



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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November 7, 2005

MEMORANDUM

AGENDA ITEM

For Meeting of: 11-10-05

SUBMITTED LATE

TO: The Commission

THROUGH: Robert J. Costa *RJC*
Acting Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Cheryl A.F. Hemsley *CAH*
Attorney

SUBJECT: Final Rules and Explanation and Justification: \$5,000 Exemption for the Disbursements of Levin Funds by State, District, and Local Party Committees and Organizations

Attached are draft Final Rules and Explanation and Justification eliminating from the regulations the \$5,000 Exemption for the disbursements of Levin funds by State, district, and local party committees and organizations pursuant to the Court of Appeals decision in Shays v. FEC, 337 F.Supp.2d 28 (D.D.C. 2004), aff'd, 414 F.3d 76 (D.C. Cir. July 15, 2005), reh'g en banc denied (October 21, 2005) (No. 04-5352).

Recommendation:

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

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 300**

3 **[Notice 2005 –]**

4 **\$5,000 Exemption for Disbursements of Levin Funds by**
5 **State, District, and Local Party Committees and Organizations**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Final Rules.

8 **SUMMARY:** The Federal Election Commission is eliminating from its
9 regulations an exemption allowing State, district, and local
10 committees and organizations of a political party to use only Levin
11 funds to pay for certain types of Federal election activity
12 aggregating \$5,000 or less in a calendar year. In Shays v. FEC, the
13 District Court invalidated the exemption and remanded the
14 regulation to the Commission for further action consistent with the
15 court's opinion. The Commission appealed this ruling, and the
16 Court of Appeals for the D.C. Circuit affirmed the District Court's
17 decision. The repeal of this rule means that State, district, and
18 local political party committees and organizations must pay for
19 these specific types of Federal election activity either entirely with
20 Federal funds, or with a mix of Federal funds and Levin funds.
21 Further information is provided in the supplementary information
22 that follows.

1 **DATES:** The rules at 11 CFR 300.32(c)(4) are effective on [Insert date 30
2 days after the date of publication in the FEDERAL REGISTER].

3 **FOR FURTHER**
4 **INFORMATION**

5 **CONTACT:** Mr. Brad C. Deutsch, Assistant General Counsel, or Ms. Cheryl
6 A.F. Hemsley, Attorney, 999 E Street NW, Washington, DC
7 20463, (202) 694-1650 or (800) 424-9530.

8 **SUPPLEMENTARY**
9 **INFORMATION:**

10 The Commission issued a Notice of Proposed Rulemaking (“NPRM”) proposing
11 to eliminate from its regulations at 11 CFR 300.32(c)(4) an exemption that had allowed
12 State, district, and local committees of a political party¹ to pay for certain types of
13 Federal election activity (“FEA”)² aggregating \$5,000 or less in a calendar year entirely
14 with Levin funds³ (“\$5,000 Exemption”). The NPRM also requested comments on the
15 possibility of creating a new, restructured exemption. The NPRM was published in the
16 Federal Register on February 2, 2005. 70 FR 5385 (February 2, 2005). The comment
17 period closed on March 4, 2005. The Commission received five comments from ten
18

¹ In addition to political party committees, these regulations are equally applicable to State, district, and local party organizations that do not qualify as political committees. See 11 CFR 300.33(a)(1) and (2).
² There are four types of FEA: Type 1 - Voter registration activity during the period that begins on the date that is 120 days before a regularly scheduled Federal election is held and ends on the date of the election; Type 2 - Voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot; Type 3 - A public communication that promotes or supports, or attacks or opposes a clearly identified candidate for Federal office; and Type 4 - Services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of his or her compensated time during that month on activities in connection with a Federal election. See 2 U.S.C. 431(20) and 11 CFR 100.24.
³ Levin funds are funds that are raised by State, district, or local party committees and organizations 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 commenters on the proposed rules.⁴ Eight commenters favored elimination of the \$5,000
2 Exemption and one commenter favored maintaining the \$5,000 Exemption.
3 Additionally, the Commission received a comment from the Internal Revenue Service,
4 indicating “the proposed rules do not pose a conflict with the Internal Revenue Code or
5 the regulations thereunder.” The Commission is issuing final rules eliminating the
6 \$5,000 Exemption and is declining to adopt a restructured exemption.

7 Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional
8 Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules
9 to the Speaker of the House of Representatives and the President of the Senate and
10 publish them in the Federal Register at least 30 calendar days before they take effect.
11 The final rule that follows was transmitted to Congress on ____, 2005.

12 **Explanation and Justification**

13 11 CFR 300.32(c) – Conditions and Restrictions on Spending Levin Funds

14 The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107-155,
15 116 Stat. 81 (2002), amended the Federal Election Campaign Act of 1971 (the “Act”),
16 2 U.S.C. 431 et seq., in many respects. Section 441i(b)(1) of the Act, as added by
17 BCRA, provides that State, district, and local political party committees generally must
18 use Federal funds⁵ to pay for FEA. However, the Levin Amendment (2 U.S.C.
19 441i(b)(2)) provides an exception for two types of FEA, for which State, district, and
20 local political party committees may allocate disbursements between Federal funds and

21
22

⁴ All comments on the NPRM are available at http://www.fec.gov/law/law_rulemakings.shtml#levin.

⁵ “Federal funds” are funds that comply with the limits, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g).

1 Levin funds in accordance with allocation ratios determined by the Commission.
2 2 U.S.C. 441i(b)(2); see also 11 CFR 300.2(i), 300.32, and 300.33. Types 1 and 2 FEA,
3 which involve certain voter registration, get-out-the-vote, voter identification, and generic
4 campaign activity, are allocable between Federal and Levin funds, so long as the
5 activities do not refer to a clearly identified Federal candidate (“allocable Type 1&2
6 FEA”). See 2 U.S.C. 441i(b)(2)(B)(i) and 11 CFR 300.32(c).

7 In 2002, the Commission promulgated regulations at 11 CFR Part 300
8 implementing BCRA. See Final Rules and Explanation and Justification for Prohibited
9 and Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR 49064 (July 29,
10 2002). Specifically, 11 CFR 300.32(c)(4) required any State, district, or local committee
11 or organization of a political party that disburses more than \$5,000 for allocable Type
12 1&2 FEA in a calendar year either to pay for such allocable FEA entirely with Federal
13 funds or to allocate the disbursements between Federal funds and Levin funds. The same
14 provision also created a “de minimis exemption” for any State, district, or local party
15 committee or organization whose disbursements for allocable Type 1&2 FEA aggregate
16 \$5,000 or less in a calendar year, thereby permitting such party committees and
17 organizations to pay for these expenses entirely with Levin funds.

18 The \$5,000 Exemption was one of several regulations at issue in Shays v. FEC,
19 337 F.Supp.2d 28 (D.D.C. 2004) (“Shays District”), aff’d, 414 F.3d 76 (D.C. Cir. July 15,
20 2005) (“Shays Appeal”), reh’g en banc denied (October 21, 2005) (No. 04-5352). The
21 District Court in Shays District held that the \$5,000 Exemption in 11 CFR 300.32(c)(4)
22 was inconsistent with Congress’s intent, as expressed in BCRA, to require State, district,
23 and local party committees to pay for allocable Type 1&2 FEA either solely with Federal

1 funds or with an allocated mix of Federal funds and Levin funds. Shays District at 114-
2 17.

3 The Commission appealed the District Court’s ruling regarding several of its
4 regulations, including 11 CFR 300.32(c)(4). On July 15, 2005, the Court of Appeals for
5 the D.C. Circuit affirmed the District Court’s invalidation of the \$5,000 Exemption.
6 Shays Appeal at 115. In affirming the District Court’s invalidation of the \$5,000
7 Exemption, the Court of Appeals concluded that the Commission had failed to establish
8 that the \$5,000 Exemption was “in fact de minimis.” Shays Appeal at 114. The Court of
9 Appeals also concluded that because Congress had exercised its judgment in enacting the
10 Levin Amendment, “Congress’s rationale for including activities in the Levin
11 Amendment obviously affords no justification for excluding them from Levin allocation,
12 the very form of regulation Congress chose.” Id. (emphasis in original).

13 The NPRM proposed to eliminate entirely the \$5,000 Exemption in 11 CFR
14 300.32(c)(4). In response to the NPRM, eight commenters urged the Commission to
15 eliminate the \$5,000 Exemption altogether. These commenters stated that BCRA was
16 clear on its face and argued that the Levin Amendment itself reflected Congress’s
17 narrowly-drawn exception allowing State, district, and local party committees to use only
18 Federal funds or to allocate between Federal and Levin funds for allocable Type 1&2
19 FEA. Four of the commenters noted that the Levin Amendment was, itself, a
20 compromise reached during Congressional deliberation. These commenters asserted that
21 Congress had contemplated that Levin funds always would be used in combination with
22 Federal funds for allocable Type 1&2 FEA, recognizing that FEA activities influence
23 Federal elections.

1 On the other hand, one commenter favored retaining the \$5,000 Exemption,
2 stating that the exemption did not undermine Congressional intent. Specifically, this
3 commenter asserted that absent the \$5,000 Exemption, a strict application of the Levin
4 Amendment would lead to suppression of “local grassroots activity in favor of non-party
5 or large institutional party activity” and that this was “an unlikely objective” for
6 Congress.

7 1. Elimination of the Current \$5,000 Exemption

8 In light of the conclusions reached by the Court of Appeals in Shays Appeal,
9 which precluded retaining the current rule, the Commission has decided to eliminate the
10 \$5,000 Exemption from paragraph (c)(4) of section 300.32. Thus, revised paragraph
11 (c)(4) requires State, district, and local committees and organizations of political parties
12 to pay for all allocable Type 1&2 FEA either entirely with Federal funds or with an
13 allocated mix of Federal funds and Levin funds, without regard to the total amount of
14 their annual disbursements. The wording of revised 11 CFR 300.32(c)(4) also includes a
15 conforming revision that replaces the word “may” with “must” to reflect unambiguously
16 that State, district, and local party committees and organizations must choose between
17 paying for such expenditures either entirely with Federal funds or with an allocated mix
18 of Federal funds and Levin funds.

19 2. Rejection of a Restructured Exemption

20 As noted above, the NPRM also requested comments on a possible restructuring
21 of the exemption in section 300.32(c)(4) to mirror the reporting exception contained in
22 section 434(e)(2)(A) of the Act, which exempts State, district, and local party committees
23 from reporting FEA if they have combined receipts and disbursements for FEA (whether

1 allocable or not) that together aggregate to less than \$5,000 in a calendar year. Seven
2 commenters addressed the restructuring proposal, all of them asserting that any
3 restructured exemption would be contrary to Congressional intent.

4 As discussed above, the Court of Appeals held that the careful balance already
5 reflected in the Levin Amendment represents Congress’s exercise of its judgment, and
6 effectively precludes the Commission from promulgating a further exemption unless such
7 an exemption were “truly de minimis.” Shays Appeal at 114. In light of the comments
8 received in this rulemaking and the decision of the Court of Appeals, the Commission has
9 decided not to adopt the restructuring proposal contained in the NPRM.

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

11 **[Regulatory Flexibility Act]**

12

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

1 committees are generally considered affiliated with the State committees and need not be
2 considered separately. To the extent that any State party committees representing minor
3 political parties might be considered “small organizations,” the number affected by this
4 final rule is not substantial.

5

6 **List of Subjects**

7 11 CFR Part 300

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

10

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

4 **PART 300-NON-FEDERAL FUNDS**

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

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

7 2. Section 300.32 is amended by revising paragraph (c)(4) to read as follows:

8 **§ 300.32 Expenditures and disbursements.**

9 * * * * *

10 (c) Conditions and restrictions on spending Levin funds.

11 * * *

12 (4) The disbursements for allocable Federal election activity ~~that exceed in the~~
13 ~~aggregate \$5,000 in a calendar year may~~must be paid for either entirely
14 with Federal funds or ~~may be~~ by ~~allocat~~inged between Federal funds and
15 Levin funds according to 11 CFR 300.33. ~~Disbursements for Federal~~
16 ~~election activity that may be allocated and that aggregate \$5,000 or less in~~
17 ~~a calendar year may be paid for entirely with Federal funds, entirely with~~
18 ~~Levin funds, or may be allocated between Federal funds and Levin funds~~
19 ~~according to 11 CFR 300.33.~~

20 * * * * *

21 _____
22 Scott E. Thomas
23 Chairman
24 Federal Election Commission

25 DATED _____
26 BILLING CODE: 6715-01-P