



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2010 APR 29 A 10:19

AGENDA ITEM

For Meeting of 04-29-10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RCR for RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

David C. Adkins *DA*
Attorney

SUBJECT: Draft Final Rule and Explanation and Justification for Participation by
Federal Candidates and Officeholders at Non-Federal Fundraising Events

Attached are draft Final Rules and an Explanation and Justification to implement the decision of the Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

We request that this draft be placed on the agenda for April 29, 2010.

Attachment

FEDERAL ELECTION COMMISSION SECRETARIAT

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FEDERAL ELECTION COMMISSION

11 CFR Part 300

[Notice 2010 - __]

AGENDA ITEM

For Meeting of 04-29-10

SUBMITTED LATE

Participation by Federal Candidates and Officeholders at Non-Federal Fundraising

Events

AGENCY: Federal Election Commission.

ACTION: Final Rules.

SUMMARY: The Federal Election Commission (“Commission”) is revising its rules regarding appearances by Federal officeholders and candidates at State, district, and local party fundraising events under the Federal Election Campaign Act of 1971, as amended. Consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in Shays v. FEC, Federal candidates and officeholders may no longer speak at State, district, and local party fundraising events “without restriction or regulation.” The revised rules address participation by Federal candidates and officeholders at all non-Federal fundraising events that are in connection with an election for Federal office or any non-Federal election and in related publicity.

EFFECTIVE DATE: These rules are effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

Ms. Amy L. Rothstein, Assistant General Counsel, or Attorneys
Mr. David C. Adkins or Mr. Neven F. Stipanovic, 999 E Street,
N.W., Washington, D.C., 20463, (202) 694-1650 or (800) 424-
9530.

7 **SUPPLEMENTARY**

8 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002¹ (“BCRA”)

9 contained extensive and detailed amendments to the Federal Election Campaign Act of
10 1971, as amended, 2 U.S.C. 431 *et seq.* (“the Act”). The Commission promulgated a
11 number of rules to implement BCRA, including rules at 11 CFR 300.64 regarding
12 Federal candidate and officeholder solicitations at State, district, and local party
13 committee fundraising events. The Court of Appeals for the District of Columbia Circuit
14 found aspects of these rules invalid in Shays v. Federal Election Commission, 528 F.3d
15 914 (D.C. Cir. 2008) (“Shays III”). The Commission is revising its rules at 11 CFR
16 300.64 to implement the Shays III decision.

17 **I. Background Information**

18 **A. BCRA**

19 In 2002, Congress amended the Act by restricting the fundraising activity of
20 Federal candidates and officeholders, their agents, and entities directly or indirectly
21 established, financed, maintained, controlled by, or acting on behalf of, Federal
22 candidates or officeholders. See BCRA at Section 323(e) (codified at 2 U.S.C. 441i(e)).
23 These persons may not “solicit, receive, direct, transfer or spend” funds in connection
24 with an election for Federal office or any non-Federal election unless the funds comply

¹ Pub. L. No. 107-155, 116 Stat. 81 (2002).

1 with the amount limitations and source prohibitions of the Act.² See 2 U.S.C.
2 441i(e)(1)(A) and (e)(1)(B), 11 CFR 300.61 and 300.62. Furthermore, Congress
3 prohibited State, district and local party committees from accepting or using as Levin
4 funds³ any funds that have been solicited, received, directed, transferred or spent by or in
5 the name of Federal candidates and officeholders. Thus, Federal candidates and
6 officeholders were effectively prohibited from raising Levin funds. See 2 U.S.C.
7 441i(b)(2)(C)(i); 11 CFR 300.31(e).

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

² The amount limitations on contributions depend on the type of contributor and the recipient. See 2 U.S.C. 441a(a)(1), (2), and (3). For example, an individual and a non-multicandidate PAC may each 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 to a State party committee (or to a State party’s respective district and local party committees, which share the State party committee’s combined limit). A multicandidate PAC, by contrast, may contribute up to \$5,000 per election to a candidate, up to \$5,000 per calendar year to a PAC, and up to \$5,000 per calendar year to a State party committee (or to a State party’s respective district and local party committees, which share the State party committee’s combined limit). Sources prohibited from making contributions 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). Furthermore, funds raised in connection with an election for Federal office are subject to the reporting requirements of the Act. See 2 U.S.C. 441i(e)(1)(A).

³ “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 Notwithstanding these restrictions, though, Section 323(e)(3) of BCRA states
2 explicitly that Federal candidates and officeholders are permitted to “attend, speak, or be
3 a featured guest at a fundraising event for a State, district, or local committee of a
4 political party.” See 2 U.S.C. 441i(e)(3).

5 B. 2002 Rulemaking

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

19 An alternative interpretation proposed a “total exemption from the general
20 solicitation ban.” 2002 NPRM at 35672-35673; see also 2 U.S.C. 441i(e)(1)(B);
21 11 CFR 300.62. Under this interpretation, Federal candidates and officeholders would be
22 permitted to “speak freely at [party fundraising events] without restriction or regulation.”
23 2002 NPRM at 35672-35673.

1 The Commission separately explored how 2 U.S.C. 441i(e)(3) – specifically, its
2 reference to “featured guests” – affected the role that Federal candidates and
3 officeholders could play in publicizing State, district, and local party committee events.
4 See 2002 NPRM at 35673. For example, the Commission sought comment on whether
5 this provision of BCRA allowed Federal candidates and officeholders to be named in
6 invitation materials and to appear as members of a host committee. Id.

7 The Commission concluded that Section 441i(e)(3) was a total exemption from
8 the general solicitation ban. Under the Commission’s regulation, Federal candidates and
9 officeholders were permitted to attend, speak, and appear as featured guests at State,
10 district, and local party committee fundraising events “without restriction or regulation.”
11 See Final Rules on Prohibited and Excessive Contributions; Non-Federal Funds or Soft
12 Money, 67 FR 49064, 49108 (July 29, 2002) (“2002 Final Rule”); 11 CFR 300.64(b).
13 The Commission did not, however, interpret 2 U.S.C. 441i(e)(3) to allow unrestricted
14 participation in publicity by Federal candidates and officeholders. Indeed, the
15 Commission concluded that Federal candidates and officeholders were “prohibited from
16 serving on ‘host committees’ for a party fundraising event or from personally signing a
17 solicitation in connection with a State, local, or district party fundraising event on the
18 basis that these pre-event activities are outside the permissible activities . . . flowing
19 from a Federal candidate’s or officeholder’s appearance or attendance at the event.” See
20 2002 Final Rule at 49108.

21 C. Shays I

22 The Commission’s 2002 regulation implementing 2 U.S.C. 441i(e)(3) was
23 challenged in Shays v. FEC. 337 F. Supp.2d 28 (D.D.C. 2004) (“Shays I”). The district

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

10 D. 2005 Rulemaking

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

21 E. Shays III

22 Against this backdrop, the Commission's rule implementing 2 U.S.C. 441i(e)(3)
23 was again challenged in court. The District Court for the District of Columbia upheld the

1 Commission’s regulation. Shays v. Federal Election Commission, 508 F.Supp.2d. 10
2 (D.D.C. 2007).

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

17 F. Advisory Opinions

18 The Commission has also issued several advisory opinions regarding aspects of
19 participation by Federal candidates and officeholders in non-Federal fundraising events
20 not specifically addressed by the Act and regulations. In particular, the Commission has
21 provided guidance on the extent to which Federal candidates and officeholders may
22 participate in non-Federal fundraising events for entities other than State, district, and

1 local party committees and the degree to which that participation can be publicized
2 before such an event.

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

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

21 The Commission also issued several advisory opinions addressing the role that
22 Federal candidates and officeholders may play in publicizing non-Federal fundraising
23 events for State, district, and local party committees and other non-Federal entities. See

1 Advisory Opinions 2003-03 (Cantor), 2003-36 (Republican Governor’s Association), and
2 2007-11 (California State Party Committees). The Commission reasoned that if publicity
3 does not contain a solicitation, then it is not subject to BCRA’s solicitation restrictions.
4 See id. If the publicity does contain a solicitation, and the Federal candidate or
5 officeholder consents to be featured or appear in the publicity, then the publicity must
6 contain a clear and conspicuous disclaimer limiting the solicitation to funds compliant
7 with the amount limitations and source prohibitions of the Act. See id. The Commission
8 made clear, however, that Federal candidates and officeholders may not solicit funds in
9 excess of the limitations and prohibitions of the Act and then qualify that impermissible
10 solicitation with a limiting disclaimer. See Advisory Opinion 2003-36 (Republican
11 Governor’s Association).

12 The Commission was unable to resolve whether a Federal candidate or
13 officeholder could be named as honorary chairperson or featured speaker in a solicitation
14 for non-Federal funds that is not otherwise signed by the Federal candidate or
15 officeholder. See Advisory Opinions 2003-36 (Republican Governor’s Association) and
16 2007-11 (California State Party Committees). In addition, the Commission was unable to
17 resolve whether a Federal candidate or officeholder may be named as a featured speaker
18 on publicity that is mailed with (e.g., in the same envelope as) a solicitation for non-
19 Federal funds that does not name a Federal candidate or officeholder. See Advisory
20 Opinion 2007-11 (California State Party Committees).

21 G. Present Rulemaking

22 In response to the circuit court’s decision in Shays III, the Commission published
23 a Notice of Proposed Rulemaking on December 7, 2009. See Notice of Proposed

1 Rulemaking on Participation by Federal Candidates and Officeholders at Non-Federal
2 Fundraising Events, 74 FR 64016 (Dec. 7, 2009) (“NPRM”). The NPRM proposed three
3 alternative revisions to the Commission’s rule at 11 CFR 300.64. The first alternative
4 proposed a surgical revision to the rule, striking the “without restriction or regulation”
5 language but leaving the other language unchanged. The other two alternatives effected
6 the same change but also proposed new rules governing Federal candidate and
7 officeholder participation in all non-Federal fundraising events – those for State, district,
8 and local party committees as well as other entities, including State and local candidates
9 and State political committees and organizations – and related publicity.

10 The initial public comment period for the NPRM closed on February 8, 2010, and
11 a reply comment period concluded on February 22, 2010. In total, the Commission
12 received seven comments (six initial comments and one reply comment) from seven
13 commenters. The Commission held a public hearing on the proposed rules on March 16,
14 2010, at which four witnesses testified. All comments and a public transcript of the
15 hearing are available at
16 http://www.fec.gov/law/law_rulemakings.shtml#solicitationshays3. For purposes of this
17 document, the terms “comment” and “commenter” apply to both written comments and
18 oral testimony at the public hearing.

19 These final rules address participation by Federal candidates and officeholders at
20 all fundraising events in connection with an election for Federal office or any non-
21 Federal election – both those for State, district, and local party committees and those for
22 other entities – at which funds outside the amount limitations and source prohibitions of
23 the Act, or Levin funds, are solicited, even if funds that comply with the amount

1 limitations and source prohibitions are also solicited at the event. The final rules cover
2 participation by Federal candidates and officeholders at the event as well as participation
3 by Federal candidates and officeholders in publicizing the event. Importantly, they set
4 forth the manner in which Federal candidates and officeholders can be involved in such
5 activities without making a solicitation of funds outside the amount limitations and
6 source prohibitions of the Act.

7 Under the APA, 5 U.S.C. 553(d), and the Congressional Review of Agency
8 Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of
9 the House of Representatives and the President of the Senate and publish them in the
10 Federal Register at least 30 calendar days before they take effect. The final rules that
11 follow were transmitted to Congress on [_____, 2010].

12 **II. Explanation and Justification**

13 The Commission is amending 11 CFR 300.64 in response to the circuit court's
14 decision in Shays III. In the NPRM, the Commission proposed three alternative rules.
15 Alternative 1 would have removed the "without restriction or regulation" language from
16 11 CFR 300.64 pursuant to the decision of the Shays III court, and would have left the
17 rest of the rule largely intact. Under Alternative 1, 11 CFR 300.64 would have continued
18 to address only fundraising events for State, district, and local party committees.

19 Alternatives 2 and 3 proposed more extensive revisions of 11 CFR 300.64. Like
20 Alternative 1, and in response to the court of appeals' decision, both Alternatives 2 and 3
21 would have removed the "without restriction or regulation" language from 11 CFR
22 300.64. Unlike Alternative 1, Alternatives 2 and 3 also proposed addressing more
23 broadly participation by Federal candidates and officeholders at all fundraising events at

1 which funds outside the limits and prohibitions of the Act are raised (“non-Federal
2 fundraising events”), and not just party committee events. Alternatives 2 and 3 proposed
3 detailed guidance on Federal candidate and officeholder participation at non-Federal
4 fundraising events. In addition, the alternatives proposed guidance on the manner in
5 which Federal candidates and officeholders could participate in publicizing such events.
6 While Alternatives 2 and 3 addressed the same range of activities, their treatment of those
7 activities differed. Alternative 2 proposed a single set of rules for all non-Federal
8 fundraising events and related publicity; it did not distinguish State, district, and local
9 party events from other non-Federal fundraising events. Alternative 3, though, proposed
10 two different standards: one for State, district, and local party committee fundraising
11 events and another for non-party fundraising events.

12 The contrasting approaches in Alternatives 2 and 3 were rooted in differing
13 interpretations of 2 U.S.C. 441i(e)(3), particularly in the wake of the Shays III decision.
14 Alternative 2 was predicated on the statement in the Shays III decision that 2 U.S.C.
15 441i(e)(3) “merely clarifies” that Federal candidates may attend, speak, and appear as
16 featured guests at State, district, and local party committee events without such activities
17 constituting an unlawful “solicitation.” Shays III, 528 F.3d at 933. As a “mere[
18 clarif[ication],” 2 U.S.C. 441i(e)(3) neither affords special permissions with regard to
19 Federal candidate and officeholder participation in State, district, and local party
20 committee fundraising events, nor does it imply any restrictions with regard to other non-
21 Federal fundraising events. Accordingly, Alternative 2 did not distinguish between State,
22 district, and local party events and other non-Federal fundraising events.

1 Alternative 3 was instead informed by an interpretation of 2 U.S.C. 441i(e)(3) as
2 establishing a limited statutory exception for Federal candidates to attend, speak and be
3 featured guests at State, district, and local party committee fundraisers – activities that the
4 court in Shays III acknowledged “might otherwise be read as forbid[den]” by the Act’s
5 fundraising restrictions –which did not extend to non-party fundraisers because they were
6 not addressed by the statutory provision. Shays III, 528 F.3d at 933. Accordingly,
7 Alternative 3 proposed one standard for Federal candidate and officeholder participation
8 at State, district, and local party committee events and another – more restrictive –
9 standard for Federal candidate and officeholder participation at other non-Federal
10 fundraising events.

11 The Commission sought comments on the three alternatives, specifically asking
12 whether each would faithfully implement the statute, whether each was responsive to the
13 Shays III decision, and whether each would provide sufficient guidance to Federal
14 candidates and officeholders; State, district, and local party committees; and other
15 affected entities.

16 Regarding Alternative 1, commenters acknowledged that it was technically
17 responsive to the Shays III opinion, but that it would leave unanswered many important
18 questions regarding Federal candidate and officeholder participation in non-Federal
19 fundraising events. In particular, the commenters pointed out that Alternative 1 would
20 not address the Commission’s previous guidance regarding Federal candidate and
21 officeholder participation in publicity for non-Federal fundraising events and whether –
22 or how – a Federal candidate or officeholder could solicit funds at a State, district, or

1 local party committee non-Federal fundraising event.⁴ One commenter suggested that
2 failure to address these related areas would create “uncertainty and trepidation for State
3 and local parties” that would chill involvement between them and Federal candidates and
4 officeholders and ultimately limit the parties’ ability “to communicate their message and
5 to fully participate in the political process.” No commenters objected to the
6 Commission’s proposal to establish rules addressing more broadly Federal candidate and
7 officeholder participation at all non-Federal fundraising events.

8 A number of commenters supported the approach of Alternative 2, which applied
9 the same framework to non-Federal fundraising events for State, district, and local party
10 committees and to other non-Federal fundraising events. These commenters stated that
11 Alternative 2 properly balanced the concerns of the Shays III court with the congressional
12 intent behind BCRA, and that it better implemented the court’s interpretation of
13 441i(e)(3). None of the commenters objected to this alternative.

14 With regard to Alternative 3, commenters generally did not favor its distinction
15 between party committee events and other non-Federal fundraising events. Those
16 commenters suggested that Alternative 3’s approach went further than is required by the
17 court’s holding in Shays III, and that it would reverse previous Commission guidance that
18 had come to be relied on by Federal candidates, officeholders, and party committees
19 alike. One commenter predicted that Alternative 3 would effectively end participation by
20 Federal candidates and officeholders at non-Federal fundraising events. The commenters

⁴ While the latter issue was addressed by the Commission in advisory opinions with respect to non-Federal fundraising events for State candidates and 527 political organizations, see Advisory Opinions 2003-03 (Cantor) and 2003-36 (Republican Governor’s Association), the advisory opinions did not address Federal candidate and officeholder solicitation at State, district, or local party committee non-Federal fundraising events because 11 CFR 300.64 permitted Federal candidates and officeholders to solicit funds at such events “without restriction or regulation.” The invalidation of this aspect of 11 CFR 300.64 in Shays III raised the question for the first time.

1 that did not object to Alternative 3 nevertheless noted that the Act did not require “a
2 distinction between different types of nonfederal fundraising events,” as proposed in
3 Alternative 3.

4 The Commission agrees that Alternative 1, while responsive to the Shays III
5 decision, would leave unanswered many important questions regarding Federal candidate
6 and officeholder participation in non-Federal fundraising events. Although the Shays III
7 decision does not mandate the adoption of a single rule that addresses participation by
8 Federal candidates and officeholders at all non-Federal fundraising events, Federal
9 candidates and officeholders, as well as entities that solicit non-Federal funds in
10 connection with elections, would benefit from the explicit guidance of a more
11 comprehensive rule.

12 Accordingly, the Commission is revising 11 CFR 300.64 to provide guidance on
13 participation by Federal candidates and officeholders in all non-Federal fundraising
14 events in connection with an election for Federal office or any non-Federal election. As
15 set forth in more detail below, the Commission’s final rule explicitly addresses
16 participation by Federal candidates and officeholders at such fundraising events, as well
17 as participation by Federal candidates and officeholders in publicizing these events. In
18 addition, the rule covers participation by Federal candidates and officeholders regardless
19 of whether the entity sponsoring the event is a State or local candidate committee, State
20 political committee, or any other organization that hosts a fundraising event in connection
21 with an election for Federal office or any non-Federal election.

22 The Commission’s final rule is based on Alternative 2 in the NPRM. The
23 Commission has determined that Alternative 2 best accomplishes two important goals:

1 (1) implementing 2 U.S.C. 441i(e) in accordance with the Shays III decision, and (2)
2 providing clear, comprehensive guidance regarding Federal candidate and officeholder
3 participation in non-Federal fundraising events and related publicity.

4 A. 300.64(a) – Scope

5 The scope of new 11 CFR 300.64 is set out in paragraph (a). The rule applies to
6 all fundraising events in connection with an election for Federal office or any non-
7 Federal election at which funds outside the limitations and source prohibitions of the Act,
8 or Levin funds, are solicited. The rule applies even if funds within the amount limitations
9 and source prohibitions of the Act are also solicited at an event or in publicity. The rule
10 does not cover events at which funds outside the amount limitations and source
11 prohibitions of the Act or Levin funds are not solicited but are, nevertheless, received.
12 Nor does the rule cover fundraising events at which only Federal funds are solicited or
13 fundraising events in connection with any non-Federal election at which only funds
14 subject to the limitations and prohibitions of the Act are solicited, such as an event
15 soliciting small-dollar, non-corporate, non-union funds for a State candidate.

16 The rule covers only non-Federal fundraising events that are “in connection with
17 an election for Federal office or any non-Federal election.” It does not apply to Federal
18 candidate and officeholder participation in fundraising events that are not in connection
19 with an election, consistent with the Act’s prohibition on Federal candidates and
20 officeholders from soliciting, receiving, directing, transferring, spending, or disbursing
21 funds in connection with an election for Federal office or any non-Federal elections. See
22 2 U.S.C. 441i(e)(1)(B).

1 The scope of the final rule is very similar to the scope proposed in the NPRM,
2 except that the proposed rule would have covered non-Federal fundraising events at
3 which funds outside the limitations and prohibitions of the Act are raised, and the final
4 rule covers non-Federal fundraising events at which funds outside the limitations and
5 prohibitions of the Act are solicited. The Commission made this change in response to a
6 comment that a solicitation-based standard more accurately captured the intent behind 2
7 U.S.C. 441i(e), which governs solicitations by Federal candidates and officeholders. The
8 commenter expressed concern that a standard based on whether non-Federal funds are
9 raised at an event could be triggered when, for example, a donor spontaneously donates a
10 large, corporate check at a non-Federal fundraising event, even though no one, including
11 the participating Federal candidate or officeholder, had solicited funds outside the amount
12 limitations or source prohibitions of the Act. The Commission agrees that a solicitation-
13 based standard is more consistent with the Act’s prohibition on solicitation than a
14 standard based on whether funds are raised at an event. See 2 U.S.C. 441i(e)(1).

15 Commenters generally supported the proposed scope of the Commission’s rule in
16 the NPRM. They differed, however, on whether the rule’s applicability should be limited
17 to fundraising events that are “in connection with an election for Federal office or any
18 non-Federal election.” One commenter supported the proposal to limit the scope of the
19 rule in this manner, while noting the Commission’s articulation of the standard in
20 previous advisory opinions, such as Advisory Opinions 2003-12 (Flake) and 2005-10
21 (Berman/Doolittle). One commenter urged the Commission to supersede Advisory
22 Opinion 2005-10 (Berman/Doolittle), which, in the commenter’s view, had incorrectly
23 applied the “in connection with an election for Federal office or any non-Federal

1 election” standard. Another commenter explicitly urged the Commission not to
2 supersede the same.

3 The Commission declines to supersede Advisory Opinion 2005-10
4 (Berman/Doolittle) in this rulemaking and continues to be guided by its prior advisory
5 opinions on the “in connection with an election for Federal office or any non-Federal
6 election” standard. See, e.g., Advisory Opinions 2005-10 (Berman/Doolittle)
7 (solicitation of donations by Federal officeholders to a State ballot measure committee
8 was not in connection with any election under the circumstances described in the
9 request); 2004-14 (Davis) (solicitation of donations by a Federal officeholder to a charity
10 was not in connection with any election); 2003-20 (Hispanic College Fund) (solicitation
11 of donations by a Federal officeholder to a scholarship fund was not in connection with
12 any election); 2003-12 (Flake) (solicitation of donations by Federal officeholders for a
13 political organization supporting a State referendum was in connection with an election if
14 the measure had qualified for the ballot). Further guidance from the Commission on
15 which activities are in connection with an election for Federal office or any non-Federal
16 election, and which are not, is best offered through the advisory opinion process.

17 The rule does not alter the fundraising exception for Federal candidates and
18 officeholders who are also State candidates, found at 11 CFR 300.63, or the fundraising
19 exceptions for certain tax-exempt organizations, found at 11 CFR 300.65. See also 2
20 U.S.C. 441i(e)(2) and (e)(4). Thus, in the event of any inconsistencies with new 11 CFR
21 300.64, the provisions of 11 CFR 300.63 and 300.65 govern.

1 B. 300.64(b) – Participation at Non-Federal Fundraising Events

2 Paragraph (b) of new 11 CFR 300.64 addresses participation by Federal
3 candidates and officeholders at non-Federal fundraising events. Paragraph (b)(1)
4 addresses attendance, speeches, and appearances as featured guests by Federal candidates
5 and officeholders at non-Federal fundraising events. Paragraph (b)(2) addresses
6 solicitations made by Federal candidates and officeholders at non-Federal fundraising
7 events.

8 1. 300.64(b)(1) – Attending, Speaking or Being a Featured Guest at Non-
9 Federal Fundraising Events

10 New 11 CFR 300.64(b)(1) provides that Federal candidates and officeholders may
11 attend, speak at, and be featured guests at non-Federal fundraising events. This provision
12 is consistent with the Shays III decision, which stated that 2 U.S.C. 441i(e)(3) “merely
13 clarifies that despite the statute’s ban on soliciting soft money, federal candidates may
14 still ‘attend, speak or be a featured guest’ at state party events where soft money is raised,
15 which the statute might otherwise be read as forbidding.” Shays III, 528 F.3d at 933. If 2
16 U.S.C. 441i(e)(3) is a “mere[] clarifi[cation],” it follows that the same underlying
17 framework applies to all fundraising events. Thus, if the statutory ban on soliciting soft
18 money does not prohibit a Federal candidate or officeholder from attending, speaking at,
19 or being a featured guest at a State, district, or local party committee’s non-Federal
20 fundraising event, then the statutory ban also does not prohibit the same person from
21 engaging in the same activities at any other non-Federal fundraising event.

22 This portion of the final rule is identical to that proposed in Alternative 2 of the
23 NPRM. No comments were received on this provision, although the commenters

1 generally supported the Commission’s broader proposal to treat Federal candidates’ and
2 officeholders’ participation in all non-Federal fundraising events the same.

3 2. 300.64(b)(2) – Solicitations at Non-Federal Fundraising Events

4 Under new 11 CFR 300.64(b)(2), Federal candidates and officeholders may solicit
5 funds at non-Federal fundraising events, provided that the solicitation is limited to funds
6 that comply with the limitations and prohibitions of the Act and that are consistent with
7 State law. Federal candidates and officeholders may no longer speak “without restriction
8 or regulation” at any non-Federal fundraising event, consistent with the circuit court’s
9 decision in Shays III.

10 New 11 CFR 300.64(b)(2) provides that Federal candidates and officeholders may
11 limit solicitations made at non-Federal fundraising events by displaying at the event a
12 clear and conspicuous written notice or by making a clear and conspicuous oral statement
13 that the solicitation is not for Levin funds (if the beneficiary of the fundraiser has a Levin
14 fund account and is raising funds for that account), does not seek funds in excess of
15 Federally permissible amounts, and does not seek funds from sources prohibited under
16 the Act, including corporations, labor organizations, national banks, Federal contractors,
17 or foreign nationals. A notice or statement limiting a solicitation will not be considered
18 “clear and conspicuous” for purposes of the final rule if it is difficult to read or hear or if
19 its placement is easily overlooked. The Commission’s regulation at 11 CFR 100.11(c)
20 further informs the “clear and conspicuous” standard.

21 One example of a limited solicitation under new 11 CFR 300.64(b)(2) is for the
22 Federal candidate or officeholder to say at a non-Federal fundraising event for a State or
23 local candidate: “I am only asking for donations of up to \$[applicable Federally

1 permissible amount, currently \$2,400 per election] from individuals and for donations of
2 up to \$[applicable Federally permissible amount, currently \$5,000 per year] from multi-
3 candidate political committees. I am not asking for donations in excess of these amounts
4 or for donations from corporations, labor organizations, foreign nationals, Federal
5 contractors, or national banks.” When delivered to the general audience, this type of
6 statement need be made only once; Federal candidates and officeholders are not obligated to
7 repeat it during one-on-one discussions with individuals at the fundraising event. Federal
8 candidates and officeholders may not, however, recite a limitation publicly, and then
9 encourage event attendees to disregard the limitation during one-on-one discussions.

10 If a Federal candidate or officeholder wishes to make a general solicitation that
11 does not expressly refer to the amount limitations and source prohibitions of the Act at a
12 non-Federal fundraising event, then the candidate or officeholder may limit the
13 solicitation by displaying a clear and conspicuous written notice or by making a clear and
14 conspicuous oral statement at the event that the solicitation is limited to funds that
15 comply with the limitations and prohibitions of the Act. An example of an adequate
16 written notice is a placard prominently displayed so that it cannot be overlooked at the
17 entrance to a fundraising event for a State or local candidate at which the Federal
18 candidate or officeholder is appearing, or a card placed on every table at the event,
19 stating:

20 Solicitations made by Federal candidates and officeholders at this event
21 are limited by Federal law. The Federal candidates and officeholders
22 speaking tonight are soliciting only donations of up to \$[applicable
23 Federally permissible amount, currently \$2,400 per election] from
24 individuals and up to \$[applicable Federally permissible amount, currently
25 \$5,000 per year] from multi-candidate political committees. They are not
26 soliciting donations in any amount from corporations, labor organizations,
27 national banks, Federal contractors, or foreign nationals.
28

1 Alternatively, an event official or the Federal candidate or officeholder could
2 make the same or a similar statement orally before any general solicitations are made by
3 the Federal candidate or officeholder, such as in welcoming remarks to persons attending
4 the fundraising event. These types of public, limiting statements need not be repeated in
5 one-on-one discussions between the Federal candidate or officeholder and event
6 attendees, so long as the Federal candidate or officeholder does not encourage event
7 attendees to disregard the limitation during one-on-one discussions.

8 The provisions of new 11 CFR 300.64(b) are substantially the same as those
9 proposed in paragraph (b) of Alternative 2 of the NPRM. Most of the comments on the
10 proposal focused on the requirement that Federal candidates and officeholders limit their
11 solicitations at non-Federal fundraising events. Two commenters asked the Commission
12 to provide in its final rule more explicit guidance on how to limit such solicitations. In
13 particular, the commenters requested additional examples of acceptable oral and written
14 limitations and a clearer articulation of the “clear and conspicuous” standard. In response
15 to these commenters, and to facilitate compliance with the regulations, the Commission
16 has provided examples of acceptable statements.

17 Two other commenters suggested that it would be unnecessary and “awkward and
18 confusing” to require Federal candidates and officeholders to limit their solicitations at
19 non-Federal fundraising events with clear and conspicuous oral or written statements.
20 The Commission concludes that any solicitation that is not limited either by its express
21 terms or otherwise (such as through a clear and conspicuous oral statement or written
22 notice), risks being understood as soliciting donations in amounts and from sources
23 prohibited under the Act, especially if other individuals at the fundraising event explicitly

1 solicit funds that are not consistent with the limitations and prohibitions of the Act. See
2 11 CFR 300.2(m) (defining “to solicit” to include “an oral or written communication that,
3 construed as reasonably understood in the context in which it is made, contains a clear
4 message, asking, requesting, or recommending that another person make a contribution,
5 donation, transfer of funds, or otherwise provide anything of value”).

6 C. 300.64(c) – Publicity for Non-Federal Fundraising Events

7 Paragraph (c) of new 11 CFR 300.64 addresses participation by Federal
8 candidates and officeholders in publicity for non-Federal fundraising events. The final
9 rule applies to Federal candidate and officeholder participation in all types of publicity
10 for non-Federal fundraising events, including publicity soliciting funds. The term
11 “publicity” as used in new 11 CFR 300.64 includes all methods used to publicize a non-
12 Federal fundraising event, including advertisements, announcements, and pre-event
13 invitations, regardless of form or medium (and includes phone calls, mail, e-mail,
14 facsimile, and text messages), as well as follow-up contacts. New paragraph (c) is
15 intended to ensure that Federal candidates and officeholders do not, in the course of
16 publicizing a non-Federal fundraising event, solicit funds outside the amount limitations
17 and source prohibitions of the Act.

18 Paragraph (c) of the final rules is substantially similar to paragraph (c) of
19 Alternative 2 in the NPRM, except as described below. All commenters supported the
20 Commission’s proposal to address publicity for non-Federal fundraising events in the rule
21 and to clarify guidance provided by the Commission in previous advisory opinions and
22 Matters Under Review. As one commenter noted, “these rules regarding pre-event
23 publicity in practice are what . . . really matter.” Another commenter expressed a similar

1 sentiment: “Frankly, once you’re at the event, it’s very rare that solicitations are ever
2 made regardless. So it is appropriate that you’ve opened the door to revisiting the
3 guidance and the rules regarding pre-event publicity. And clarity really is an important
4 thing in these rules[.]”

5 1. 300.64(c)(1) – Publicity Not Containing a Solicitation

6 Paragraph (c)(1) of new 11 CFR 300.64 provides that if publicity for, or
7 information about, a non-Federal fundraising event does not solicit funds, then Federal
8 candidates and officeholders may approve, authorize, agree to, or consent to the use of
9 their names and likenesses in it. Such publicity may, for example, use the name or
10 likeness of a Federal candidate or officeholder to indicate that such person will attend,
11 speak, or be a featured guest at the event. The publicity may also indicate the Federal
12 candidate’s or officeholder’s involvement or role in the event. See discussion of
13 paragraph (c)(3), below. No Federal disclaimer or attribution statement is required on
14 such publicity.

15 Paragraph (c)(1) is identical to proposed paragraph (c)(1) in Alternative 2 of the
16 NPRM. The Commission did not receive any comments specifically addressing this
17 provision, although the commenters generally supported the Commission’s proposed
18 treatment of publicity for non-Federal fundraising events. One commenter, for example,
19 indicated that the mere listing of a Federal candidate or officeholder on an invitation for a
20 non-Federal fundraising event does not constitute a solicitation.

21 The Commission agrees that, in the context of publicity that does not otherwise
22 contain a solicitation, merely approving, authorizing, agreeing to, or consenting to the use
23 of one’s name or likeness does not, in and of itself, constitute a solicitation.

1 The Commission also concludes that paragraph (c)(1) gives full effect to 2 U.S.C.
2 441i(e)(3), as interpreted by the court in Shays III, which states that Federal candidates
3 and officeholders may be featured guests at State, district, and local party committee
4 fundraising events. One aspect of being a featured guest is being identified as such in
5 publicity. Thus, paragraph (c)(1) is consistent with the Act and the Shays III court
6 decision.

7 2. 300.64(c)(2) – Publicity Containing a Solicitation Limited to Funds that
8 Comply with the Amount Limitations and Source Prohibitions of the Act

9 Paragraph (c)(2) of new 11 CFR 300.64 provides that Federal candidates and
10 officeholders may approve, authorize, agree to, or consent to the use of their names and
11 likenesses in publicity for a non-Federal fundraising event if the publicity solicits only
12 funds that comply with the amount limitations and source prohibitions of the Act.
13 Federal candidates and officeholders may be identified on the publicity in a manner
14 specifically related to fundraising, such as honorary chairperson of the fundraising event,
15 and may also sign the solicitation letters themselves, if the solicitation is limited to funds
16 that comply with the amount limitations and source prohibitions of the Act.

17 This provision merely makes explicit what was implicit in the proposed rule, and
18 reiterates what is expressly provided for in 2 U.S.C. 441i(e)(1): that Federal candidates
19 and officeholders may solicit funds that comply with the amount limitations and source
20 prohibitions of the Act.

1 3. 300.64(c)(3) – Publicity Containing a Solicitation Outside the Amount
2 Limitations and Source Prohibitions of the Act

3 Paragraph (c)(3) of new 11 CFR 300.64 addresses publicity that solicits funds
4 outside the amount limitations and source prohibitions of the Act or Levin funds. This
5 provision is based on the Commission’s determination that a Federal candidate or
6 officeholder may approve, authorize, agree to, or consent to the use of his or her name or
7 likeness on publicity for a non-Federal fundraising event in a manner that does not result
8 in the solicitation being attributed to the Federal candidate or officeholder.

9 Under paragraph (c)(3)(i), a Federal candidate or officeholder may approve,
10 authorize, agree to, or consent to the use of his or her name or likeness in publicity for a
11 non-Federal fundraising event that contains a solicitation of funds outside the amount
12 limitations and source prohibitions of the Act or Levin funds, but only if: (1) the Federal
13 candidate or officeholder is identified in the publicity in a manner not specifically related
14 to fundraising, and (2) the publicity includes a clear and conspicuous disclaimer that the
15 solicitation is not being made by the Federal candidate or officeholder.

16 New 11 CFR 300.64(c)(3)(i)(A) provides nonexhaustive examples of the
17 positions that a Federal candidate or officeholder may be identified as holding that are not
18 specifically related to fundraising. They include featured guest, honored guest, special
19 guest, featured speaker, or honored speaker. Thus, merely identifying a Federal
20 candidate or officeholder as holding a position not specifically related to fundraising on
21 publicity does not constitute a solicitation of funds outside the amount limitations and
22 source prohibitions of the Act or Levin funds by the Federal candidate or officeholder.

23 The Commission is not requiring that all Federal candidates or officeholders be identified

1 by one of the listed titles. Rather, the Federal candidate or officeholder may be identified
2 in any manner not specifically related to fundraising. For example, the Federal candidate
3 or officeholder may be identified simply by name, as in “Please join the State Party at a
4 reception with Senator Jones and Governor Smith.”

5 To avoid any confusion in this regard, paragraph (c)(3)(i)(B) requires the
6 publicity to include a clear and conspicuous disclaimer stating that the solicitation is not
7 being made by the Federal candidate or officeholder. New 11 CFR 300.64(c)(3)(ii)
8 provides that disclaimers on written publicity must meet the requirements in 11 CFR
9 110.11(c)(2). For publicity disseminated via non-written means, such as by telephone
10 calls, a disclaimer is required only if the publicity is recorded or follows any form of a
11 written script. A script for these purposes means any written text that callers use to guide
12 their conversations with potential attendees, regardless of whether it takes the form of
13 complete paragraphs, bullet points, notes, or other written prompts. As long as the text
14 includes appropriate disclaimers, the Commission will presume (absent evidence to the
15 contrary) that the requirements of the rule were met.

16 New paragraph (c)(3)(iv) provides two examples of disclaimers that would satisfy
17 the requirement. Both examples state that the Federal candidate or officeholder is not
18 soliciting funds in connection with the fundraising event. These examples are intended to
19 serve as guidance for Federal candidates, officeholders, and sponsors of non-Federal
20 fundraising events. Importantly, written disclaimers, including those that conform to the
21 examples provided in the rule, are not sufficient unless they are “clear and conspicuous”
22 under 11 CFR 110.11(c)(2). Some additional limitations on the use of disclaimers are
23 addressed in new paragraph (c)(3)(v) of 11 CFR 300.64, as discussed below.

1 Paragraph (c)(3)(v) of new 11 CFR 300.64 states that a Federal candidate or
2 officeholder may not approve, authorize, agree to, or consent to the use of his or her
3 name or likeness in publicity that contains a solicitation of non-Federal or Levin funds if
4 the Federal candidate or officeholder is identified in the publicity as serving in a position
5 specifically related to fundraising. Positions specifically related to fundraising include,
6 for example, honorary chair of the fundraising event or member of the host committee.
7 Nor may a Federal candidate or officeholder approve, authorize, agree to, or consent to
8 the use of his or her name or likeness if the Federal candidate or officeholder is identified
9 on publicity containing a solicitation of non-Federal or Levin funds as extending an
10 invitation to the event. For example, an invitation stating “Featured guest Congressman
11 X invites you to join him at next week’s reception” would fall into this category, as
12 would an invitation signed by the Federal candidate or officeholder.

13 The Commission has concluded that participation by the Federal candidate or
14 officeholder in this manner would be an impermissible solicitation of funds outside the
15 amount limitations and source prohibitions of the Act or Levin funds. As such, no
16 disclaimer, even one that complies with paragraph (c)(3)(i)(B) of new 11 CFR 300.64,
17 would be capable of curing the violation of 2 U.S.C. 441i(e), no matter how clear or
18 conspicuous the disclaimer may be.

19 Finally, paragraph (c)(3)(vi) prohibits Federal candidates and officeholders, and
20 their agents, from disseminating publicity for a non-Federal fundraising event if the
21 publicity solicits funds outside the amount limitations and source prohibitions of the Act
22 or Levin funds. This paragraph is a logical outgrowth of the proposal in the NPRM; the

1 Commission has decided to implement this provision to prohibit conduct that could result
2 in an impermissible solicitation by Federal candidates and officeholders.

3 The final rule covers much of the same activity as the rule proposed in Alternative
4 2 of the NPRM, but is organized differently. The proposed rule did not, for example,
5 explicitly address publicity that solicits only funds within the limitations and prohibitions
6 of the Act, whereas the final rule does. More significantly, the structure of the proposed
7 rule depended on whether the solicitation in the publicity was made by the Federal
8 candidate or officeholder. By contrast, the structure of the final rule depends on whether
9 the publicity solicits funds within the amount limitations and source prohibitions of the
10 Act.

11 The comments received on this aspect of the proposed rule focused for the most
12 part on the disclaimer requirement for publicity naming a Federal candidate or
13 officeholder and including a solicitation by a person other than the Federal candidate or
14 officeholder. Four commenters disagreed with the disclaimer requirement, arguing that
15 the disclaimers would confuse the average person. These commenters observed that the
16 average recipient of publicity could easily conclude that the mere listing of a Federal
17 candidate or officeholder – as a featured guest, for example – on publicity was not a
18 solicitation by that Federal candidate or officeholder, even if the publicity included a
19 solicitation of funds outside the amount limitations and source prohibitions of the Act.
20 Moreover, one commenter opined that fundraising hosts would bear a substantial burden
21 if employees and volunteers were required to issue such disclaimers during the telephone
22 calls and conversations that frequently follow the distribution of written publicity for a
23 non-Federal fundraising event. Instead, two commenters suggested that the Commission

1 require such disclaimers only when a Federal candidate or officeholder signs a
2 solicitation or explicitly solicits funds.

3 Other commenters supported the Commission’s proposed disclaimer requirement,
4 stating that it would make “infinitely clear to the recipient of the solicitation” that the
5 Federal candidate or officeholder was not asking for funds outside the limitations or
6 prohibitions of the Act. Another commenter asked the Commission to provide specific
7 examples of statements that would satisfy the disclaimer requirement.

8 The Commission has considered the comments and has concluded that identifying
9 a Federal candidate or officeholder as serving in a role not specifically related to
10 fundraising does not, by itself, result in a solicitation by the Federal candidate or
11 officeholder. However, just as the circuit court concluded in Shays III that 2 U.S.C.
12 441i(e)(3) “merely clarifies” the reach of “the statute’s ban on soliciting soft money,” the
13 Commission also seeks to make it unmistakably clear that Federal candidates and
14 officeholders who participate at non-Federal fundraising events and in publicity are not
15 making a solicitation that would be prohibited under the law. Shays III, 528 F.3d at 933.
16 The disclaimer requirement helps to ensure that persons receiving publicity for non-
17 Federal fundraising events understand that any solicitation of funds outside the amount
18 limitations and source prohibitions of the Act is made by a person other than the Federal
19 candidate or officeholder identified in the publicity. The disclaimer requirement may
20 also help to protect Federal candidates and officeholders against complaints filed with the
21 Commission that result from a misunderstanding as to who is soliciting funds in
22 connection with the fundraising event.

1 D. Effect of this Rulemaking on Prior Commission Advisory Opinions

2 The Commission has addressed the issue of participation by Federal candidates
3 and officeholders in non-Federal fundraising events in Advisory Opinions 2007-11
4 (California State Party Committees), 2005-02 (Corzine II), 2004-12 (Democrats for the
5 West), 2003-36 (Republican Governors Association), and 2003-03 (Cantor). As
6 explained below, the Commission is superseding the aspects of these advisory opinions
7 that address this issue.

8 In Advisory Opinions 2005-02 (Corzine II) and 2004-12 (Democrats for the
9 West), the Commission concluded, in part, that Federal candidates and officeholders
10 could appear, speak, and be featured guests at non-Federal fundraising events “without
11 restriction or regulation” under former 11 CFR 300.64(b). Given that this provision of
12 the rule was explicitly struck down by the Shays III court and has been removed by the
13 Commission, the Commission is superseding the parts of Advisory Opinions 2004-12
14 (Democrats for the West) and 2005-02 (Corzine II) that apply the “without restriction or
15 regulation” standard. Specifically, the Commission is superseding the answer to
16 Question 7 in Advisory Opinion 2004-12 (Democrats for the West), as to whether
17 Democrats for the West may invite Federal candidates, officeholders, or their agents to
18 appear as guests or featured speakers at fundraising events, and the second paragraph in
19 the answer to Question 2 in Advisory Opinion 2005-02 (Corzine II), regarding Federal
20 candidate and officeholder participation in raising funds for the non-Federal accounts of
21 State and local party committees.

22 Advisory Opinions 2007-11 (California State Party Committees), 2003-36
23 (Republican Governors Association), and 2003-03 (Cantor) also addressed participation

1 by Federal candidates and officeholders at non-Federal fundraising events in connection
2 with elections, and related publicity. Some of the conclusions are consistent with new 11
3 CFR 300.64, such as the conclusion in Advisory Opinions 2003–36 (Republican
4 Governors Association) and 2003–03 (Cantor) that the mere attendance of a Federal
5 candidate or officeholder at a non-Federal fundraiser does not, in and of itself, give rise to
6 a violation of the Act or Commission regulations. On the other hand, some of the
7 conclusions in these prior advisory opinions may not be consistent with new 11 CFR
8 300.64.

9 To help avoid potential confusion as to which parts of the prior advisory opinions
10 are consistent with the new rule and which parts are inconsistent, the Commission is
11 superseding Advisory Opinion 2003–03 (Cantor), except for the answer to Question 6
12 regarding agency, and Advisory Opinion 2003–36 (Republican Governors Association),
13 except for the answer to Question 3 regarding corporate donations to the Republican
14 Governors Association’s conference account and the last paragraph of the answer to
15 Question 2 regarding whether the conference account’s activities are in connection with
16 an election. The Commission is also superseding in its entirety Advisory Opinion 2007-
17 11 (California State Party Committees), which addressed three types of proposed
18 communications related to State party fundraising events that identified Federal
19 candidates or officeholders as featured speakers or honored guests.

20 These actions are consistent with a comment received in response to the NPRM.
21 The comment noted the potential tension and confusion that could result from having to
22 reconcile past advisory opinions with the Commission’s new rule. The comment

1 suggested that the Commission indicate explicitly that the series of advisory opinions on
2 this issue no longer articulate the correct standard of law and are thus superseded.

3 The Commission agrees that where the new rule addresses the same issue as a
4 prior advisory opinion, the new rule provides the applicable standard of law, and the
5 advisory opinion is superseded. However, the Commission declines to supersede the
6 entire series of advisory opinions which reference this issue. As discussed above,
7 sections of certain advisory opinions are not affected by the new rule and hence remain in
8 force. Accordingly, the Commission has explicitly indicated which advisory opinions are
9 now superseded, in whole or in part. Although new 11 CFR 300.64 is in part informed
10 by, and adopts, some of the Commission’s conclusions in prior advisory opinions, the
11 new rule is based entirely on the reasoning set forth in this explanation and justification
12 and does not rely on any prior Commission advisory opinions.

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

14 **[Regulatory Flexibility Act]**

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

20 This final rule affects State, district, and local party committees, as well as
21 Federal candidates and their campaign committees. Federal candidates, as individuals, do
22 not fall within the definition at 5 U.S.C. 601, and campaign committees are not

1 independently owned and operated because they are not financed and controlled by a
2 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 final rule is not substantial.

13

1 List of Subjects

2

3 11 CFR Part 300

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

6

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

3 **PART 300 – NON-FEDERAL FUNDS**

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

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

6 2. Section 300.64 is revised to read as follows:

7 **§ 300.64 Participation By Federal Candidates and Officeholders at Non-Federal**
8 **Fundraising Events (2 U.S.C. 441i(e)(1) and (3)).**

9 (a) Scope. This section covers participation by Federal candidates and officeholders
10 at fundraising events in connection with an election for Federal office or any non-Federal
11 election at which funds outside the amount limitations and source prohibitions of the Act
12 or Levin funds are solicited. This section also covers participation by Federal candidates
13 and officeholders in publicity related to such non-Federal fundraising events. This
14 section applies even if funds that comply with the amount limitations and source
15 prohibitions of the Act are also solicited at the event. Nothing in this section shall be
16 construed to alter the fundraising exception for State candidates at 11 CFR 300.63 or the
17 fundraising exceptions for certain tax-exempt organizations at 11 CFR 300.65.

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

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

21 (2) Solicit funds at a non-Federal fundraising event, provided that the
22 solicitation is limited to funds that comply with the amount limitations and
23 source prohibitions of the Act and that are consistent with State law.

1 (i) A Federal candidate or officeholder may limit such a solicitation
2 by displaying at the fundraising event a clear and conspicuous
3 written notice, or making a clear and conspicuous oral statement,
4 that the solicitation is not for Levin funds (when applicable), does
5 not seek funds in excess of \$[Federally permissible amount], and
6 does not seek funds from corporations, labor organizations,
7 national banks, federal government contractors, or foreign
8 nationals.

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

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

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

19 (2) Publicity containing a solicitation limited to funds that comply with the
20 amount limitations and source prohibitions of the Act. A Federal
21 candidate or officeholder may approve, authorize, agree to, or consent to
22 the use of his or her name or likeness in publicity for a non-Federal

1 fundraising event that solicits only funds that comply with the amount
2 limitations and source prohibitions of the Act.

3 (3) Publicity containing a solicitation of funds outside the amount limitations
4 and source prohibitions of the Act.

5 (i) A Federal candidate or officeholder may approve, authorize, agree
6 to, or consent to the use of his or her name or likeness in publicity
7 for a non-Federal fundraising event that contains a solicitation of
8 funds outside the amount limitations and source prohibitions of the
9 Act or Levin funds only if:

10 (A) The Federal candidate or officeholder is identified as a
11 featured guest, honored guest, special guest, featured
12 speaker, or honored speaker, or in any other manner not
13 specifically related to fundraising; and

14 (B) The publicity includes a clear and conspicuous disclaimer
15 that the solicitation is not being made by the Federal
16 candidate or officeholder.

17 (ii) The disclaimer required in paragraph (c)(3)(i)(B) of this section
18 must meet the requirements in 11 CFR 110.11(c)(2) if the publicity
19 is written.

20 (iii) Where publicity is disseminated by non-written means, the
21 disclaimer described in paragraph (c)(3)(i)(B) of this section is
22 required only if the publicity is recorded or follows any form of
23 written script.

- 1 (iv) Examples of disclaimers that satisfy paragraph (c)(3)(i)(B) of this
2 section include, but are not limited to:
- 3 (A) “[Name of Federal candidate/officerholder] is appearing at
4 this event only as a featured speaker. [Federal
5 candidate/officerholder] is not asking for funds or
6 donations”; or
- 7 (B) “All funds solicited in connection with this event are by
8 [name of non-Federal candidate or entity], and not by
9 [Federal candidate/officerholder].”
- 10 (v) A Federal candidate or officerholder may not approve, authorize,
11 agree to, or consent to the use of his or her name or likeness in
12 publicity for a non-Federal fundraising event that contains a
13 solicitation of funds outside the amount limitations and source
14 prohibitions of the Act or Levin funds if:
- 15 (A) The Federal candidate or officerholder is identified as
16 serving in a position specifically related to fundraising,
17 such as honorary chairperson or member of a host
18 committee, or is identified in the publicity as extending an
19 invitation to the event, even if the communication contains
20 a written disclaimer as described in paragraph (c)(3)(i)(B)
21 of this section; or
- 22 (B) The Federal candidate or officerholder signs the
23 communication, even if the communication contains a

1 written disclaimer as described in paragraph (c)(3)(i)(B) of
2 this section.

3 (vi) A Federal candidate, officeholder, or an agent of either, may not
4 disseminate publicity for a non-Federal fundraising event that
5 contains a solicitation of funds outside the amount limitations and
6 source prohibitions of the Act or Levin funds by someone other
7 than the Federal candidate or officeholder.

8
9 On behalf of the Commission,

10
11 _____
12 Matthew S. Petersen
13 Chairman
14 Federal Election Commission
15

16
17 DATED: _____
18 BILLING CODE: 6715-01-P