



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

FEB 9 2006

TO: The Commission

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AGENDA ITEM
For Meeting of: 02-09-06

SUBMITTED LATE

SUBJECT: Draft Final Rules and Explanation and Justification on the Definition of Federal Election Activity (11 CFR 100.24).

Attached are the draft Final Rules and the Explanation and Justification for revisions to the definition of "Federal election activity" at 11 CFR 100.24 in order to comply with the decisions in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004); *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

The Office of General Counsel requests that this draft be placed on the agenda for the February 9, 2006 open meeting.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[Notice 2006 - >>]**

4 **Definition of Federal Election Activity**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Final Rules.

7 **SUMMARY:** The Federal Election Commission (“Commission”) is
8 revising its rules defining “Federal election activity”
9 (“FEA”) under the Federal Election Campaign Act of 1971,
10 as amended (“FECA”). These final rules modify the
11 definitions of “get-out-the-vote activity” and “voter
12 identification” consistent with the ruling of the U.S. District
13 Court for the District of Columbia in Shays v. FEC. The
14 final rules retain the definition of “voter registration
15 activity” that the Commission promulgated in 2002, and
16 provide a fuller explanation of what this term encompasses
17 in response to the district court’s decision. The
18 Commission is also revising the definition of “in
19 connection with an election in which a candidate for
20 Federal office appears on the ballot” for FEA purposes.
21 Further information is provided in the supplementary
22 information that follows.

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

4 **FOR FURTHER**
5 **INFORMATION**
6 **CONTACT:** Ms. Mai T. Dinh, Assistant General Counsel, Mr. J. Duane
7 Pugh Jr., Senior Attorney, or Ms. Margaret G. Perl,
8 Attorney, 999 E Street, N.W., Washington, D.C. 20463,
9 (202) 694-1650 or (800) 424-9530.

10 **SUPPLEMENTARY**
11 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”),
12 Public Law No. 107-155, 116 Stat. 81 (2002), amended FECA by adding a new term,
13 “Federal election activity,” to describe certain activities that State, district, and local party
14 committees must pay for with either Federal funds or a combination of Federal and Levin
15 funds.¹ 2 U.S.C. 431(20) and 441i(b)(1). The FEA requirements apply to all State,
16 district, and local party committees regardless of whether they are registered as political
17 committees with the Commission. The term also affects fundraising on behalf of tax-
18 exempt organizations. National, State, district, and local party committees are prohibited
19 from soliciting or directing non-Federal funds to tax-exempt entities organized under 26
20 U.S.C. 501(c) that engage in FEA or make other disbursements or expenditures in
21 connection with a Federal election. 2 U.S.C. 441i(d)(1). Also, Federal candidates and
22 officeholders may make only limited solicitations for funds on behalf of tax-exempt

¹ “Federal funds” are funds subject to the limitations, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g). “Levin funds” are funds raised by State, district, and 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 entities organized under 26 U.S.C. 501(c) whose principal purpose is to conduct certain
2 types of FEA. 2 U.S.C. 441i(e)(4).

3 BCRA identifies four types of FEA: voter registration activity (Type I); voter
4 identification, get-out-the-vote activity (“GOTV activity”), or generic campaign activity
5 (Type II); public communications that refer to clearly identified Federal candidates and
6 that promote, support, attack or oppose (“PASO”) a candidate for that office (Type III);
7 and services provided by an employee of a State, district, or local political party
8 committee who spends more than 25 percent of that individual’s compensated time on
9 activities in connection with a Federal election (Type IV). See 2 U.S.C. 431(20)(A)(i)-
10 (iv). Only the first two types of FEA are implicated in this rulemaking. The Commission
11 defined the different components of Types I and II FEA in 11 CFR 100.24. Final Rules
12 and Explanation and Justification on Prohibited and Excessive Contributions: Non-
13 Federal Funds or Soft Money, 67 FR 49064, 49066 (July 29, 2002) (“Soft Money E&J”).

14 In 2004, the Commission’s rules defining “voter registration activity,” “GOTV
15 activity,” and “voter identification” were reviewed by the U.S. District Court for the
16 District of Columbia in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), aff’d, 414 F.3d
17 76 (D.C. Cir. 2005) (“Shays”). The district court invalidated certain aspects of these
18 regulations because they did not satisfy the first step of the test set out in Chevron,
19 U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)
20 (“Chevron”).² Shays, 337 F. Supp. 2d at 98-100, 102-103. The district court held that
21 other aspects of these regulations satisfied the Chevron step one analysis, but the 2002

² The first step of the Chevron analysis, which courts use to review an agency’s regulations, asks whether Congress has directly spoken to the precise questions at issue. The second step considers whether the agency’s resolution of an issue not addressed in the statute is based on a permissible construction of the statute. See Shays, 337 F. Supp. 2d at 51-52 (citing Chevron, 467 U.S. at 842-43).

1 NPRM did not fully notice the approach taken in the final rule, as required by the
2 Administrative Procedure Act, 5 U.S.C. 553(b)(3) (“APA”). Shays, 337 F. Supp. 2d at
3 101, 105-107. The district court remanded the regulations to the Commission for further
4 action consistent with the court’s decision. Id. at 130. The Commission did not appeal
5 the district court’s ruling on these regulations.

6 In response to the district court’s decision, the Commission published a Notice of
7 Proposed Rulemaking on May 4, 2005. See Notice of Proposed Rulemaking on the
8 Definition of Federal Election Activity, 70 FR 23068 (May 4, 2005) (“2005 NPRM or
9 NPRM”). The NPRM proposed possible modifications to the definitions of “voter
10 registration activity,” “GOTV activity,” and “voter identification.” The NPRM also
11 proposed several changes to the definition of “in connection with an election in which a
12 candidate for Federal office appears on the ballot” in 11 CFR 100.24(a)(1). The public
13 comment period for the NPRM closed on June 3, 2005. The Commission received
14 written comments from 14 commenters. The Commission held a public hearing on
15 August 4, 2005, at which six witnesses testified. After the hearing, the Commission
16 reopened the comment period until September 29, 2005 to allow interested parties to
17 submit additional information or comments. See Notice to Reopen Comment Period on
18 the Definition of Federal Election Activity, 70 FR 51302 (Aug. 30, 2005). The
19 Commission received two additional comments during this period. All comments and a
20 transcript of the public hearing are available at
21 http://www.fec.gov/law/law_rulemakings.shtml under “Definition of Federal Election
22 Activity.” For purposes of this document, the terms “comment” and “commenter” apply
23 to both written comments and oral testimony at the public hearing.

1 These final rules remove the exception to the definitions of “get-out-the-vote
2 activity” and “voter identification” for associations or other similar groups of candidates
3 for State and local office. These final rules also remove the reference to “within 72 hours
4 of an election” from the definition of “get-out-the-vote activity” and amend the definition
5 of “voter identification” so as to include “acquiring information about potential voters,
6 including, but not limited to, obtaining voter lists.” The final rules retain the current
7 definition of “voter registration activity,” and provide a fuller explanation of what this
8 term encompasses. The Commission is also revising the definition of “in connection with
9 an election in which a candidate for Federal office appears on the ballot” to remove
10 restrictions on the rules for special elections to odd-numbered years.

11 Under the APA, 5 U.S.C. 553(d), and the Congressional Review of Agency
12 Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of
13 the House of Representatives and the President of the Senate and publish them in the
14 Federal Register at least 30 calendar days before they take effect. The final rules that
15 follow were transmitted to Congress on _____, 2006.

16 **EXPLANATION AND JUSTIFICATION**

17 **A. Definitions of “Voter Registration Activity” (11 CFR 100.24(a)(2)) and “GOTV**
18 **Activity” (11 CFR 100.24(a)(3))**

19 BCRA uses the terms “voter registration activity” and “get-out-the-vote activity”
20 within the definition of FEA. Congress did not, however, define these terms. See 2

1 U.S.C. 431(20)(A)(i)-(ii).³ In 2002, the Commission defined “voter registration activity”
2 to mean “contacting individuals by telephone, in person, or by other individualized means
3 to assist them in registering to vote. Voter registration activity includes, but is not limited
4 to, printing and distributing registration and voting information, providing individuals
5 with voter registration forms, and assisting individuals in the completion and filing of
6 such forms.” 11 CFR 100.24(a)(2). Similarly, Commission regulations define “GOTV
7 activity” to mean “contacting registered voters by telephone, in person, or by other
8 individualized means, to assist them in engaging in the act of voting.” 11 CFR
9 100.24(a)(3). This provision also includes a non-exhaustive list of examples of different
10 types of GOTV activity. See 11 CFR 100.24(a)(3)(i)-(ii).

11 The Shays plaintiffs argued that the requirement that voter registration and GOTV
12 activity “assist” in the registration of voters or the act of voting impermissibly narrowed
13 the statutory definition of “FEA” by excluding activities that only “encourage”
14 registration and voting. See Shays, 337 F. Supp. 2d at 98-99, 102-103. The district court
15 did not invalidate these definitions on Chevron grounds. Instead, the district court found
16 that the Commission’s interpretation of section 431(20)(A) is permissible under the
17 Chevron step one analysis because it does not conflict with expressed Congressional
18 intent. Shays, 337 F. Supp. 2d at 99-100, 102-103. Specifically, the district court noted
19 that “it is possible to read the term ‘voter registration activity’ to encompass those
20 activities that actually register persons to vote, as opposed to those that only encourage
21 persons to do so without more. Moreover, the Court [did not] find based on the record

³ The statute states that voter registration activity (Type I FEA) is FEA only when it is conducted 120 days or fewer before a regularly scheduled Federal election. See 2 U.S.C. 431(20)(A)(i). BCRA also specifies that GOTV activity (Type II FEA) is FEA only when it is conducted “in connection with an election in which a candidate for Federal office appears on the ballot,” see 2 U.S.C. 431(20)(A)(ii), which the Commission defined in 11 CFR 100.24(a)(1), as discussed below.

1 presented that the ‘common usage’ of the term ‘voter registration activity’ necessarily
2 includes the latter type of activities.” Shays, 337 F. Supp. 2d at 99 (internal citation
3 omitted); see also Shays, 337 F. Supp. 2d at 102-03 (GOTV activity). With respect to
4 Chevron step two, the district court concluded that the “exact parameters of the
5 Commission’s regulation[s] are subject to interpretation,” and absent further guidance,
6 the plaintiffs’ challenges were not ripe. Shays, 337 F. Supp. 2d at 100 (voter registration
7 activity); see also Shays, 337 F. Supp. 2d at 105 (GOTV activity). The district court
8 concluded that if the parameters were sufficiently broad, it would alleviate any concerns
9 that the regulations would “unduly compromise[] the Act.” Shays, 337 F. Supp. 2d at
10 100 and 105 (citing Orloski v. FEC, 795 F.2d 156, 164 (D.C. Cir. 1986)).

11 The district court remanded these regulations to the Commission because the
12 court found that the NPRM for 11 CFR 100.24 did not provide sufficient notice that the
13 Commission might limit the definitions of “voter registration” and “GOTV activity” to
14 activities that “assist” individuals to register to vote or to vote. Shays, 337 F. Supp. 2d at
15 101, 105-107; see also Notice of Proposed Rulemaking on Prohibited and Excessive
16 Contributions; Non-Federal Funds or Soft Money, 67 FR 35654 (May 20, 2002) (“2002
17 NPRM”). The district court concluded that the final rules could not have been reasonably
18 anticipated based on the 2002 NPRM proposals and therefore interested parties did not
19 have an adequate opportunity to comment. Shays, 337 F. Supp. 2d at 101, 105-107.

20 The Commission’s 2005 NPRM proposed retaining the “assist” requirement in
21 these definitions. The purpose of retaining the “assist” requirement is to exclude “mere
22 encouragement” from the scope of the rules. In proposing to retain the “assist”
23 requirement, the Commission was concerned that regulations that included activities that

1 merely encouraged people to register and vote may sweep too broadly. The proposed
2 rule addressed the financing of the voter registration and GOTV activities that Congress
3 sought to regulate. At the same time, the Commission reviewed the statutory language
4 and the legislative history of the FEA provision and found no evidence that Congress
5 intended to capture every State or local party event where an individual ends a speech
6 with the exhortation, “Don’t forget to vote!” Both Congress and the Commission are
7 aware that such speech is ubiquitous and often spontaneous in an election year.

8 The 2005 NPRM sought public comment on how to address the district court’s
9 concerns that the scope of the 2002 rules might be too narrow. In addition, the
10 Commission asked whether there were any particular activities that should be specifically
11 included in, or excluded from, these provisions.

12 Several commenters supported the Commission’s proposal to retain the current
13 definitions of “voter registration activity” and “GOTV activity.” These commenters
14 argued that the “assist” requirement effectuates BCRA and gives State, district, and local
15 party committees a rule that is understandable. Some commenters asserted that including
16 “encouragement” to register and/or to vote would broaden the reach of these provisions
17 to cover nearly every activity of State, district, and local party committees. These
18 commenters stated that local party committees would find it particularly difficult to
19 comply with more expansive rules. According to these commenters, most local parties
20 are small volunteer-centered organizations that operate largely autonomously from the
21 State and national committees. Many local party committees do not have the resources to
22 comply with the complexities of Federal law, and their response to BCRA has been to
23 avoid voter registration and GOTV activities that might trigger Federal reporting and

1 financing requirements. These commenters urged the Commission not to expand the
2 FEA definitions because any further expansion of these definitions could preclude local
3 parties at the grassroots level from answering simple voter inquiries about where to
4 register or to refer voters to those who could legally assist them in registering.

5 Other commenters urged the Commission to amend the definitions of “voter
6 registration activity” and “GOTV activity” to include “encouragement” to register and/or
7 to vote, arguing that this approach would better reflect Congressional intent, and that the
8 “assist” requirement improperly narrows the reach of these provisions. These
9 commenters urged the Commission to adopt a standard such that a “mere exhortation to
10 register to vote,” without any additional activity to assist the individual in doing so,
11 would be covered by the FEA definitions and funding requirements. These commenters
12 argued that any concerns about the FEA definition sweeping too broadly are alleviated by
13 the fact that the rule applies only to State, district, or local party committees⁴ and that the
14 funding requirements on voter registration activity are limited to the period of 120 days
15 before a Federal election.

16 The Commission has decided to retain the current definitions of “voter
17 registration activity” and “GOTV activity,” which exclude mere encouragement of
18 registration and/or voting from these definitions. See 11 CFR 100.24(a)(2) and (a)(3).
19 The district court emphasized that “it is possible to read the term ‘voter registration
20 activity’ to encompass those activities that actually register persons to vote, as opposed to
21 those that only encourage persons to do so without more. Moreover, the Court [did not]
22 find based on the record presented that the ‘common usage’ of the term ‘voter registration

⁴ However, as noted above, the FEA definition also affects the ability of national, State, district or local party committees and Federal candidates and officeholders to raise funds for tax-exempt entities organized under 26 U.S.C. 501(c).

1 activity' necessarily includes the latter type of activities." Shays, 337 F. Supp. 2d at 99
2 (internal citation omitted); see also Shays, 337 F. Supp. 2d at 102-03 (GOTV activity).

3 The Commission's regulations are consistent with BCRA, which seeks to regulate
4 the funds used to influence Federal elections. The final rules regulate actual voter
5 registration activity without capturing incidental speech or the exchange of publicly
6 available information, such as the address on the FEC's website for the National Voter
7 Registration Form or the 1-800 number of a State's Division of Elections. Should a
8 State, district, or local party expend funds actually to register individuals to vote, such
9 uses of funds are clearly covered by the Commission's regulations.

10 Moreover, in the Commission's extensive enforcement experience, general
11 exhortations to register to vote and to vote are so common in political party
12 communications that including encouragement to register to vote and to vote would be
13 overly broad, is not necessary to effectively implement BCRA, and could have an
14 adverse impact on grassroots political activities. As the Supreme Court has repeatedly
15 stressed, where First Amendment rights are affected, "[p]recision of regulation must be
16 the touchstone." Edenfield v. Fane, 507 U.S. 761, 777 (1993). The Commission notes
17 that these definitions will not lead to circumvention of FECA because the regulations
18 prohibit the use of non-Federal funds for disbursements that State, district, and local
19 parties make for those activities that actually register individuals to vote. Additionally,
20 many programs for widespread encouragement of voter registration to influence Federal
21 elections would be captured as public communications under Type III FEA.

22 Commenters who supported including "encouragement" in the definitions noted
23 that these definitions do not exactly match the definition of "voter registration and get-

1 out-the-vote activities” in 11 CFR 100.133. Section 100.133 exempts from the definition
2 of “expenditure” the costs of non-partisan activity “designed to encourage individuals to
3 register to vote or to vote.” However, the district court agreed with the Commission that
4 these regulations are not in conflict. Shays, 337 F. Supp. 2d at 100. Indeed, these
5 regulations are consistent because both provisions promote the public policy goal of
6 encouraging civic participation through voter registration and voting. For reasons similar
7 to the policy rationale that underlies the exception to the funding restrictions on
8 expenditures in section 100.133, the Commission declines to impose FEA funding
9 restrictions on State, district, and local party committees’ mere “encouragement” of
10 registering to vote or voting.

11 Therefore, the Commission is reaffirming its interpretation of the statutory FEA
12 provision in its definitions at 11 CFR 100.24(a)(2) and (a)(3).

13 1. Examples of “Voter Registration Activity”

14 As stated above, the district court concluded that the scope of the “assist”
15 requirement was unclear. Shays, 337 F. Supp. 2d at 100. Commenters disagreed about
16 whether particular State, district, or local party committee activities would meet the
17 current definition of “voter registration activity.” The Commission has decided to
18 include some additional examples in this Explanation and Justification to provide more
19 guidance on which activities are, and are not, covered by this rule. These examples are
20 illustrations only.⁵

21 The following are examples of activity that are Type I FEA voter registration
22 activity:

⁵ All of these examples exclude public communications that PASO any Federal candidate and, therefore, would not raise the possibility of otherwise qualifying as Type III FEA. See 11 CFR 100.24(b)(3).

1 1. At a county fair, a local political party committee sponsors a booth. The
2 booth has banners reading, “Don’t forget to register to vote!” Party staff at
3 the booth provides voter registration forms and answers questions about
4 completing and submitting the forms. They also accept completed forms and
5 mail them to the appropriate governmental agency.

6 2. A State party committee conducts a phone bank contacting possible voters.
7 The party staff making the calls encourages the individuals to register to vote,
8 provides information about how to register to vote, and offers to mail
9 registration forms with a prepaid postage envelope to the individuals.

10 Both of these examples illustrate activity where a State, district, or local party
11 committee is providing potential voters with personal assistance in registering to vote.
12 Both examples include general statements encouraging voter registration (on the banner
13 and by the caller). However, general statements of encouragement alone are not enough
14 to trigger the FEA definition. In example 1, providing registration forms and personal
15 assistance in completing and submitting those forms are actions that actually assist
16 individuals in registering to vote. In example 2, the State party committee is
17 affirmatively contacting individual potential voters to provide them with registration
18 information and offering to provide registration forms. Therefore, these examples would
19 satisfy the definition of “voter registration activity” and are FEA if conducted within 120
20 days of a Federal election.

21 The following is an example of activity that is not Type I FEA voter registration
22 activity:

1 3. A guest speaker at a local party committee rally for a mayoral candidate extols
2 the virtues of the candidate and concludes his remarks by stating: “Don’t
3 forget to register and vote!”

4 In contrast to examples 1 and 2 above, example 3 involves a State or local party
5 committee speaker merely encouraging registration and voting without any additional
6 concrete action that would be considered personal assistance to potential voters.
7 Congress did not express an intent in BCRA to require that Federal funds be used for an
8 entire State or local party committee rally on behalf of non-Federal candidates on the
9 basis of speeches that merely encourage the audience to register to vote. Additionally,
10 this type of party event would not lead to actual or apparent corruption of Federal
11 candidates or officeholders. Under BCRA, Congress continued to allow these
12 organizations to use non-Federal funds for this type of State, district, or local activity
13 generally and there is no legislative history or administrative record that general
14 encouragement to vote is similar to the other corrupting activity Congress was concerned
15 with when it required certain activity to be funded with Federal dollars.

16 Congress, as a policy matter, has historically recognized the importance of
17 encouraging voters to register to vote and to vote in a variety of laws. See, e.g., FECA, 2
18 U.S.C. 431(9)(B)(ii) (exception to the definition of “expenditure” for non-partisan voter
19 registration efforts and GOTV activity); Voting Rights Act of 1965, 42 U.S.C.
20 1973b(a)(1)(F)(iii) (a jurisdiction which wants to terminate “Section 5” coverage must
21 show that it has “engaged in...constructive efforts, such as expanded opportunity for
22 convenient registration”); National Voter Registration Act of 1993, 42 U.S.C.
23 1973gg(b)(1) (purpose of the Act is to “establish procedures that will increase the number

1 of eligible citizens who register to vote in elections for Federal office”); Help America
2 Vote Act of 2002, 42 U.S.C. 15483 (standards for computerized statewide voter
3 registration lists and registering to vote by mail). The Commission believes that BCRA
4 should be interpreted to be faithful to these purposes.

5 2. Examples of “GOTV Activity”

6 The Commission’s 2002 definition of “GOTV activity” included examples of
7 activity that meet the “assist” requirement for GOTV activity in 11 CFR 100.24(a)(3)(i)
8 and (ii). The first example is “[p]roviding to individual voters, within 72 hours of an
9 election, information such as the date of the election, the times when polling places are
10 open, and the location of particular polling places.” 11 CFR 100.24(a)(3)(i) (emphasis
11 added). The district court rejected the plaintiffs’ challenge to the 72-hour provision in the
12 first example at 11 CFR 100.24(a)(3)(i), noting that the general definition of “GOTV
13 activity” in section 100.24(a)(3) makes clear that the list of examples is non-exhaustive.
14 Shays, 337 F. Supp. 2d at 103. Similar to its Chevron step two analysis of the “assist”
15 requirement discussed above, the district court held that the 72-hour provision was not
16 ripe for review because it was unclear what activity the Commission would consider to be
17 GOTV activity if conducted outside of this 72-hour window. Shays, 337 F. Supp. 2d at
18 105.

19 The NPRM sought public comment as to whether to revise the list of examples of
20 GOTV activity in 11 CFR 100.24(a)(3)(i)-(ii) to address the district court’s ruling on the
21 72-hour example. Most of the commenters urged the Commission to remove the 72-hour
22 example, although for different reasons. Some commenters argued that GOTV activity
23 occurs weeks and months before an election, and this example could suggest that no

1 GOTV activity is covered until 72-hours before the election. Other commenters claimed
2 that this example created confusion for State, district, and local party committees as to the
3 timing, method, and content of communications that might be considered GOTV activity.
4 Many commenters noted that it was unclear how the Commission would apply the 72-
5 hour provision with regard to absentee balloting and early voting, which is now available
6 in most states. One commenter argued that the Commission should include an
7 exhaustive, yet narrow, list of covered activities in the definition of "GOTV activity,"
8 while another commenter urged the Commission to eliminate all of the regulatory
9 examples.

10 Activity conducted earlier than 72 hours before the election that meets the general
11 definition of "GOTV activity" in 11 CFR 100.24(a)(3) is Type II FEA. As the
12 Commission explained in the Soft Money E&J, the non-exhaustive list of examples in
13 section 100.24(a)(3)(i)-(ii) is merely illustrative of the types of activity that would satisfy
14 the definition of "GOTV activity." See Soft Money E&J, 67 FR at 49067. For example,
15 a State party committee could hire a consultant a month prior to the election to design a
16 GOTV program for the State party committee and recruit volunteers to drive voters to the
17 polls on election day. The consultant's work performed well before the 72-hour time
18 period would be considered Type II FEA and must be paid for by the State party
19 committee only with Federal funds or an allocated mix of Federal and Levin funds. Also,
20 the definition of "GOTV activity" would apply equally to actions taken with regard to
21 absentee balloting or early voting.

22 The 72-hour provision in the first example was included in the rule as an effort to
23 provide an example of what activity would clearly be covered by the definition of

1 “GOTV activity,” and was not intended to exclude activity in any other timeframe. The
2 Commission based the example on its understanding that the execution of most GOTV
3 activity tends to occur within 72 hours of an election. However, based on the comments
4 received by the Commission, it appears that the 72-hour provision in the first example
5 has given rise to uncertainty and potential confusion over whether GOTV activity
6 conducted earlier in the election cycle would not be covered by the rule. No such time
7 limitation exists, and the removal of the 72-hour reference will clarify that this has
8 always been the case. Therefore, the Commission is removing the phrase “within 72
9 hours of an election” from the example in 11 CFR 100.24(a)(3)(i). The remainder of the
10 example in section 100.24(a)(3)(i) gives proper guidance as to the type of activity
11 covered by the rule, regardless of when it occurs inside the Type II FEA window.

12 **B. Definition of “Voter Identification” (11 CFR 100.24(a)(4))**

13 In 2002, the Commission’s regulations defined “voter identification” to mean
14 “creating or enhancing voter lists by verifying or adding information about the voters’
15 likelihood of voting in an upcoming election or their likelihood of voting for specific
16 candidates.” See 11 CFR 100.24(a)(4) (2002) (emphasis added). This definition did not
17 include the initial acquisition of a voter list because the Commission concluded that
18 political party committees might acquire voter lists for a number of reasons other than for
19 voter identification in connection with an election in which a Federal candidate appears
20 on the ballot. Such reasons include fundraising and off-year party building activities.
21 See Soft Money E&J, 67 FR at 49069. The district court in Shays held that the
22 Commission’s decision not to include acquisition of voter lists in the definition of “voter
23 identification” failed Chevron step one. Shays, 337 F. Supp. 2d at 108.

1 To comport with this ruling, the NPRM proposed revising section 100.24(a)(4) to
2 include the acquisition of voter lists in the definition of “voter identification.” Most of
3 the commenters agreed that the Commission is required to include the acquisition of
4 voter lists.

5 The NPRM also sought comment on whether the Commission should use the date
6 a voter list is purchased or the date a voter list is used to determine whether the
7 acquisition of a voter list occurs “in connection with an election in which a candidate for
8 Federal office appears on the ballot,” as defined in 11 CFR 100.24(a)(1). A few
9 commenters urged the Commission to adopt a “use” test to foreclose the possibility of
10 State, district, and local party committees purchasing a list outside the FEA period and
11 then using it inside the FEA period. Most commenters, however, supported the
12 “purchase” test, noting the burdensome tracking that would be required of State, district,
13 and local party committees under a “use” test. In addition, these commenters noted that a
14 “purchase” test would not unfairly burden State, district, and local party committees that
15 acquire lists in odd-numbered years for voter identification uses outside of the FEA
16 windows. Some commenters also noted that a “use” test would effectively eliminate the
17 FEA window for voter identification because any subsequent “use” of a voter list would
18 reach back and retroactively convert a non-FEA acquisition into FEA.

19 The Commission has decided to amend the definition of “voter identification” to
20 include “acquiring information about potential voters, including, but not limited to,
21 obtaining voter lists.” See revised 11 CFR 100.24(a)(4). Under the new rule, the
22 acquisition of a voter list is considered FEA if it occurs after the earliest filing deadline
23 for the ballot in an even-numbered year and for those States that do not conduct

1 primaries, on January 1 of an even-numbered year, and after the date is set for a special
2 election in which a candidate for Federal office appears on the ballot. See 11 CFR
3 100.24(a)(1) and 100.24(b)(2). Under these revised rules, State, district, and local party
4 committees should use the date the information was purchased, rather than the date the
5 information was used, to determine whether the acquisition of a voter list falls within the
6 FEA timeframes. The revised rule states that “[t]he date a voter list is acquired shall
7 govern whether a State, district, or local party committee has obtained a voter list.” See
8 revised 11 CFR 100.24(a)(4). Any acquisition of voter lists during the FEA period would
9 come within this revised definition, and must be paid for with Federal funds or an
10 allocated mix of Federal and Levin funds. The purchase of any voter list before the FEA
11 period begins may be made with an allocated mixture of Federal and non-Federal funds
12 under 11 CFR 106.7(c). Any subsequent use of the voter list during the FEA period will
13 not be considered a separate FEA cost unless the political party is also “enhancing” the
14 voter list by verifying or adding information, as discussed below. See 11 CFR
15 100.24(a)(4).

16 This approach has a number of benefits. It provides a sensible, bright line rule.
17 In addition, this interpretation is consistent with the Commission’s reporting
18 requirements, as political party committees are required to report disbursements for a
19 voter list at the time of purchase. See 11 CFR 300.36. Finally, the Commission’s rule
20 allows for off-year party fundraising and party building activities not connected to
21 Federal elections by using voter lists acquired outside of the FEA window without
22 automatic imposition of the FEA rules.

1 The NPRM also sought public comment on a proposed exception to the definition
2 of “voter identification” when a State party committee uses the voter list in connection
3 with an election where no Federal candidates appear on the ballot. See NPRM, 70 FR at
4 23070. Most of the commenters who discussed this proposed exception opposed it as
5 exceeding the Commission’s statutory authority under BCRA. The Commission has
6 decided not to adopt any new exceptions to the voter identification provision at this time.
7 Additionally, this proposed exception would be challenging for State, district, and local
8 party committees to apply and for the Commission to enforce because it is difficult to
9 determine when a voter list is, or is not, “used” by a State party committee. Finally, any
10 acquisitions of voter lists to be used in odd-numbered year, non-Federal elections would
11 most likely occur outside the FEA timeframes, and would therefore not be considered
12 FEA.

13 C. Exceptions for Non-Federal Candidate Associations in GOTV Activity (11 CFR
14 100.24(a)(3)) and Voter Identification (11 CFR 100.24(a)(4))

15 The 2002 regulatory definitions of “GOTV activity” and “voter identification”
16 included exceptions for associations or similar groups of candidates for State or local
17 office or of individuals holding State or local office (collectively “non-Federal candidate
18 associations”). See 11 CFR 100.24(a)(3) and (4). The Commission intended that these
19 exceptions would keep State and local candidates’ grassroots and local political activity a
20 question of State, not Federal law. See Soft Money E&J, 67 FR at 49067. The
21 Commission decided not to interpret BCRA in a way that would “undertake . . . a vast
22 federalization of State and local activity without greater direction from Congress.” See
23 id., 67 FR at 49067.

1 The district court found that these exceptions “run[] contrary to Congress’s
2 clearly expressed intent” as enacted in BCRA and fail step one of Chevron. See Shays,
3 337 F. Supp. 2d at 104 and 107 n.83. The district court also observed that the Supreme
4 Court rejected the federalism concerns underlying these exceptions in McConnell v. FEC,
5 540 U.S. 93 (2003). See Shays, 337 F. Supp. 2d at 104 (citing McConnell, 540 U.S. at
6 186).

7 To comply with the district court’s opinion, the NPRM proposed removing from
8 both definitions the exceptions for non-Federal candidate associations. See NPRM, 70
9 FR at 23072. The NPRM also sought comment on the impact of removing the
10 exceptions, and whether other alternatives could address the Commission’s concerns
11 while still satisfying Congressional intent as determined by the Shays court. See id., 70
12 FR at 23069 and 23070.

13 Several commenters agreed that BCRA or the district court’s decision in Shays
14 requires the removal of these exceptions from the definitions of “GOTV activity” and
15 “voter identification.” One commenter urged the Commission to leave the definition of
16 “FEA” undisturbed “to the maximum extent permitted by the court’s judgment in Shays.”
17 All of the commenters who addressed the issue believed that non-Federal candidate
18 associations would be required to use Federal funds for FEA in the absence of these
19 exceptions. No commenter provided any specific alternatives that would address the
20 Commission’s concerns that gave rise to these exceptions and satisfy Congressional
21 intent as determined by the Shays court.

22 In light of these comments and the district court’s reasoning, the Commission has
23 decided to remove the exception for non-Federal candidate associations from the

1 definitions of “GOTV activity” and “voter identification.” See revised 11 CFR
2 100.24(a)(3) and (4). These revisions require that non-Federal candidate associations use
3 only Federal funds to pay for FEA. See 2 U.S.C. 441i(b)(1) and 11 CFR 300.32(a)(1).

4 D. Type II FEA Time Periods (11 CFR 100.24(a)(1))

5 BCRA provides that voter identification, GOTV activity, and generic campaign
6 activity constitute FEA only when “conducted in connection with an election in which a
7 candidate for Federal office appears on the ballot (regardless of whether a candidate for
8 State or local office also appears on the ballot).” 2 U.S.C. 431(20)(A)(ii). In 2002, the
9 Commission defined this period as beginning on the date of the earliest filing deadline for
10 a primary election ballot for Federal candidates in each particular State and ending on the
11 date of the general election, up to and including any runoff election date. See 11 CFR
12 100.24(a)(1)(i) (2002). For States that do not hold primary elections, the period begins
13 January 1 of each even-numbered year. Id. For special elections in which Federal
14 candidates are on the ballot, the period begins when the date of the special election is set
15 and ends on the date of the special election. See 11 CFR 100.24(a)(1)(ii). By its terms,
16 the 2002 rule for special elections applied in odd-numbered years only. Id.⁶

17 1. FEA Time Period for Special Elections During Odd-Numbered Years

18 In the NPRM, the Commission proposed eliminating the odd-numbered year
19 limitation on the Type II FEA time period for special elections. NPRM, 70 FR at 23071
20 and 23072. All of the commenters who addressed this topic supported the proposed
21 change. The Commission has decided to remove the limitation from former 11 CFR
22 100.24(a)(1)(ii) that made it applicable only to those special elections that take place in
23 odd-numbered years. For any special elections that are scheduled in even-numbered

⁶ None of these rules was challenged in Shays.

1 years, the same Type II FEA time period should apply. Therefore, the phrase “In an odd-
2 numbered year,” no longer appears in revised 11 CFR 100.24(a)(1)(ii).

3 2. Other Proposed Changes to Type II FEA Time Period.

4 The NPRM also sought comment on three limited exceptions to the Type II FEA
5 time period in 11 CFR 100.24(a)(1). NPRM, 70 FR at 23071 and 23072. The first
6 exception concerned special elections for Federal office that are scheduled to be held on
7 the same date as a previously scheduled State or local election. NPRM, 70 FR at 23071.
8 The second exception would have applied to municipal elections that take place during
9 the Type II FEA time period, but on dates other than Federal election dates. NPRM, 70
10 FR at 23071 and 23072. The third exception took a narrower approach for municipal
11 elections, excepting only activities within 72 hours before the municipal election.
12 NPRM, 70 FR at 23071.

13 Some commenters opposed any further restrictions on when activity will be
14 considered FEA as contrary to Congress’s intent in BCRA. Other commenters supported
15 the proposed exceptions and the Commission’s attempt to limit the scope of the FEA
16 requirements. Some commenters gave examples of municipal elections that were
17 scheduled within Type II FEA time periods and argued that an exception for these
18 municipal elections was appropriate and necessary. One commenter who generally
19 supported the exceptions sought clarification as to how the municipal election exception
20 would apply to State and local political party committees in States where some of the
21 municipal elections met the requirements of the exception. This commenter noted that
22 the proposal did not address whether all of a State political party committee’s activities
23 would enjoy the exception if one municipality in the State had an election that met the

1 requirements of the exception, and if not, how the State political party committee should
2 divide its Type II FEA into excepted and not excepted FEA.

3 The Commission recognizes that the definition of “FEA” could reach activity
4 targeted at a State or local election only and remains concerned about federalizing purely
5 State and local political activity. The Commission, however, has decided not to adopt
6 any of the proposed exceptions because of their practical effects. The proposed
7 exceptions would introduce significant complexity into the regulations on FEA and may
8 cause confusion among the State, district, and local party committees about how those
9 exceptions would operate. Additionally, the district court’s decision in Shays does not
10 require the Commission to create any of the proposed exceptions.

11 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

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

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

4 **List of Subjects**

5 11 CFR Part 100

6 Elections

For the reasons set out in the preamble, Subchapter A of Chapter 1 of Title 11 of the Code of Federal Regulations is amended as follows:

1 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

2 1. The authority citation for 11 CFR part 100 continues to read as follows:

3 **Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

4 2. In section 100.24, paragraph (a) is revised to read as follows:

5 **§ 100.24 Federal Election Activity (2 U.S.C. 431(20)).**

6 (a) As used in this section, and in part 300 of this chapter,

7 (1) In connection with an election in which a candidate for Federal office
8 appears on the ballot means:

9 (i) The period of time beginning on the date of the earliest filing
10 deadline for access to the primary election ballot for Federal
11 candidates as determined by State law, or in those States that do
12 not conduct primaries, on January 1 of each even-numbered year
13 and ending on the date of the general election, up to and including
14 the date of any general runoff.

15 (ii) ~~In an odd-numbered year, the~~ The period beginning on the date on
16 which the date of a special election in which a candidate for
17 Federal office appears on the ballot is set and ending on the date of
18 the special election.

19 (2) Voter registration activity means contacting individuals by telephone, in
20 person, or by other individualized means to assist them in registering to
21 vote. Voter registration activity includes, but is not limited to, printing

1 and distributing registration and voting information, providing individuals
2 with voter registration forms, and assisting individuals in the completion
3 and filing of such forms.

4 (3) Get-out-the-vote activity means contacting registered voters by telephone,
5 in person, or by other individualized means, to assist them in engaging in
6 the act of voting. ~~Get-out-the-vote activity shall not include any~~
7 ~~communication by an association or similar group of candidates for State~~
8 ~~or local office or of individuals holding State or local office if such~~
9 ~~communication refers only to one or more State or local candidates.~~ Get-
10 out-the-vote activity includes, but is not limited to:

- 11 (i) Providing to individual voters, ~~within 72 hours of an election,~~
12 information such as the date of the election, the times when polling
13 places are open, and the location of particular polling places; and
14 (ii) Offering to transport or actually transporting voters to the polls.

15 (4) Voter identification means acquiring information about potential voters,
16 including, but not limited to, obtaining voter lists and creating or
17 enhancing voter lists by verifying or adding information about the voters'
18 likelihood of voting in an upcoming election or their likelihood of voting
19 for specific candidates. The date a voter list is acquired shall govern
20 whether a State, district, or local party committee has obtained a voter list
21 within the meaning of this section. ~~This paragraph shall not apply to an~~
22 ~~association or similar group of candidates for State or local office or of~~
23 ~~individuals~~

1 ~~holding State or local office if the association or group engages in voter~~
2 ~~identification that refers only to one or more State or local candidates.~~

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Michael E. Toner
Chairman
Federal Election Commission

8 DATED _____
9 BILLING CODE: 6715-01-U