, 1989). Thus, the word
9 “direction” in the earmarking rules means “instructing with authority.” For the reasons
10 explained above, this meaning for “to direct” would seem to be subsumed under the
11 definition of “to solicit.” Nevertheless, the Commission seeks comment on whether the
12 term “to direct” in BCRA should be interpreted to parallel the earmarking rules regarding
13 contributions directed through a conduit or intermediary. The word “direction” in the
14 Commission’s earmarking rules has been applied, for example, in Advisory Opinions
15 2003-23, 1991-29, 1986-4, 1980-46, and 1975-10 and MURs 1028 and 2314. Do these
16 precedents provide a sufficient frame of reference that renders unnecessary a definition
17 for purposes of 11 CFR Part 300?

18

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

20 **[Regulatory Flexibility Act]**

21

22

23 The Commission certifies that the attached proposed rules if promulgated would
24 not have a significant economic impact on a substantial number of small entities. The
basis for this certification is that the organizations affected by these rules are the national,

1 State, district, and local party committees of the two major political parties and other
2 political committees, which are not small entities under 5 U.S.C. 601 because they are not
3 small businesses, small organizations, or small governmental jurisdictions. National,
4 State, district, and local party committees and any other political committees affected by
5 these proposed rules are not-for-profit committees that do not meet the definition of
6 “small organization,” which requires that the enterprise be independently owned and
7 operated and not dominant in its field. State political party committees are not
8 independently owned and operated because they are not financed and controlled by a
9 small identifiable group of individuals, and they are affiliated with the larger national
10 political party organizations. In addition, the National and State political party
11 committees representing the Democratic and Republican parties have a major controlling
12 influence within the political arena of their State and are thus dominant in their field.
13 District and local party committees are generally considered affiliated with the State
14 committees and need not be considered separately.

15 Most other political committees affected by these rules are not-for-profit
16 committees that do not meet the definition of “small organization.” Most political
17 committees are not independently owned and operated because they are not financed by a
18 small identifiable group of individuals. Most political committees rely on contributions
19 from a large number of individuals to fund the committees’ operations and activities.

20 To the extent that any State party committees representing minor political parties
21 or any other political committees might be considered “small organizations,” the number
22 affected by this rule is not substantial.

1 Finally, candidates and other individuals operating under these rules are not small
2 entities.

3

4

5 **List of Subjects**

6 11 CFR Part 300

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

9

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

4 **PART 300 – NON-FEDERAL FUNDS**

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

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

7 2. Section 300.2 would be amended by revising paragraphs (m) and (n) to read as
8 follows:

9 **§ 300.2 Definitions.**

10 * * * * *

11 (m) To Solicit. For the purposes of part 300, to solicit means to ask, suggest, or
12 recommend that another person make a contribution, donation, transfer of funds, or
13 otherwise provide anything of value, whether ~~the contribution, donation, transfer of~~
14 ~~funds, or thing of value, it~~ is to be made or provided directly or through a conduit or
15 intermediary. A solicitation is a written or oral communication, whether explicit or
16 implicit, construed as a reasonable person would understand it in context. A solicitation
17 does not include merely providing information or guidance as to the requirement of
18 particular law.

19 (n) To Direct. For the purposes of part 300, to direct means to guide ~~ask~~ a person
20 who has expressed an intent to make a contribution, donation, transfer of funds, or
21 otherwise provide anything of value, by identifying a candidate, political committee or
22 organization, for the receipt of a contribution, donation, transfer of funds, or thing of
23 value, to make that contribution, donation, transfer of funds, or to provide that thing of

1 ~~value, including through a conduit or intermediary.~~ The contribution, donation, transfer,
2 or thing of value may be made or provided directly or through a conduit or intermediary.

3 Direction does not include merely providing information or guidance as to the
4 requirement of particular law.

5 * * * * *

6

7

8

9

10

11

12

Scott E. Thomas
Chairman
Federal Election Commission

13 DATED _____
14 BILLING CODE: 6715-01-U