



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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MEMORANDUM

**AGENDA ITEM**  
For Meeting of: 11-19-09

**TO:** The Commission

**FROM:** Thomasenia P. Duncan *TPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Amy L. Rothstein *ALR*  
Assistant General Counsel

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Attorney

**SUBMITTED LATE**

**SUBJECT:** Draft Notice of Proposed Rulemaking on Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events

Attached is a draft Notice of Proposed Rulemaking ("NPRM") to implement the participation by Federal candidates and officeholders at non-Federal fundraising events aspects of Shays v. Federal Election Commission, 528 F.3d 914 (D.C. Cir. 2008).

We have been asked to place this draft on the agenda for November 19, 2009.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 300**

3 **[Notice 2009 - 26]**

4 **Participation by Federal Candidates and Officeholders at Non-Federal**  
5 **Fundraising Events**

6 **AGENCY:** Federal Election Commission.

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

8 **SUMMARY:** The Federal Election Commission seeks comments on  
9 proposed changes to its rules regarding participation by  
10 Federal candidates and officeholders at non-Federal  
11 fundraising events under the Federal Election Campaign  
12 Act of 1971, as amended. These proposed changes are in  
13 response to the decision of the U.S. Court of Appeals for  
14 the District of Columbia Circuit in Shays v. FEC. The  
15 Commission has made no final decision on the issues  
16 presented in this rulemaking. Further information is  
17 provided in the supplementary information that follows.

18 **DATES:** Comments must be received on or before Monday,  
19 February 8, 2010. Reply comments must be limited to the  
20 issues raised in the initial comments and must be received  
21 on or before Monday, February 22, 2010. The Commission  
22 will hold a hearing on these proposed rules on Wednesday,  
23 March 10, 2010. Anyone wishing to testify at the hearing

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must file written comments by the due date and must include a request to testify in the written comments.

**ADDRESSES:** All comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, facsimile or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to SolicitationShays3@fec.gov. If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, D.C. 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its website after the comment period ends. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, D.C.

**FOR FURTHER  
INFORMATION**

1   **CONTACT:**                               Ms. Amy L. Rothstein, Assistant General Counsel, or  
2                                                       Attorneys Mr. David C. Adkins or Mr. Neven F.  
3                                                       Stipanovic, 999 E Street, NW., Washington, D.C. 20463,  
4                                                       (202) 694-1650 or (800) 424-9530.

5   **SUPPLEMENTARY**  
6   **INFORMATION:**                        The Bipartisan Campaign Reform Act of 2002<sup>1</sup> (“BCRA”) contained extensive and detailed amendments to the Federal Election Campaign Act of 7  
8   1971, as amended, 2 U.S.C. 431 et seq. (“the Act”). The Commission promulgated a  
9   number of rules to implement BCRA, including rules regarding Federal candidate and  
10   officeholder solicitations at State, district, and local party committee fundraising events at  
11   11 CFR 300.64. The Court of Appeals for the District of Columbia Circuit found aspects  
12   these rules invalid in Shays v. Federal Election Commission, 528 F.3d 914 (D.C. Cir.  
13   2008) (“Shays III”). The Commission seeks comment on proposed changes to the rules  
14   at 11 CFR 300.64 to implement the Shays III decision.

15   **I.       Background Information**

16   **A.       BCRA**

17               In 2002, Congress amended the Act by restricting the fundraising activity of  
18   Federal candidates and officeholders, their agents, and entities directly or indirectly  
19   established, financed, maintained, controlled by, or acting on behalf of, any such  
20   candidates or Federal officeholders. See BCRA at Section 323(e); 2 U.S.C. 441i(e). For  
21   both Federal and non-Federal elections, these persons may not “solicit, receive, direct,  
22   transfer or spend” funds unless the funds comply with the amount limitations and source

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<sup>1</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002).

1 prohibitions of the Act.<sup>2</sup> See 2 U.S.C. 441i(e)(1)(A) and (e)(1)(B), 11 CFR 300.61 and  
2 300.62. Furthermore, Congress prohibited State, district and local party committees from  
3 accepting or using as Levin funds those funds that have been solicited, received, directed,  
4 transferred or spent by or in the name of Federal candidates and officeholders. Thus,  
5 Federal candidates and officeholders were effectively prohibiting from raising Levin  
6 funds.<sup>3</sup> See 2 U.S.C. 441i(b)(2)(C)(i); 11 CFR 300.31(e).

7 As one principal BCRA sponsor noted, “The basic rule in the bill is that federal  
8 candidates and officials cannot raise non-federal (or soft) money donations – that is,  
9 funds that do not comply with federal contribution limits and source prohibitions.” 148  
10 Cong. Rec. H407 (daily ed. Feb. 13 2002) (statement of Rep. Shays). As that ban related  
11 to party committees, another of BCRA’s main sponsors noted: “The rule here is simple:  
12 Federal candidates and officeholders cannot solicit soft money funds, funds that do not  
13 comply with Federal contribution limits and source prohibitions, for any party  
14 committee—national, State, or local.” 148 Cong. Rec. S2139 (daily ed. March 20, 2002)  
15 (statement of Sen. McCain).

16 Notwithstanding these restrictions, though, Section 323(e)(3) of BCRA states  
17 explicitly that Federal candidates and officeholders are permitted to “attend, speak, or be

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<sup>2</sup> The amount limits on contributions depend on the type of contributor and the recipient. See 2 U.S.C. 441a(a)(1), (2), and (3). For example, individuals and non-multicandidate PACs may contribute up to \$2,400 per election to a candidate, up to \$5,000 per calendar year to a PAC, and up to \$10,000 per year (combined) to State, district, and local party committees. A multicandidate PAC, by contrast, may give up to \$5,000 per election to a candidate, up to \$5,000 per calendar year to a PAC, and up to \$5,000 (combined) to State, district, and local party committees. Sources prohibited under the Act include national banks, corporations, labor organizations, and foreign nationals. See 2 U.S.C. 441a, 441b, and 441e; see also 2 U.S.C. 441c (government contractors) and 441f (contributions made in the name of another).

<sup>3</sup> “Levin funds” are funds raised by State, district, or local party committees pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. See 11 CFR 300.2(i).

1 a featured guest at a fundraising event for a State, district, or local committee of a  
2 political party.” See 2 U.S.C. 441i(e)(3).

3 B. 2002 Rulemaking

4 In 2002, the Commission commenced a rulemaking to establish rules governing  
5 Federal candidate and officeholder participation in State, district, and local party  
6 committee fundraising events. The Commission proposed alternative interpretations of 2  
7 U.S.C. 441i(e)(3). One interpretation would have allowed Federal candidates and  
8 officeholders only to attend, speak, or be a featured guest at State, district, and local party  
9 committee fundraising events, but, consistent with the Act’s prohibition on the  
10 solicitation of funds outside the limitation and prohibitions of the Act by Federal  
11 candidates and officeholders, would have prohibited those persons from soliciting,  
12 receiving, directing, transferring, or spending funds or participating in any other  
13 fundraising aspect of a State, district, or local party committee fundraising event. See  
14 Notice of Proposed Rulemaking on Prohibited and Excessive Contributions; Non-Federal  
15 Funds or Soft Money, 67 FR 35654, 35672, 35688 (May 20, 2002) (“2002 NPRM”).

16 An alternative interpretation proposed a “total exemption from the general  
17 solicitation ban.” 2002 NPRM at 35672-35673; see also 2 U.S.C. 441i(e)(1)(B);  
18 11 CFR 300.62. Under this interpretation, Federal candidates and officeholders would be  
19 permitted to “speak freely at [party fundraising events] without restriction or regulation.”  
20 2002 NPRM at 35672-35673.

21 The Commission separately explored how 2 U.S.C. 441i(e)(3) – specifically its  
22 reference to “featured guests” – affected the role that Federal candidates and  
23 officeholders could play in publicizing State, district, and local party committee events.

1 See 2002 NPRM at 35673. For example, the Commission sought comment on whether  
2 this provision of BCRA allowed Federal candidates and officeholders to be named in  
3 invitation materials and appear as members of a host committee. Id.

4 The Commission concluded that Section 441i(e)(3) was a total exemption from  
5 the general solicitation ban. Under the Commission’s regulation, Federal candidates and  
6 officeholders were permitted to attend, speak, and appear as featured guests at State,  
7 district, and local party committee fundraising events “without restriction or regulation.”  
8 See Final Rules on Prohibited and Excessive Contributions; Non-Federal Funds or Soft  
9 Money, 67 FR 49064, 49108 (July 29, 2002) (“2002 Final Rule”); 11 CFR 300.64(b).  
10 The Commission justified its interpretation by citing to statutory structure, legislative  
11 intent, general First Amendment concerns and the special relationships that Federal  
12 candidates and officeholders share with State, district, and local party committees. See  
13 2002 Final Rule at 49108.

14 The Commission did not, however, interpret 2 U.S.C. 441i(e)(3) to allow  
15 unrestricted participation in pre-event publicity by Federal candidates and officeholders.  
16 Indeed, the Commission concluded that Federal candidates and officeholders were  
17 “prohibited from serving on ‘host committees’ for a party fundraising event or from  
18 personally signing a solicitation in connection with a State, local, or district party  
19 fundraising event on the basis that these pre-event activities are outside the permissible  
20 activities . . . flowing from a Federal candidate’s or officeholder’s appearance or  
21 attendance at the event.” See 2002 Final Rule at 49108.

1 C. Shays I

2 The Commission’s 2002 regulation implementing 2 U.S.C. 441i(e)(3) was  
3 challenged in Shays v. FEC. 337 F. Supp.2d 28 (D.D.C. 2004) (“Shays I”). The district  
4 court held that the meaning of 2 U.S.C. 441i(e)(3) was ambiguous and so the  
5 Commission’s regulation was not necessarily contrary to congressional intent. Shays I at  
6 90 (applying Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837  
7 (1984)). And, while the court acknowledged that the regulation created “the potential for  
8 abuse,” it did not find that the regulation unduly compromised BCRA’s purpose such that  
9 it was not entitled to deference from the court. Id. at 91. The court did, however, find  
10 that the Commission’s explanation of the rule was inadequate and, therefore, in violation  
11 of the Administrative Procedure Act, 5 U.S.C. 553. Id. at 92-93. The Commission did  
12 not challenge this holding by the district court.

13 D. 2005 Rulemaking

14 Upon remand, the Commission commenced a rulemaking to implement the Shays  
15 I district court’s opinion. See Revised Explanation and Justification, Candidate  
16 Solicitation at State, District and Local Party Fundraising Events, 70 FR 37649 (June 30,  
17 2005) (“2005 Revised E&J”). This rulemaking provided additional explanation and  
18 justification of the 2002 Final Rule, but it did not change the text of that rule. The  
19 Commission, as it did in 2002, concluded that 2 U.S.C. 441i(e)(3) was a total exemption  
20 from the general solicitation ban. Thus, Federal candidates and officeholders were  
21 permitted, as before, to attend, speak, and appear as featured guests at State, district, and  
22 local party committee fundraising events “without restriction or regulation.” See 2005  
23 Revised E&J at 37650-51.



1 E. Advisory Opinions

2 The Commission has previously been asked for advisory opinions regarding the  
3 participation of Federal candidates and officeholders in non-Federal fundraising events  
4 for State, district, and local party committees, as well as for non-Federal candidates, State  
5 political organizations, and other non-Federal entities.

6 In Advisory Opinions 2003-02 (Cantor) and 2003-36 (Republican Governor's  
7 Association), the Commission stated that a Federal candidate or officeholder may attend  
8 and speak at non-Federal fundraisers for non-Federal candidates and other non-Federal  
9 political organizations, even if non-Federal funds are being raised at the event. The  
10 Commission concluded that this type of participation would not violate BCRA's  
11 restrictions on soliciting funds outside the limits and prohibitions of the Act because  
12 attending such an event or giving a speech at such an event is not a solicitation under  
13 Commission regulations.

14 In those same advisory opinions, the Commission also determined that Federal  
15 candidates and officeholders may solicit funds at events at which non-Federal funds are  
16 being raised if their solicitations are limited to funds that comply with the amount  
17 limitations and source prohibitions of the Act. To ensure that these solicitations are  
18 properly limited, Federal candidates and officeholders have had to either (1) make a  
19 specific solicitation such as "I am soliciting \$500 from individuals only," or (2) condition  
20 a general solicitation with a disclaimer indicating that the solicitation is only for funds  
21 within the limitations and prohibitions of the Act. This disclaimer may be made orally by  
22 the Federal candidate or officeholder or, alternatively, in writing by posting at the event a  
23 clear and conspicuous notice limiting the solicitation.

1           The Commission also issued several advisory opinions addressing the role that  
2 Federal candidates and officeholders may play in publicizing non-Federal fundraising  
3 events for State, district, and local party committees and other non-Federal entities. See  
4 Advisory Opinions 2003-03 (Cantor), 2003-36 (Republican Governor’s Association), and  
5 2007-11 (California State Party Committees). The Commission reasoned that if pre-  
6 event publicity does not contain a solicitation, then it is not subject to BCRA’s  
7 solicitation restrictions. See id. If the pre-event publicity does contain a solicitation, and  
8 the Federal candidate or officeholder consents to be featured or appear in the publicity,  
9 then the publicity must contain a clear and conspicuous disclaimer limiting the  
10 solicitation to funds compliant with the source prohibitions and amount limitations of the  
11 Act. See id. The Commission made clear, however, that Federal candidates and  
12 officeholders may not solicit funds in excess of the amount limitations and source  
13 prohibitions of the Act and then qualify that impermissible solicitation with a limiting  
14 disclaimer. See Advisory Opinion 2003-36 (Republican Governor’s Association).

15           As of 2007, Commission regulations and advisory opinions created two sets of  
16 procedures governing activities by Federal candidates and officeholders at fundraising  
17 events at which funds outside the Act’s limitations and prohibitions are raised.  
18 Commission regulations provided that Federal candidates and officeholders could attend  
19 fundraising events for State, district, and local party committee events, whether as a  
20 featured guest or not, and could speak at such events “without restriction or regulation.”  
21 As a result, Federal candidates and officeholders were permitted to solicit directly non-  
22 Federal funds at such events. Further, through its advisory opinions the Commission had  
23 clarified that Federal candidates and officeholders could also attend, speak, or be a

1 featured guest at non-party fundraising events at which funds outside the Act's  
2 limitations and prohibitions are raised. Solicitations at these events, however, were  
3 subject to the Act's fundraising restrictions; Federal candidates and officeholders were  
4 required to issue disclaimers – oral or written – that any solicitation made by them was  
5 only for funds that complied with the limitations and restrictions of the Act.

6 The guidance relating to pre-event publicity for non-Federal fundraisers – both for  
7 State, district, and local party committees as well as other non-Federal fundraising events,  
8 did not evolve as clearly, however. The Commission was unable to resolve whether a  
9 Federal candidate or officeholder could be named as honorary chairperson or featured  
10 speaker in a solicitation for non-Federal funds that is not otherwise signed by the Federal  
11 candidate or officeholder. See Advisory Opinions 2003-36 (Republican Governor's  
12 Association) and 2007-11 (California State Party Committees). In addition, the  
13 Commission was unable to resolve whether a Federal candidate or officeholder may be  
14 named as a featured speaker on pre-event publicity that is mailed with (e.g., in the same  
15 envelope) a solicitation for non-Federal funds that does not name a Federal candidate or  
16 officeholder. See Advisory Opinion 2007-11 (California State Party Committees).

17 F. *Shays III*

18 Against this backdrop, the Commission's rule implementing 2 U.S.C. 441i(e)(3)  
19 was again challenged in court. The District Court for the District of Columbia upheld the  
20 Commission's regulation. Shays v. Federal Election Commission, 508 F.Supp.2d. 10  
21 (D.D.C. 2007).

22 On appeal, however, the United States Court of Appeals for the District of  
23 Columbia Circuit reversed the District Court, concluding that the total exemption from

1 the general solicitation ban “allows what BCRA directly prohibits.” Shays III, 528 F.3d  
2 at 933. In addressing the Commission’s regulation, the Court first concluded that  
3 2 U.S.C. 441i(e)(3) did not create an ambiguity in the law, but should be read as  
4 “clarif[ying] that . . . federal candidates may still ‘attend, speak, or be a featured guest’ at  
5 State party events where soft money is being raised, which the statute might otherwise be  
6 read as forbidding.” Id. at 933. The court then held that the Commission had “no basis”  
7 to read 2 U.S.C. 441i(e)(3) as creating “an implied fourth exception” to the solicitation  
8 restrictions at Section 441i(e)(1), given that Congress had explicitly enumerated the  
9 instances in which Federal candidates and officeholders could “solicit” funds outside  
10 BCRA’s restrictions. Id. at 933-34. The court found compelling the specific language in  
11 the statute – noting that “Congress repeatedly used the term ‘solicit’ and ‘solicitation’ in  
12 Section 441i—over a dozen times—yet chose not to do so in Section 441i(e)(3).”

## 13 **II. Proposed Revisions to 11 CFR 300.64**

14 To comply with the Shays III decision, the Commission proposes revising the  
15 exemption for attending, speaking and being a featured guest at non-Federal fundraising  
16 events at 11 CFR 300.64. The Commission seeks comment on three alternative  
17 proposals. Alternative 1 addresses only non-Federal fundraising events for State, district,  
18 and local party committees, while Alternatives 2 and 3 address participation by Federal  
19 candidates and officeholders at all non-Federal fundraising events, including fundraisers  
20 for State and local candidates.

21 The Commission has not made any determination as to which of the alternative  
22 provisions to adopt in the final rule. The final rule may contain only aspects of one  
23 alternative or elements from some or all of the alternatives. The Commission invites

1 comment on which, if any, of the three alternatives would be best and why. The  
2 Commission is particularly interested in whether the proposed alternatives would satisfy  
3 the court of appeals decision in Shays III.

4 A. Alternative 1

5 Alternative 1 proposes an amendment to current 11 CFR 300.64 in order to  
6 remedy the deficiencies identified by the court of appeals in Shays III. It would make  
7 fewer changes to the existing rule than either Alternative 2 or Alternative 3. Alternative  
8 1 would not address non-Federal fundraising events for entities other than State, district,  
9 and local committees of political parties. Accordingly, Alternative 1 does not attempt to  
10 extend or limit the advice given in Advisory Opinions 2003-03 (Cantor) and 2003-36  
11 (Republican Governor’s Association).

12 First and foremost, Alternative 1 would delete paragraph (b) of 11 CFR 300.64,  
13 which allows Federal candidates and officeholders to speak at State, district, and local  
14 party committee fundraising events without restriction or regulation. This change is  
15 meant to address the Shays III court’s concerns that the provision “allows what BCRA  
16 directly prohibits”: the raising of funds outside the limitations and prohibitions of the Act  
17 by Federal candidates and officeholders. See Shays III, 528 F.3d at 933. The  
18 Commission seeks comment on this proposed deletion. In particular, would it be  
19 sufficiently responsive to the Shays III court’s opinion? By deleting this paragraph,  
20 would the rule properly interpret and give effect to the language of 2 U.S.C. 441i(e)(3)?

21 In addition, Alternative 1 would designate the introductory paragraph of 11 CFR  
22 300.64 as paragraph (a) and amend it to provide that: (1) Federal candidates and  
23 officeholders may attend, speak, or be featured guests at State, district, and local party

1 committee fundraising events at which funds outside the limitations and prohibitions of  
2 the Act or Levin funds are raised and (2) Federal candidates and officeholders who  
3 solicit, receive, direct, transfer, or spend funds at such events must do so in accordance  
4 with Commission regulations. In general, Federal candidates and officeholders may not  
5 solicit funds in connection with any election outside the limitations and prohibitions of  
6 the Act. 2 U.S.C. 441i(e)(1).<sup>4</sup> The exceptions to this general rule are set forth in subpart  
7 D of 11 CFR 300.

8 Although the statutory limitation contained in 2 U.S.C. 441i(e)(1) applies at any  
9 time and in any context that a Federal candidate or officeholder might make a solicitation  
10 in connection with any election, 2 U.S.C. 441i(e)(3) provides that Federal candidates and  
11 officeholders may “attend, speak, or be a featured guest” at fundraising events for State,  
12 district and local party committees.

13 Alternative 1 is intended to implement 2 U.S.C. 441i(e)(3) by permitting certain  
14 activities by Federal candidates and officeholders – attending, speaking at, or being a  
15 featured guest at a State, district, or local party committee event at which funds outside  
16 the limits and prohibitions of the Act are being solicited or directed by the host party  
17 committee – that might otherwise be limited by the Act because they could be viewed as  
18 soliciting, receiving, directing, transferring, and spending funds outside the limitations  
19 and prohibitions of the Act in connection with any election.

20 The Commission seeks public comment on proposed paragraph (a). Does the  
21 proposal provide sufficient guidance to Federal candidates and officeholders regarding

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<sup>4</sup> 2 U.S.C. 441i(e)(1)(A) applies to a candidate or officeholder soliciting funds “in connection with an election for federal office” and 2 U.S.C. 441i(e)(1)(B) applies to a candidate or officeholder soliciting funds “in connection with any election other than an election for federal office.”

1 their conduct at fundraising events for State, district, and local committees of political  
2 parties, including how they may solicit at such events?

3 Proposed paragraph (a) would also effect a technical correction in the rule. The  
4 proposal would delete the reference to 11 CFR 100.24 in the current rule and replace it  
5 with a reference to 11 CFR 300.31(e)(2). This change would track more closely with  
6 cross-references in the Act. See 2 U.S.C. 441i(e)(3). Section 441i(e)(3) of the Act  
7 includes a cross reference to Section 441i(b)(2)(C), which in effect prohibits Federal  
8 candidates and officeholders from soliciting, receiving, directing, transferring or spending  
9 Levin funds. See 2 U.S.C. 441i(b)(2)(C). However, 11 CFR 300.64, the rule  
10 implementing Section 441i(e)(3) of the Act, does not include a parallel cross-reference to  
11 11 CFR 300.31(e), the rule implementing Section 441i(b)(2)(C). Instead, 11 CFR 300.64  
12 cross-references 11 CFR 100.24, which defines Federal election activity and thus is not  
13 directly related to the issue of attending, speaking, or being a featured guest at a State,  
14 district or local party committee fundraising event.

15 Alternative 1 would also redesignate paragraph (a) of the current rule, which  
16 addresses advertising, announcing, or otherwise publicizing a Federal candidate or  
17 officeholder's appearance at a State, district, or local party committee fundraising event,  
18 as paragraph (b). Because publicity for a fundraising event for a State, district, or local  
19 committee of a political party was not at issue in the Shays litigation, Alternative 1 does  
20 not propose any substantive changes to the current rule regarding publicity. As the  
21 Commission has stated previously, the purpose of this paragraph is to clarify that State  
22 parties are free to advertise, announce or otherwise publicize, including in pre-event  
23 invitations, a Federal candidate or officeholder's attendance, speaking, being a featured

1 guest at a State, district, or local party committee fundraising event as long as that  
2 publicity does not constitute a solicitation of funds outside the limits and prohibitions of  
3 the Act by the Federal candidate or officeholder. See 2002 Final Rules, 67 FR at 49108;  
4 2005 Revised E&J, 70 FR at 37651. In light of the Shays III court’s ruling that Federal  
5 candidates and officeholders may not solicit funds outside the prohibitions and  
6 limitations of the Act at such events, should the rule explicitly state that they also may  
7 not solicit such funds in pre-event publicity materials? Alternatively, should paragraph  
8 (b) be deleted altogether?

9       The proposed rule text in Alternative 1 addresses only Federal officeholders’ and  
10 candidates’ attendance, speaking, or being a featured guest at State, local, and district  
11 party fundraising events. Alternative 1 also provides that State, district, and local party  
12 committees may publicize Federal candidates’ and officeholders’ participation at such  
13 events, but does not specifically address the parameters of such publicity, such as  
14 whether the publicity may include solicitations of funds outside the limits and  
15 prohibitions of the Act by the event sponsor if the Federal candidate or officeholder  
16 appears on the publicity, and what would constitute a solicitation by the Federal  
17 candidate or officeholder in this context. Alternative 1 also would continue to leave  
18 unaddressed whether, and under what conditions, Federal officeholders and candidates  
19 may participate at non-party fundraising events that are in connection with any election at  
20 which funds outside the limits and prohibitions of the Act are raised.

21       Although the text of the rule would not address whether Federal candidates and  
22 officeholders may serve on “host committees” for a party fundraising event at which  
23 funds outside the prohibitions and limitations of the Act are raised or may sign or



1 otherwise make a solicitation in connection with a party fundraising event at which such  
2 funds are raised, such activities would continue to be prohibited. See 2002 Final Rules,  
3 67 FR at 49108; 2005 Revised E&J, 70 FR at 37651.

4 B. Scope of Alternatives 2 and 3

5 Under proposed Alternatives 2 and 3, 11 CFR 300.64 would be more extensively  
6 revised to comply with the court of appeals' decision, as well as to provide additional  
7 guidance on participation by Federal candidates and officeholders in all fundraising  
8 events at which funds outside the limits and prohibitions of the Act are raised (“non-  
9 Federal fundraising events”). The scope of activities covered by Alternatives 2 and 3 is  
10 the same, although the two proposals diverge in how they would regulate those activities.

11 Paragraph (a), which is the same in both of these alternatives, establishes that the  
12 scope of the proposed rule is more comprehensive than current 11 CFR 300.64. In  
13 addition, paragraph (a) provides that the proposed rule would address a fuller spectrum of  
14 Federal candidate and officeholder activity – specifically, Federal candidate and  
15 officeholder participation at non-Federal fundraising events, as well as Federal candidates  
16 and officeholder participation in the pre-event publicity for such events.

17 However, proposed paragraph (a) limits the scope of Alternatives 2 and 3 in three  
18 important respects. First, it provides that the rule would cover only participation by  
19 Federal candidates and officeholders in non-Federal fundraising events – those  
20 fundraising events at which funds outside the limits and prohibitions of the Act, or Levin  
21 funds, are raised, even if Federal funds are also raised at the event. The proposed rule  
22 would not cover fundraising events at which only Federal funds are raised, nor would it  
23 apply to fundraising events in connection with any non-Federal election at which only

1 funds subject to the limitations and prohibitions of the Act are raised (e.g., a small-dollar,  
2 non-corporate, non-union fundraiser for a State candidate).

3         Second, proposed paragraph (a) provides that Alternatives 2 and 3 would cover  
4 only those non-Federal fundraising events that are “in connection with any election for  
5 Federal office or any non-Federal election.” In other words, the Commission does not  
6 intend these alternatives to affect Federal candidate and officeholder participation in  
7 fundraising events that are in no way election related. The purpose of this provision is  
8 two-fold: first, it applies the Act’s prohibition on Federal candidates and officeholders  
9 soliciting, receiving, directing, transferring, spending, or disbursing funds in connection  
10 with any election for Federal office or any non-Federal elections, see 2 U.S.C.  
11 441i(e)(1)(B); second, it ensures that the proposed rule does not reach activity that is  
12 outside the Commission’s jurisdiction.

13         Third, proposed paragraph (a) states explicitly that nothing in proposed 11 CFR  
14 300.64 shall alter the fundraising exception for Federal candidates and officeholders who  
15 are also State candidates, found at 11 CFR 300.63, or the fundraising exceptions for  
16 certain tax-exempt organizations, found at 11 CFR 300.65. See also 2 U.S.C. 441i(e)(2)  
17 and (e)(4). To the extent that Alternative 2 or 3 could be read to limit in any way these  
18 pre-existing statutory exceptions, the Commission wishes to make clear that they do not.

19         The Commission seeks comment on the scope of Alternatives 2 and 3 as set forth  
20 in proposed paragraph (a) of each. Does it correctly establish the scope of the proposed  
21 rule? Is it appropriate for the rule to address the full range of Federal candidate and  
22 officeholder participation in non-Federal fundraising events? Do Alternatives 2 and 3 set  
23 forth proposed rules that clearly state the manner in which Federal candidates and

1 officeholders may participate in such events? Are there other forms of participation in  
2 these types of events which the rules neglect to cover? The Commission intends for the  
3 scope to cover activities at all fundraising events at which funds outside the limitations  
4 and prohibitions of the Act are raised, including dual purpose fundraisers (i.e.,  
5 fundraising events at which Federal funds and non-Federal funds are raised). The  
6 Commission seeks comment on whether it is necessary to include an explicit statement in  
7 the rule indicating that such dual-purpose events are covered.

8 Does proposed paragraph (a) appropriately limit the scope of Alternatives 2 and  
9 3? By covering participation by Federal candidates and officeholders only in fundraising  
10 events that are in connection with any election for Federal office or any non-Federal  
11 election and at which funds outside the limits and prohibitions of the Act are raised, has  
12 the rule been crafted too narrowly? Are there other types of fundraising events that  
13 should be addressed by the proposed rule that are not under the current construction? Is  
14 the scope of Alternatives 2 and 3 correctly limited to only participation in those events at  
15 which funds outside the limitations and prohibitions of the Act and Levin funds are  
16 raised, regardless of whether Federal funds are also raised at the event?

17 Importantly, the Commission seeks comment on whether proposed paragraph (a)  
18 – and its use of the “in connection with any election for Federal office or any non-Federal  
19 election” standard – establishes a clear and administrable standard. Does this standard  
20 provide clear guidance to Federal candidates and officeholders as to which types of  
21 events will – and will not – be affected under the proposed rule? Do prior Commission  
22 advisory opinions already provide sufficient guidance for the meaning of this term? See,  
23 e.g., Advisory Opinions 2005-10 (Berman/Doolittle) (solicitation of donations by Federal

1 officeholders to a State ballot measure committee was not in connection with any  
2 election); 2004-14 (Davis) (solicitation of donations by a Federal officeholder to a charity  
3 was not in connection with any election); 2003-20 (Hispanic College Fund) (solicitation  
4 of donations by a Federal officeholder to a scholarship fund was not in connection with  
5 any election). Cf. Advisory Opinion 2003-12 (Flake) (solicitation of donations by  
6 Federal officeholders for a political organization supporting a State referendum was in  
7 connection with an election if the measure had qualified for the ballot). Alternatively,  
8 should the Commission define what constitutes “in connection with any election for  
9 Federal office or any non-Federal election” for purposes of Alternatives 2 and 3? If so,  
10 how should the Commission define this standard?

11 As proposed, Alternatives 2 and 3 cover participation in fundraising events that  
12 are “in connection with any election for Federal office or any non-Federal election.”  
13 Does this establish the correct standard? Should the rule instead look to the organization  
14 or entity that is the beneficiary of the fundraiser for purposes of determining whether the  
15 “in connection with any election for Federal office or any non-Federal election” standard  
16 is met? See, e.g., Advisory Opinion 2003-36 (Republican Governor’s Association).

17 Finally, the Commission seeks comment on whether proposed paragraph (a)  
18 sufficiently preserves the statutory exclusions at 2 U.S.C. 441i(e)(2) and (3). Are the  
19 cross-references to 11 CFR 300.63 and 300.65 clear and helpful? Are they necessary?

20 C. Alternative 2

21 Under Alternative 2, Federal candidates and officeholders would be permitted to:  
22 (1) attend, speak, and be featured guests at non-Federal fundraising events; (2) solicit  
23 funds in compliance with the limitations and prohibitions of the Act at such events; and

1 (3) be featured, with certain limitations, in pre-event publicity for such events.

2 Alternative 2 is based on the statement in the Shays III decision that 2 U.S.C. 441i(e)(3)  
3 "merely clarifies" that Federal candidates may attend, speak, or appear as featured guests  
4 at State, district, or local party committee events without such activities constituting an  
5 unlawful "solicitation." Shays III, 528 F.3d at 933. The court explained that if Congress  
6 had intended for 2 U.S.C. 441i(e)(3) to create an exception to the general solicitation ban,  
7 it would have done so explicitly, as it did in other provisions of Section 441i(e).  
8 Id. at 933-4.

9 To that end, Alternative 2 does not distinguish between State, district, and local  
10 party events and other non-Federal fundraising events. Under proposed paragraph (b)(1)  
11 of Alternative 2, Federal candidates and officeholders may attend, speak, and be featured  
12 guests at all non-Federal fundraising events. This provision reflects that, under  
13 Alternative 2, attending, speaking at, or being a featured guest at non-Federal fundraising  
14 events does not constitute a solicitation and, therefore, these activities are not subject to  
15 the Act's restrictions on Federal candidates and officeholders.

16 The proposed rule in Alternative 2 is in part informed by, and adopts, some of the  
17 Commission's conclusions reached in Advisory Opinions 2003-3 (Cantor) and 2003-36  
18 (Republican Governors Association). Although Alternative 2 is consistent with certain  
19 conclusions contained in previous Commission advisory opinions, Alternative 2 is based  
20 entirely on the reasoning set forth in this notice.

21 The Commission seeks comment on this approach. Does it correctly interpret and  
22 implement the court's decision in Shays III? Is it appropriate to allow Federal  
23 candidates and officeholders to attend, speak at, and be featured guests at all non-Federal

1 fundraising events – whether for State, district, or local party committees or for other  
2 entities? Does such an approach give appropriate meaning to 2 U.S.C. 441i(e)? If it is  
3 correct to interpret the Shays III decision to mean that merely being a featured guest at a  
4 State, district, or local party committee fundraiser is not in and of itself an unlawful  
5 solicitation according to the Act (2 U.S.C. 441i(e)(3)), how could being a featured guest  
6 at a non-party, non-Federal fundraiser transform such activity into an unlawful  
7 solicitation? So long as a Federal candidate or officeholder does not solicit funds outside  
8 the limitations and prohibitions of the Act, what statutory authority does the Commission  
9 have to limit Federal candidates and officeholders from attending, speaking at, or  
10 appearing as featured guests at non-party, non-Federal fundraising events? And if such  
11 statutory authority exists, how can it be harmonized with the court’s reasoning in Shays  
12 III?

13 Proposed paragraph (b)(2) allows Federal candidates and officeholders to solicit  
14 funds at non-Federal fundraising events so long as the solicitations are in amounts and  
15 from sources that are consistent with State law and do not violate the Act’s contribution  
16 limits or source prohibitions. Proposed paragraphs (b)(2)(i) and (ii) clarify the manner in  
17 which Federal candidates and officeholders may so limit their solicitations at non-Federal  
18 fundraising events. Specifically, proposed paragraph (b)(2)(i) states that a Federal  
19 candidate or officeholder may properly limit such a solicitation either by displaying a  
20 written notice or by making an oral statement that the solicitation is limited to funds  
21 permitted under the Act. Paragraph (b)(2)(ii) provides that, whether done orally or in  
22 writing, the notice would have to be clear and conspicuous.

1           The Commission seeks comment on proposed paragraph (b)(2). Does it faithfully  
2 implement the restrictions imposed by the Act on Federal candidates and officeholders in  
3 their solicitation of funds in connection with non-Federal elections? See 2 U.S.C.  
4 441i(e)(1)(B); see also 11 CFR 300.62. Should the Commission be more explicit  
5 regarding notices limiting solicitations at non-Federal fundraising events? For example,  
6 should the final rule include examples of notices that satisfy the rule? Further, should the  
7 Commission articulate more clearly how a notice will be considered clear and  
8 conspicuous? What factors should the Commission consider in making this  
9 determination? Are such notices effective?

10           Finally, paragraph (c) of Alternative 2 addresses publicity associated with non-  
11 Federal fundraising events, including advertisements, announcements, and pre-event  
12 invitations, regardless of form (e.g., phone calls, mail, e-mail, facsimile), and the extent  
13 to which Federal candidates and officeholders may participate in such publicity. The  
14 proposal distinguishes between publicity that solicits funds outside the limitations and  
15 prohibitions of the Act and publicity that does not. Proposed paragraph (c) is intended to  
16 be consistent with the conclusions that were reached in Advisory Opinions 2003-36  
17 (Republican Governor’s Association) and 2007-11 (California State Party Committees)  
18 and also answer the questions raised in those advisory opinions that the Commission was  
19 unable to resolve.

20           Proposed paragraph (c)(1) provides that Federal candidates and officeholders may  
21 without limitation approve, authorize, agree, or consent to the use of their names or  
22 likenesses in publicity for non-Federal fundraising events, if the publicity does not  
23 contain a solicitation. Such publicity may use the name or likeness of a Federal candidate

1 or officeholder to indicate that such person will attend, speak, or be a featured guest at the  
2 event.

3 If pre-event publicity solicits funds outside the limitations or prohibitions of the  
4 Act or Levin funds, though, proposed paragraph (c)(2) establishes two different standards  
5 for participation by Federal candidates and officeholders that are contingent upon  
6 whether the solicitation is made by the Federal candidate or officeholder or by another  
7 person or entity associated with the event.

8 Specifically, under proposed paragraph (c)(2)(i), Federal candidates and  
9 officeholders would be prohibited from authorizing the use of their names or likenesses  
10 in publicity that would constitute a solicitation by them of funds outside the limitations  
11 and prohibitions of the Act. Proposed paragraph (c)(2)(i)(A) states that this prohibition  
12 covers publicity in which a Federal candidate or officeholder solicits funds outside the  
13 limitations and prohibitions of the Act, such as by signing a solicitation letter. Publicity  
14 that identifies a Federal candidate or officeholder as serving in a role tied to fundraising,  
15 such as serving on the event's "host committee," is a solicitation of funds outside the  
16 limitations and prohibitions of the Act by that individual and also would be prohibited.  
17 By contrast, proposed paragraph (c)(2)(i)(B) provides that being identified on pre-event  
18 publicity as merely serving as a "featured speaker" or "honorary chairperson" would not  
19 be in and of itself a solicitation because this Alternative presumes that those are not roles  
20 tied to fundraising and therefore would be permitted.

21 Proposed paragraph (c)(2)(ii) permits a Federal candidate or officeholder to  
22 approve, authorize, agree, or consent to the use of his or her name or likeness on publicity  
23 that contains a solicitation of funds outside the limitations and prohibitions of the Act if



1 the solicitation is made by – and clearly attributable to – a person or entity other than the  
2 Federal candidate or officeholder. Such publicity must include a clear and conspicuous  
3 statement noting that the solicitation of funds outside the limitations and prohibitions of  
4 the Act is not being made by the Federal candidate or officeholder whose name or  
5 likeness is featured. Such a statement would be required to meet the requirements of 11  
6 CFR 110.11(c)(2) in order to be considered “clear and conspicuous.”

7 The Commission seeks comments on how pre-event publicity for non-Federal  
8 fundraising events is treated in proposed paragraph (c). Given the court’s statement in  
9 Shays III that 2 U.S.C. 441i(e)(3) provides that “Federal candidates may . . . be a featured  
10 guest at a State party event where soft money is raised,” Shays III, 528 F.3d at 933, is  
11 there any reason why pre-event publicity regarding that activity should not be allowed?  
12 Should such publicity be limited in any way, or do such limitations infringe upon a  
13 Federal candidate’s or officeholder’s ability to be a featured guest?

14 As above, the Commission also requests comments on whether the discussion in  
15 Shays III regarding this issue was limited to State party events, or whether the court’s  
16 reasoning applies more broadly to all non-Federal fundraising events. If the latter, does  
17 its reasoning apply also to how Federal candidates and officeholders may be “featured” in  
18 pre-event publicity? Is proposed paragraph (c) of Alternative 2 consistent with the Shays  
19 III decision on this issue? Is it consistent with 2 U.S.C. 441i(e)?

20 Additionally, does proposed Alternative 2 establish a generally workable standard  
21 that provides clear guidance to Federal candidates and officeholders? Does the proposal  
22 adequately address all types of publicity associated with these events? Does the proposal  
23 correctly implement the prohibition in the Act and in Commission regulations regarding

1 the solicitation, receipt, direction, transfer, spending, and disbursement of funds outside  
2 the limitations and prohibitions of the Act by Federal candidates and officeholders? Is  
3 the identification of a Federal candidate or officeholder as member of a “host committee”  
4 appropriately treated under the proposal as being a solicitation by the Federal candidate  
5 or officeholder, or is it common for such an individual to be identified as a “host” in a  
6 capacity not related to solicitation or fundraising? Is it appropriate for the proposal to  
7 exclude titles on pre-event publicity such as featured guest, featured speaker, or honorary  
8 chairperson, or should such titles similarly be considered to be a solicitation by the  
9 individual?

10 Is the distinction between publicity that includes a solicitation by Federal  
11 candidates and officeholders and publicity that includes a solicitation by another person  
12 associated with the non-Federal fundraising event a reasonable one? Could a Federal  
13 candidate or officeholder be featured in publicity that solicits funds outside the  
14 limitations and prohibitions of the Act without having that solicitation attributed, at least  
15 in part, to that candidate or officeholder? Is proposed paragraph (c) of Alternative 2  
16 consistent with proposed paragraph (b), governing participation by Federal candidates  
17 and officeholders at non-Federal fundraising events?

18 In conclusion, the Commission seeks comment on proposed Alternative 2 in all  
19 respects. Does it appropriately resolve the Shays III court’s criticisms of the  
20 Commission’s previous implementation of 2 U.S.C. 441i(e)(3) and does it appropriately  
21 implement that Section, as well as Section 441i(e) generally?

22 D. Alternative 3

1           As noted above, the proposed scope of Alternative 3 is the same as that proposed  
2 in Alternative 2. As with Alternative 2, Alternative 3 does not cover participation by  
3 Federal candidates or officeholders in fundraising events at which only Federal funds are  
4 raised, nor would it apply to fundraising events in connection with any non-Federal  
5 election at which only funds subject to the limitations and prohibitions of the Act are  
6 raised (e.g., a small-dollar, non-corporate, non-union fundraiser for a State candidate).  
7 Though Alternatives 2 and 3 would cover the same universe of activity, they diverge in  
8 the manner in which that activity would be addressed. Specifically, Alternative 3 would  
9 treat participation by Federal candidates and officeholders at non-Federal fundraising  
10 events for State, district, and local party committees differently from participation by  
11 Federal candidates and officeholders at all other non-Federal fundraising events (e.g., for  
12 a local candidate, a State PAC, or an organization making independent expenditures).  
13 This approach is informed both by the court’s decision that found invalid the  
14 Commission’s previous rule allowing Federal candidates and officeholders to speak at  
15 certain non-Federal fundraising events without “restriction or regulation,” and by the  
16 plain language of the Act, specifically, by the focus in 2 U.S.C. 441i(e)(3) on State,  
17 district, and local party committee fundraisers only.

18           As the court noted in Shays III, 2 U.S.C. 441i(e)(3) permits Federal candidates to  
19 attend, speak or be a featured guest at State, district, and local party committee  
20 fundraisers – activities which the Act and, specifically, its fundraising restrictions, “might  
21 otherwise be read as forbidding.” Shays III, 528 F.3d at 933. This language could be  
22 read as an acknowledgement by the court that Section 441i(e)(1) may permissibly and  
23 plausibly be construed to limit attending, speaking, and being a featured guest as

1 fundraising activities. If such a construction of Section 441i(e)(1) had not been possible,  
2 Section 441(i)(e)(3) would not have been necessary.

3           Whether the statute would affect such activities is largely a function of the  
4 Commission’s definition of “solicit,” which was promulgated subsequent to the passage  
5 of BCRA and 2 U.S.C. 441i(e)(3). The Commission initially defined “to solicit” as “to  
6 ask that another person make a contribution, donation, transfer of funds, or otherwise  
7 provide anything of value.” 11 CFR 300.2(m) (2003). The Court of Appeals stuck down  
8 this definition for failing to enact a restriction equal in breadth to that intended by  
9 Congress. Shays v. FEC, 414 F.3d 76, 103-105 (D.C. Cir. 2005). Specifically, the Court  
10 held that the Commission’s prior definition failed to cover indirect requests. Id. In order  
11 to comply with the court’s ruling, the Commission revised its definition of “to solicit” to  
12 mean “to ask, request or recommend, explicitly or implicitly, that another person make a  
13 contribution, donation, transfer of funds, or otherwise provide anything of value.” 11  
14 CFR 300.2(m).

15           Federal candidates and officeholders are often included at fundraising events for  
16 the specific purpose of drawing more donors (and more donations) to the events. The  
17 fundraiser’s motivation to include Federal candidates and officeholders at the event is, as  
18 one commenter in the 2005 rulemaking explained, “to increase attendance and the  
19 [fundraiser]’s yield from that event.” 2005 Revised E&J, 70 FR 37654 (June 30, 2005).  
20 When a Federal candidate or officeholder allows his or her name to be used to increase  
21 the number of donors and amount of donations, that helps to raise funds — potentially  
22 funds outside the limitations and prohibitions of the Act. Participating in non-Federal  
23 fundraisers in this way would constitute an implicit ask, request, or recommendation that

1 individuals attend and donate funds as part of the fundraising event, and thus would be  
2 prohibited for Federal candidates and officeholders to the extent the event seeks to raise  
3 funds outside the limitations and prohibitions of the Act.

4 Under this reading, 2 U.S.C. 441i(e)(3) does, indeed, provide a limited exception  
5 to the Act’s fundraising restrictions – specifically, for Federal candidates and  
6 officeholders who appear as featured guests at non-Federal fundraising events for State,  
7 district, or local party committees. Importantly, given 2 U.S.C. 441i(e)(3)’s specific  
8 focus on only State, district, and local party committee events, this exception would not  
9 extend to other election-related non-Federal fundraising events. As such, proposed  
10 paragraph (b)(1)(i) of Alternative 3 provides that a Federal candidate or officeholder may  
11 attend, speak, or be a featured guest at a State, district or local party fundraiser. By  
12 contrast, proposed paragraph (c) provides that a Federal candidate or officeholder may  
13 attend a non-party, non-Federal fundraising event and speak at such an event (so long as  
14 the speech does not itself constitute a solicitation), but may not consent to the use of his  
15 or her name or likeness in publicity for non-party, non-Federal events. This aspect of the  
16 proposal is intended to prohibit activities by Federal candidates and officeholders in  
17 connection with non-Federal fundraising events that constitute the solicitation of funds  
18 outside the limits and prohibitions of the Act, which would violate the Act.

19 The Commission seeks comment on this approach. As a threshold matter, does  
20 the proposed bifurcated structure of the rule appropriately recognize the Act’s unique  
21 treatment of participation by Federal candidates and officeholders at State, district, and  
22 local party committee fundraisers? If the Commission were to adopt a rule that treats  
23 Federal candidate and officeholder participation at all non-Federal fundraising events the

1 same, would it, in effect, render Section 441i(e)(3) of the Act meaningless? Would it be  
2 responsive to the Shays III court’s concern that the Commission’s initial regulation was  
3 too permissive? Is the approach proposed in Alternative 3 consistent with the court’s  
4 opinion in Shays III? Does the court’s opinion provide guidance on whether the rule  
5 should treat State, district, and local party committee fundraisers differently from other  
6 election-related non-Federal fundraising events, given that these other events were not at  
7 issue in the prior regulation?

8         The Commission invites comments on whether the Commission should provide  
9 additional guidance by promulgating a regulatory definition of “featured guest,” and if so,  
10 what should that definition be? Are there different ways in which a guest might be  
11 featured and would some of those ways constitute a solicitation while others would not?  
12 What does it mean to be a featured guest? Is being featured as a guest limited to  
13 appearing on written materials or can a guest be featured in some other manner? Is there  
14 a difference between simply appearing on a list of attendees and being featured on such a  
15 list? If pre-event publicity for a fundraising event indicates that a Federal candidate or  
16 officeholder will be attending, or will be speaking, is that alone enough to make the  
17 Federal candidate or officeholder a featured guest?

18         What factors should the Commission consider in determining when a person  
19 should be considered to be a featured guest? If a person is listed in pre-event publicity as  
20 “invited” (but for which there is no confirmation the person will attend), should the  
21 person still be considered a featured guest? Should a person be considered a featured  
22 guest even though the word “featured” is not used? Can a person be a “guest” if the  
23 person is a usual attendee or a member of the group hosting the event?

1 Similarly, because the exemption for participating as a featured guest only applies  
2 when a Federal candidate does so at a State, district, or local party committee’s  
3 fundraising event, should the Commission promulgate a regulatory definition of what  
4 qualifies as a “fundraising event”? For instance, is there a minimum number of attendees  
5 required to constitute a fundraising event? Or is the term “fundraising event” generally  
6 understood by those who participate in them, such that no definition is required?

7 Regarding the specifics of Alternative 3, proposed paragraph (b)(1)(i) of  
8 Alternative 3 provides that a Federal candidate or officeholder may attend, speak, or be a  
9 featured guest at a State, district or local party fundraiser. Proposed paragraph (b)(1)(ii)  
10 provides that Federal candidates and officeholders may solicit funds at such non-Federal  
11 fundraising events if the solicitation is not for Levin funds and is limited to funds that do  
12 not exceed the Act’s contribution limits or come from prohibited sources under the Act.  
13 Each proposed paragraph implements, almost verbatim, a provision of the Act. Proposed  
14 paragraph (b)(1)(i) addresses 2 U.S.C. 441i(e)(3) of the Act, which provides that a  
15 Federal candidate or officeholder may attend, speak, or be a featured guest at a State,  
16 district or local party fundraiser. Proposed paragraph (b)(1)(ii) states that Federal  
17 candidates and officeholders may solicit funds for State, district and local party  
18 committees so long as the solicitation is consistent with 2 U.S.C. 441i(e)(1)(B). Proposed  
19 paragraph (b)(1)(ii) is intended to require all solicitations made by Federal candidates and  
20 officeholders at such events to be limited to funds that comply with the Act’s amount  
21 limitations and source prohibitions. This proposal would neither preserve nor extend the  
22 disclaimer regime of Advisory Opinions 2003-36 (Republican Governor’s Association)  
23 and 2003-03 (Cantor).

1           The Commission seeks comment on the proposed distinctions between party  
2 committee non-Federal events and other non-Federal fundraising events. Does the  
3 proposal faithfully implement the Act? Does it appropriately recognize Congress's  
4 different statutory treatment of Federal candidates' and officeholders' participation in  
5 non-Federal party committee events and other non-Federal fundraising events? Or,  
6 consistent with Alternative 2, does the statute merely clarify that Federal candidates and  
7 officeholders may participate in non-Federal party committee events, without necessarily  
8 differentiating between party versus non-party events? Does proposed paragraph  
9 (b)(1)(ii) establish clear guidance for Federal candidates and officeholders who wish to  
10 solicit funds at fundraising events for a State, district, or local committee of a political  
11 party?

12           Proposed paragraph (b)(2) of Alternative 3 would address publicity associated  
13 with non-Federal fundraising events for State, district, and local committees of political  
14 parties. It would provide that a Federal candidate or officeholder may approve, authorize,  
15 agree, or consent to the use of his or her name or likeness in publicity for a non-Federal  
16 fundraising event for a State, district, or local party committee for the purpose of  
17 indicating that he or she will be attending, speaking, or will be a featured guest at the  
18 event only if the publicity does not solicit funds outside the limitations and prohibitions  
19 of the Act or Levin funds. Publicity covered by proposed paragraph (b)(2) would  
20 include, but not be limited to, pre-event invitation materials. Like proposed paragraph  
21 (b)(1)(ii), proposed paragraph (b)(2) is intended to ensure that Federal candidate and  
22 officeholder participation in publicity for State, district and local party committee



1 fundraisers is consistent with the Act’s prohibition on raising funds outside the  
2 limitations and prohibitions of the Act. See 2 U.S.C. 441i(e)(1)(B).

3           The Commission seeks comments on paragraph (b)(2)’s treatment of publicity in  
4 connection with non-Federal fundraising events for State, district, and local party  
5 committees. Does the proposal properly implement 2 U.S.C. 441i(e)(3)? Does it  
6 preserve the Act’s restrictions on the raising of Levin funds and funds outside the  
7 limitations and prohibitions of the Act? Does proposed paragraph (b)(2) establish clear  
8 guidance as to how Federal candidates and officeholders may and may not be featured in  
9 such publicity? Would it clearly establish the types of publicity that would solicit Levin  
10 funds or funds outside the limitations and prohibitions of the Act?

11           Proposed paragraph (c) of Alternative 3 in turn would establish rules governing  
12 participation by Federal candidates and officeholders at all other non-Federal fundraising  
13 events. Given the absence of a statutory provision addressing specifically non-party,  
14 non-Federal fundraisers, it follows that no special exceptions exist for Federal candidates  
15 and officeholders at such events. Accordingly, rules governing participation by Federal  
16 candidates and officeholders at such events would be guided only by to the Act’s general  
17 fundraising restrictions. See 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. Accordingly, a  
18 Federal candidate or officeholder could participate in non-party, non-Federal fundraisers  
19 only if his or her participation did not constitute a solicitation otherwise prohibited by the  
20 Act.

21           To that end, proposed paragraph (c)(2) provides that a Federal candidate or  
22 officeholder may attend a non-party, non-Federal fundraising event and speak at such an  
23 event so long as the speech does not, itself, constitute a solicitation. Although this type

1 of participation at non-party, non-Federal fundraisers is not explicitly exempted by the  
2 Act, it is also not specifically prohibited by the Act or Commission regulations. See, e.g.,  
3 11 CFR 300.2(m). So long as a Federal candidate or officeholder can attend or speak at a  
4 non-party, non-Federal fundraising event without soliciting funds outside the limitations  
5 and prohibitions of the Act, the Commission is not proposing to prohibit such attendance  
6 and speech.

7 Proposed paragraph (c)(1) of Alternative 3, however, prohibits Federal candidates  
8 and officeholders from consenting to the use of their names or likenesses in publicity for  
9 non-party, non-Federal fundraisers. This aspect of Alternative 3 is based upon the  
10 premise that Federal candidates and officeholders lend their names to publicity for  
11 fundraising events for one reason: to help raise funds. Therefore, it follows that  
12 appearing in publicity as a featured guest at an event where funds outside the limitations  
13 and prohibitions of the Act will be raised amounts to an implicit request that someone  
14 make a contribution beyond the limits of the Act and Commission regulations. See 2  
15 U.S.C. 441i(e)(1)(B), 11 CFR 300.62, 11 CFR 300.2(m) (stating that a solicitation may  
16 be made “explicitly or implicitly” and is any activity that “in context” contains a clear  
17 message asking for a contribution or donation). To the extent that the purpose of a  
18 Federal candidate or officeholder’s participation is to attract contributors and  
19 contributions to an event that solicits funds outside the limitations and prohibitions of the  
20 Act, such participation is prohibited under proposed paragraph (c)(1). A Federal  
21 candidate or officeholder may not participate in those efforts.

22 The Commission seeks comment on this approach. Would allowing Federal  
23 candidates and officeholders to attend or speak at such non-Federal fundraisers

1 undermine the Act’s restrictions on soliciting Levin funds and funds outside the  
2 limitations and prohibitions of the Act? Does the Commission have statutory authority to  
3 restrict Federal candidates and officeholders from attending or speaking at non-party,  
4 non-Federal fundraisers, if they do not ask for funds outside the limitations and  
5 prohibitions of the Act?

6 In conclusion, the Commission seeks comment on proposed Alternative 3 in all  
7 respects. Does it appropriately resolve the Shays III court’s criticisms of the  
8 Commission’s previous implementation of 2 U.S.C. 441i(e)(3) and does it appropriately  
9 implement that section? Does Alternative 3 provide a generally workable standard that  
10 provides clear guidance to Federal candidates and officeholders?

11

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

13 **[Regulatory Flexibility Act]**

14 The Commission certifies that the attached proposed rule, if promulgated, would  
15 not have a significant economic impact on a substantial number of small entities. The  
16 basis for this certification is that the entities affected by this proposed rulemaking do not  
17 meet the definition of “small entity” under 5 U.S.C. 601. That definition requires that the  
18 enterprise be independently owned and operated and not dominate in its field. 5 U.S.C.  
19 601(4).

20 This proposed rulemaking would affect State, district, and local party committees,  
21 as well as Federal candidates and their campaign committees. Federal candidates, as  
22 individuals, do not fall within the definition at 5 U.S.C. 601, and campaign committees

1 are not independently owned and operated because they are not financed and controlled  
2 by a small identifiable group of individuals.

3 State, district, and local party committees also fall outside the definition of “small  
4 entity.” These committees are not independently owned and operated because they are  
5 not financed and controlled by a small identifiable group of individuals, and they are  
6 affiliated with the larger national political party organizations. In addition, the State  
7 political party committees representing the Democratic and Republican parties have a  
8 major controlling influence within the political arenas of their States and are thus  
9 dominant in their fields. District and local party committees are generally considered  
10 affiliated with the State committees and need not be considered separately. To the extent  
11 that any State party committees representing minor political parties might be considered  
12 “small organizations,” the number affected by this proposal is not substantial.

13

1 **List of Subjects**

2 11 CFR Part 300

3 Campaign funds, nonprofit organizations, political committees and parties, political  
4 candidates, reporting and recordkeeping requirements.

5

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

3 **PART 300 – NON-FEDERAL FUNDS**

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

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

6 2. Section 300.64 would be revised to read as follows:

7 **Alternative 1**

8 **§ 300.64 ~~Exemption for a~~Attending, speaking, or appearing as a featured guest at**  
9 **State, district, or local party committee fundraising events (2 U.S.C. 441i(e)(3)).**

10 ~~(a) Notwithstanding the provisions of 11 CFR 100.24, 300.61 and 300.62, a~~ A  
11 Federal candidate or individual holding Federal office may attend, speak, or be a featured  
12 guest at a fundraising event for a State, district, or local committee of a political party,  
13 including, but not limited to, a fundraising event at which ~~Levin funds are raised, or at~~  
14 ~~which non-Federal funds are raised~~ funds outside the limits and prohibitions of the Act or  
15 Levin funds are raised. In light of the foregoing: Federal candidates and individuals  
16 holding Federal office who solicit, receive, direct, transfer, or spend funds at any such  
17 fundraising event shall only do so in accordance with 11 CFR 300.31(e)(2), 300.61 and  
18 300.62.

19 ~~(ab)~~ State, district, or local committees of a political party may advertise, announce or  
20 otherwise publicize that a Federal candidate or individual holding Federal office will  
21 attend, speak, or be a featured guest at a fundraising event, including, but not limited to,  
22 publicizing such appearance in pre-event invitation materials and in other party  
23 committee communications; ~~and.~~

1 ~~(c) — Candidates and individuals holding Federal office may speak at such events~~  
2 ~~without restriction or regulation.~~

3  
4 **Alternative 2**

5 **§ 300.64 Participation By Federal Candidates and Officeholders at Non-Federal**  
6 **Fundraising Events (2 U.S.C. 441i(e)(1) and (3)).**

7 (a) Scope. This section covers participation by Federal candidates and officeholders  
8 at fundraising events in connection with any election for Federal office or any non-  
9 Federal election at which funds outside the limitations and prohibitions of the Act or  
10 Levin funds are raised, and in publicity related to such non-Federal fundraising events.

11 This section applies even if funds that comply with the limitations and prohibitions of the  
12 Act are also raised at the event. Nothing in this section shall be construed to alter the  
13 fundraising exception for State candidates at 11 CFR 300.63 or the fundraising  
14 exceptions for certain tax-exempt organizations at 11 CFR 300.65.

15 (b) Participation at non-Federal fundraising events. A Federal candidate or  
16 officeholder may:

17 (1) Attend, speak, or be a featured guest at a non-Federal fundraising event.

18 (2) Solicit funds at a non-Federal fundraising event, provided that the solicitation  
19 is limited to funds that comply with the limitations and prohibitions of the Act and  
20 is consistent with State law.

21 (i) A Federal candidate or officeholder may limit such a solicitation by  
22 displaying at the fundraising event a clear and conspicuous written notice,  
23 or making a clear and conspicuous oral statement, that the solicitation is

1 not for Levin funds, does not seek funds that exceed the Act's contribution  
2 limits, and does not seek funds from prohibited sources under the Act.

3 (ii) A written notice or oral statement is not clear and conspicuous if it is  
4 difficult to read or hear or if its placement is easily overlooked.

5 (c) Publicity for non-Federal fundraising events. For the purposes of this paragraph,  
6 publicity for a non-Federal fundraising event includes, but is not limited to,  
7 advertisements, announcements, or pre-event invitation materials, regardless of format or  
8 medium of communication.

9 (1) Publicity not containing a solicitation. A Federal candidate or  
10 officeholder may approve, authorize, agree, or consent to the use of his or  
11 her name or likeness in publicity for a non-Federal fundraising event that  
12 does not contain a solicitation.

13 (2) Publicity containing a solicitation.

14 (i) Solicitation by the Federal candidate or officeholder. A Federal  
15 candidate or officeholder may not solicit funds outside the  
16 limitations or prohibitions of the Act or Levin funds in any  
17 publicity for a non-Federal fundraising event.

18 (A) A solicitation by the Federal candidate or  
19 officeholder occurs if the Federal candidate or officeholder  
20 approves, authorizes, agrees, or consents to being identified  
21 as serving in a position specifically related to fundraising,  
22 such as on a host committee, or signs the communication,



1 even if the communication contains a written statement as  
2 described in paragraph (c)(2)(ii) of this section.

3 (B) Titles such as featured guest, featured speaker, or  
4 honorary chairperson are not positions specifically related  
5 to fundraising for purposes of this paragraph.

6 (ii) Solicitations by someone other than the Federal candidate or  
7 officeholder. A Federal candidate or officeholder may approve,  
8 authorize, agree, or consent to the use of his or her name or  
9 likeness in publicity for a non-Federal fundraising event that  
10 contains a solicitation of funds outside the limitations and  
11 prohibitions of the Act or Levin funds only if the solicitation is  
12 made by someone other than the Federal candidate or officeholder.  
13 Any such publicity must include a clear and conspicuous written  
14 statement that the solicitation is not being made by the Federal  
15 candidate or officeholder. The written statement must meet the  
16 requirements in 11 CFR 110.11(c)(2).

17 **Alternative 3**

18 **§ 300.64 Participation By Federal Candidates and Officeholders at Non-Federal**  
19 **Fundraising Events (2 U.S.C. 441i(e)(1) and (3)).**

20 (a) Scope. This section covers participation by Federal candidates and officeholders  
21 at fundraising events in connection with any election for Federal office or any non-  
22 Federal election at which funds outside the limitations and prohibitions of the Act or  
23 Levin funds are raised, and in publicity related to such non-Federal fundraising events.

1 This section applies even if funds that comply with the limitations and prohibitions of the  
2 Act are also raised at the event. Nothing in this section shall be construed to alter the  
3 fundraising exception for State candidates at 11 CFR 300.63 or the fundraising  
4 exceptions for certain tax-exempt organizations at 11 CFR 300.65.

5 (b) Non-Federal fundraising event for a State, district, or local committee of a  
6 political party.

7 (1) Participation by a Federal candidate or officeholder. A Federal candidate  
8 or officeholder may:

9 (i) Attend, speak, or be a featured guest at a non-Federal fundraising  
10 event for a State, district, or local committee of a political party;

11 and

12 (ii) Solicit funds at such non-Federal fundraising events, provided that  
13 the solicitation is limited to funds in amounts that do not exceed  
14 the Act's contribution limits and do not come from prohibited  
15 sources under the Act.

16 (2) Publicity for a non-Federal fundraising event for a State, district, or local  
17 committee of a political party. A Federal candidate or officeholder may  
18 approve, authorize, agree, or consent to the use of his or her name or  
19 likeness in an advertisement, announcement, or other publicity for a  
20 fundraising event for a State, district, or local committee of a political  
21 party for the purpose of indicating that the Federal candidate or  
22 officeholder will attend, speak, or be a featured guest at the fundraising  
23 event, provided that the advertisement, announcement, or other publicity

1 does not solicit funds outside the limitations and prohibitions of the Act or  
2 Levin funds. Such advertisements, announcements, or other publicity may  
3 include but are not limited to pre-event invitation materials.

4 (c) Other non-Federal fundraising events.

5 (1) For non-Federal fundraising events that are not described in paragraph (b)  
6 of this section, a Federal candidate or officeholder may not approve,  
7 authorize, agree, or consent to the use of his or her name or likeness in an  
8 advertisement, announcement or other publicity for the event, including  
9 but not limited to pre-event invitation materials.

10 (2) Nothing in paragraph (c)(1) would prohibit a Federal candidate or  
11 officeholder from attending or speaking at such a non-Federal fundraising  
12 event as long as he or she does not solicit funds outside the limitations and  
13 prohibitions of the Act.

14  
15 On behalf of the Commission,

16  
17 \_\_\_\_\_  
18 Steven T. Walther  
19 Chairman  
20 Federal Election Commission  
21  
22

23 DATED: \_\_\_\_\_  
24 BILLING CODE: 6715-01-P