



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2006 MAR 10 P 12:36

March 10, 2006

MEMORANDUM

AGENDA ITEM
For Meeting of: 3-16-06
SUBMITTED LATE

TO: The Commission

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

FROM: Lawrence H. Norton *LH*
General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Mai T. Dinh *MTD (RC)*
Assistant General Counsel

J. Duane Pugh Jr. *JDP*
Senior Attorney

SUBJECT: Draft Explanation and Justification for Interim Final Rule on Definition of "Federal Election Activity" (11 CFR 100.24(a)(1)(iii)).

Attached is a draft Explanation and Justification for an Interim Final Rule on the Definition of "Federal Election Activity" (11 CFR 100.24(a)(1)(iii)). The Commission approved a new rule on February 9, 2006, regarding voter identification and get-out-the-vote activities limited to non-Federal elections. As directed by the Commission at that time, this Office has prepared the attached draft Explanation and Justification to accompany the promulgation of the new rule as an interim final rule.

The Office of the General Counsel requests that this draft be placed on the agenda for the March 16, 2006 open meeting. If the Commission approves this draft, we will send the document to the *Federal Register* for publication and to Congress.

Attachment

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FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2006 - __]

Definition of Federal Election Activity

AGENCY: Federal Election Commission.

ACTION: Interim Final Rule.

SUMMARY: The Federal Election Commission (“Commission”) is revising the regulation defining the phrase “in connection with an election in which a candidate for Federal office appears on the ballot.” The Bipartisan Campaign Reform Act of 2002 (“BCRA”) amended the Federal Election Campaign Act of 1971 (“FECA”), to provide that when voter identification, get-out-the-vote activity, and generic campaign activities are in connection with an election in which a candidate for Federal office appears on the ballot, they are “Federal election activity” (“FEA”), subject to certain funding limits and prohibitions. In its new interim final rule, the Commission specifies when voter identification and get-out-the-vote activity are conducted exclusively in connection with non-Federal elections and are therefore not FEA. The Commission is soliciting comments on all aspects of the interim final rule and may amend the interim rule as appropriate in response to

1 comments received. Further information is provided in the
2 supplementary information that follows.

3 **DATES:** The interim final rule is effective on March 24,
4 2006. Comments must be received on or before
5 [INSERT DATE 30 DAYS AFTER DATE OF
6 PUBLICATION IN THE FEDERAL REGISTER].

7 **ADDRESSES:** All comments must be in writing, must be
8 addressed to Ms. Mai T. Dinh, Assistant General
9 Counsel, and must be submitted in either email,
10 facsimile, or paper copy form. Commenters are
11 strongly encouraged to submit comments by email
12 or fax to ensure timely receipt and consideration.
13 Email comments must be sent to either
14 **municipal.election@fec.gov** or submitted through
15 the Federal eRegulations Portal at
16 <www.regulations.gov>. If email comments
17 include an attachment, the attachment must be in
18 Adobe Acrobat (.pdf) or Microsoft Word (.doc)
19 format. Faxed comments must be sent to (202) 219-
20 3923, with paper copy follow-up. Paper copy
21 comments and paper copy follow-up of faxed
22 comments must be sent to the Federal Election
23 Commission, 999 E Street, N.W., Washington, D.C.

1 20463. All comments must include the full name
2 and postal service address of the commenter or they
3 will not be considered. The Commission will post
4 comments on its website after the comment period
5 ends.

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

Ms. Mai T. Dinh, Assistant General Counsel, or Mr. J.
9 Duane Pugh Jr., Senior Attorney, 999 E Street, N.W.,
10 Washington, D.C. 20463, (202) 694-1650 or (800) 424-
11 9530.

12 **SUPPLEMENTARY**
13 **INFORMATION:**

The Bipartisan Campaign Reform Act of 2002 (“BCRA”),
14 Public Law No. 107-155, 116 Stat. 81 (2002), amended FECA by adding a new term,
15 “Federal election activity,” to describe certain activities that State, district, and local party
16 committees must pay for with either Federal funds or a combination of Federal and Levin
17 funds.¹ 2 U.S.C. 431(20) and 441i(b)(1). The FEA requirements apply to all State,
18 district, and local party committees and organizations, regardless of whether they are

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 registered as political committees with the Commission. The term also affects
2 fundraising on behalf of tax-exempt organizations.²

3 BCRA specifies that voter identification, get-out-the-vote activity (“GOTV
4 activity”), and generic campaign activity (collectively “Type II FEA”) constitute FEA
5 only when these activities are conducted “in connection with an election in which a
6 candidate for Federal office appears on the ballot.” 2 U.S.C. 431(20)(A)(ii). In 2002, the
7 Commission defined “in connection with an election in which a candidate for Federal
8 office appears on the ballot” as beginning on the filing deadline for access to the primary
9 election ballot and ending on the date of the general election, or, in those States that do
10 not conduct primaries, as beginning on January 1 of each even-numbered year. See 11
11 CFR 100.24(a)(1). The Commission is now issuing an interim final rule refining the
12 definition of “in connection with an election in which a candidate for Federal office
13 appears on the ballot” to clarify when activities and communications are in connection
14 with a non-Federal election, and are not in connection with a Federal election, and
15 therefore are not Type II FEA.

16 Under the Administrative Procedure Act (“APA”), 5 U.S.C. 553(b), agencies
17 must provide public notice and an opportunity for comment (“notice and comment”)
18 before they may promulgate final rules. However, the “good cause” exemption allows an
19 agency to waive this requirement if the agency determines that notice and comment is
20 “impracticable, unnecessary or contrary to the public interest.” See 5 U.S.C. 553(b)(B).

² National, State, district, and local party committees are prohibited from soliciting or directing non-Federal funds to tax-exempt entities organized under 26 U.S.C. 501(c) that engage in FEA or make other disbursements or expenditures in connection with a Federal election. 2 U.S.C. 441i(d)(1). Also, Federal candidates and officeholders may make only limited solicitations for funds on behalf of tax-exempt entities organized under 26 U.S.C. 501(c) whose principal purpose is to conduct certain types of FEA. 2 U.S.C. 441i(e)(4).

1 For the reasons stated below, the Commission determines that providing notice and
2 comment for the interim final rule would be impracticable and contrary to the public
3 interest.

4 The Type II FEA time period currently applies throughout much of the country,
5 while scores of municipalities have scheduled non-Federal elections as early as March
6 2006. Thus, political campaign activity related to the upcoming non-Federal elections
7 will fall within the Type II FEA time period as defined in 11 CFR 100.24(a)(1)(i). The
8 interim final rule at new section 100.24(a)(1)(iii) ensures that the FEA requirements do
9 not extend to activities that are solely in connection with these upcoming non-Federal
10 elections and are therefore beyond the scope of FECA. Any delay for notice and
11 comment would make it impossible to promulgate section 100.24(a)(1)(iii) before the
12 upcoming non-Federal elections and would cause the FEA regulations to cover
13 improperly activities that as a matter of law are not in connection with an election for
14 Federal office.

15 Additionally, other regulatory changes in 2006 enhance the need to distinguish
16 activities that are “in connection with” a Federal election from those activities that are
17 not. See Final Rules on the Definition of Federal Election Activity, 71 FR 8926 (Feb. 22,
18 2006) (“2006 Final Rules”). These other changes were required by the Shays district
19 court and will take effect March 24, 2006. In order to have one consistent definition of
20 “FEA” for the remainder of this election cycle, the interim final rule needs to be effective
21 on the same date that the 2006 Final Rules are effective. Therefore, it would be
22 impracticable and contrary to the public interest to delay promulgation of the interim

1 final rule to provide notice and comment prior to the implementation of new section
2 100.24(a)(1)(iii). See 5 U.S.C. 553(b)(B).

3 For the same reasons the Commission is promulgating the interim final rule under
4 the “good cause” exception in 5 U.S.C. 553(b)(B), the effective date does not need to be
5 delayed 30 days from the date of publication in the Federal Register under 5 U.S.C.
6 553(d)(3). Therefore, the interim final rule at 11 CFR 100.24(a)(1)(iii) will take effect on
7 March 24, 2006.

8 The Commission seeks public comment on the interim final rule. The
9 Commission will consider such comments, along with the written comments and hearing
10 testimony on the issues raised in the 2005 NPRM, and it intends to promulgate a Final
11 Rule addressing activities that are limited to elections for non-Federal offices as soon as
12 its rulemaking calendar permits. Seeking public comment on a rule that has taken effect
13 permits the Commission simultaneously to implement FECA properly, to comply with
14 the requirements of the Shays district court decision in a timely manner, and to seek and
15 consider additional public comment before promulgating a Final Rule in this area.

16 Under the Congressional Review of Agency Rulemaking Act,
17 5 U.S.C. 801(a)(1)(A), agencies must submit final rules to the Speaker of the House of
18 Representatives and the President of the Senate before they take effect. The interim final
19 rule was transmitted to Congress on _____, 2006. Unless the final rules are major
20 rules, the effective date for final rules is the date they become effective under the APA.
21 Because the interim final rule is not a major rule, it takes effect on March 24, 2006 for the
22 reasons stated above.

1 **EXPLANATION AND JUSTIFICATION FOR 11 CFR 100.24(a)(1)(iii)**

2 In its 2002 definitions of “FEA,” the Commission established a time period for
3 determining when voter identification, GOTV activity, and generic campaign activities
4 are “in connection with” a Federal election. The time period begins on the date of the
5 earliest filing deadline for a primary election ballot for Federal candidates in each
6 particular State and ends on the date of the general election, up to and including any
7 runoff election date. See 11 CFR 100.24(a)(1)(i). For States that do not hold primary
8 elections, the period begins January 1 of each even-numbered year. Id. For special
9 elections in which Federal candidates are on the ballot, the period begins when the date of
10 the special election is set and ends on the date of the special election. See 11 CFR
11 100.24(a)(1)(ii).

12 2005 Notice of Proposed Rulemaking

13 In 2004, several of the Commission’s rules defining FEA terms were reviewed by
14 the U.S. District Court for the District of Columbia in Shays v. FEC, 337 F. Supp. 2d 28
15 (D.D.C. 2004), aff’d, 414 F.3d 76 (D.C. Cir. 2005) (“Shays”). In response to the district
16 court’s decision, the Commission published a Notice of Proposed Rulemaking on May 4,
17 2005. See Notice of Proposed Rulemaking on the Definition of Federal Election
18 Activity, 70 FR 23068 (May 4, 2005) (“2005 NPRM”). In addition to proposing possible
19 modifications to the FEA definitions affected by the Shays decision, the 2005 NPRM also
20 proposed several changes to the definition of “in connection with an election in which a
21 candidate for Federal office appears on the ballot” in 11 CFR 100.24(a)(1).

22 The 2005 NPRM sought comment on three proposed exceptions to the Type II
23 FEA time period in 11 CFR 100.24(a)(1). See 2005 NPRM, 70 FR at 23071 and 23072.

1 The first proposed exception would have applied to special elections for Federal office
2 that are scheduled to be held on the same date as previously scheduled State or local
3 elections. Id., 70 FR at 23071. The second proposed exception would have applied to
4 municipal elections that take place during the Type II FEA time period, but on dates other
5 than Federal election dates. Id., 70 FR at 23071 and 23072. The third proposed
6 exception would have taken a narrower approach for municipal elections, excepting only
7 GOTV activities within 72 hours before the municipal election. Id., 70 FR at 23071.

8 The Commission received several comments on the issues raised in the 2005
9 NPRM.³ Some commenters opposed any further restrictions on when activity will be
10 considered FEA as contrary to Congress's intent in BCRA. Other commenters supported
11 the proposed exceptions and the Commission's attempt to limit the scope of the FEA
12 requirements. Some commenters gave examples of municipal elections that were
13 scheduled within Type II FEA time periods and argued that an exception for these
14 municipal elections was appropriate and necessary. One commenter who generally
15 supported the exceptions sought clarification as to how the municipal election exception
16 would apply to State and local political party committees in States where some of the
17 municipal elections met the requirements of the exception. This commenter noted that
18 the proposal did not address whether all of a State political party committee's activities
19 would enjoy the exception if one municipality in the State had an election that met the
20 requirements of the exception, and if not, how the State political party committee should
21 divide its Type II FEA into excepted and not excepted FEA.

³ All comments and a transcript of the public hearing related to the 2005 NPRM are available at http://www.fec.gov/law/law_rulemakings.shtml under "Definition of Federal Election Activity."

1 After reviewing written comments on the 2005 NPRM and conducting a public
2 hearing on August 4, 2005, the Commission approved Final Rules and an Explanation
3 and Justification on the Definition of Federal Election Activity. See 2006 Final Rules.
4 The Commission decided not to amend the definition of “in connection with an election
5 in which a candidate for Federal office appears on the ballot” by incorporating any of the
6 proposed exceptions as part of the 2006 Final Rules. Rather, the Commission decided to
7 promulgate a more narrowly focused final rule, but also wanted the benefit of comments
8 on the final rule. Thus, the Commission is adopting this interim final rule so that new
9 rules on FEA will operate seamlessly while the Commission acts to finalize the definition
10 of “FEA.”

11 New 11 CFR 100.24(a)(1)(iii)–Voter Identification and Get-Out-the-Vote Activities
12 Limited to Non-Federal Elections

13 BCRA requires State, district, and local political party committees and
14 organizations to finance FEA with Federal funds or, in some instances, with an allocated
15 mix of Federal funds and Levin funds. 2 U.S.C. 441i(b). One of the principal sponsors
16 of BCRA described its FEA provisions as “a balanced approach which addresses the very
17 real danger that Federal contribution limits could be evaded by diverting funds to State
18 and local parties,” while “not attempt[ing] to regulate State and local party spending
19 where this danger is not present, and where State and local parties engage in purely non-
20 Federal activities.” 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (Statement of Sen.
21 McCain).

22 BCRA does not authorize the Commission to regulate voter identification and
23 GOTV activity by State, district, and local political party committees and certain other

1 groups that are exclusively in connection with non-Federal elections. Yet under the
2 current regulation, that is exactly what can happen. Scores of communities of all sizes--
3 from large cities like Orlando, Florida; Sacramento, California; and Norfolk, Virginia; to
4 small cities like Sand Springs, Oklahoma--conduct entirely non-Federal elections that fall
5 within Type II FEA time periods because of Federal elections that are held on a later date
6 in the election cycle. See, e.g., [http://www.usmayors.org/uscm/elections/](http://www.usmayors.org/uscm/elections/99elections.asp?Action=View)
7 99elections.asp?Action=View (listing previous mayoral elections by date) (last visited
8 Mar. 8, 2006). Moreover, some of the amendments adopted in the 2006 Final Rules,
9 adopted pursuant to the Shays decision, bring FEA conducted by associations of local
10 candidates within BCRA's funding restrictions. Under the regulations as revised by the
11 2006 Final Rules, even a non-partisan association of non-Federal candidates would be
12 required to use Federal funds for FEA.

13 The Commission, therefore, is adopting an interim final rule that better
14 distinguishes between voter identification and GOTV activities that are FEA, and those
15 activities that are not FEA because they do not involve elections in which Federal
16 candidates are on the ballot. See 2 U.S.C. 431(20)(A)(ii); new 11 CFR 100.24(a)(1)(iii).
17 The interim final rule is a narrower measure than the exceptions proposed in the 2005
18 NPRM in several respects.

19 First, proposals in the 2005 NPRM would have excepted all forms of Type II
20 Federal election activities based only on the fact that they preceded the date of a
21 municipal election. Instead of using timing as the dispositive factor, the interim final rule
22 includes affirmative requirements for the content of the communications and activities
23 that must be satisfied to ensure that the interim final rule applies only to communications

1 and activities that are solely in connection with an election in which no Federal candidate
2 appears on the ballot. Second, the interim final rule does not apply to purely generic
3 campaign activity, as discussed further below. The interim final rule's approach of
4 focusing on the nature of the voter identification and GOTV efforts, both of which relate
5 to specific candidates or particular elections, represents a more tailored approach to that
6 would avoid imposing Federal funding restrictions on efforts related to non-Federal
7 elections that simply happen to fall within the Type II FEA time periods.

8 New section 100.24(a)(1)(iii) requires that a non-Federal election must be held on
9 a date separate from any Federal election and the communication or activity must be in
10 connection with the non-Federal election. Any activity that is also in connection with a
11 Federal election renders the interim final rule inapplicable.

12 Under the interim final rule, the activity or communication must refer exclusively
13 to one or more of the following three topics: (1) the non-Federal candidates on the ballot;
14 (2) ballot initiatives or referenda; or (3) the date, time, and polling locations of the non-
15 Federal election. 11 CFR 100.24(a)(1)(iii)(A) to (C). The "exclusive" requirement of
16 new section 100.24(a)(1)(iii) means that the activity or communication may not refer to
17 candidates or elections other than the non-Federal election that triggers new section
18 100.24(a)(1)(iii). For an activity to be covered by the interim final rule, it must include a
19 communication that addresses one or more of the three topics listed in section
20 100.24(a)(1)(iii)(A) to (C).

21 In contrast, generic campaign activity, by definition, promotes a political party
22 and does not promote a Federal or non-Federal candidate, so generic campaign activity
23 cannot satisfy the requirement of "exclusively" referring to non-Federal candidates, ballot

1 initiatives, or non-Federal polling place and time information. See 2 U.S.C. 431(21); see
2 also 11 CFR 100.25. No generic campaign activity, therefore, will satisfy the
3 requirements of the interim final rule. Thus, the interim final rule operates so that it can
4 apply only to voter identification and GOTV activities. The Commission seeks comment
5 on whether this is an appropriate determination or whether generic campaign activities
6 should be included when the Commission promulgates a final rule.

7 Voter identification and GOTV activities can include a generic component and
8 remain eligible for the interim final rule. For example, a GOTV phone bank that urges
9 voters to vote for “Smith, the Democratic candidate for Mayor” and that also refers to
10 “the great Democratic team” could qualify for the interim final rule (assuming it meets
11 the other requirements of 11 CFR 100.24(a)(1)(iii)).

12 Voter list acquisition generally will not qualify for the interim final rule because
13 most State, district and local party committees and organizations will acquire voter lists
14 for use in connection with more than one election.⁴ However, if a State, district, or local
15 party committee or organization were to acquire a voter list to conduct GOTV activities
16 and/or voter identification exclusively for a municipal election, acquisition of the voter
17 list would not be Type II FEA. Under these circumstances, the interim final rule permits
18 a State, district or local party committee or organization to use an allocable mix of
19 Federal and non-Federal funds under 11 CFR 106.7(b), (c)(3), and (c)(5) to acquire this
20 voter list.⁵

⁴ State, district and local party committees would also have to use the list in an activity that refers exclusively to one or more of the three topics listed in new section 100.24(a)(1)(iii)(A) through (C).

⁵ Pursuant to 11 CFR 106.7(b), political party organizations that are not political committees under FECA may establish separate Federal and non-Federal accounts or use a “reasonable accounting method approved by the Commission” to allocate their voter drive expenses between Federal and non-Federal funds.

1 For example, if a local party committee chooses to acquire a list of voters for the
2 municipal election during the Type II FEA time period, the voter list must be the closest
3 available to the list of eligible voters in the non-Federal election. If a municipality is
4 conducting an election during the Type II FEA time period, but only a countywide voter
5 list is available, acquisition of the that voter list would still fall within new section
6 100.24(a)(1)(iii) and would not be Type II FEA. However, if the local party committee
7 acquires a voter list that is for a geographic region that is larger than the municipality
8 conducting the non-Federal election and a small voter list covering the municipality is
9 available, the acquisition of the larger voter list would be Type II FEA. Choosing a list
10 of voters that goes beyond the voters participating in the municipal election demonstrates
11 that the voter identification program is not exclusively in connection with the municipal
12 election.

13 The interim final rule is consistent with section 441i(b) of BCRA, which seeks to
14 regulate the funds used for Type II FEA that are in connection with Federal elections by
15 State, district, and local political party committees and organizations. In defining “FEA,”
16 BCRA limited the definition to voter registration activity within 120 days of a Federal
17 election and to Type II FEA that are “in connection with” an election in which a Federal
18 candidate appears on the ballot. See 2 U.S.C. 431(20)(A)(i) and (ii). Thus, BCRA
19 recognizes that some voter registration activity, voter identification, GOTV activity, and
20 generic campaign activity is not FEA. New section 100.24(a)(1)(iii) applies only to voter
21 identification and GOTV activities that are not “in connection with an election in which a
22 candidate for Federal office appears on the ballot,” as required by BCRA.

1 The interim final rule will not lead to circumvention of BCRA. The definition of
2 “FEA” as amended by the interim final rule fully captures the activities Congress sought
3 to subject to BCRA’s funding restrictions. As noted above, the FEA provisions in BCRA
4 address “the very real danger that Federal contribution limits could be evaded by
5 diverting funds to State and local parties,” and it does so “while preserving the rights and
6 abilities of our State and local parties to engage in truly local activity.” See 148 Cong.
7 Rec. S2138 (daily ed. Mar. 20, 2002) (Statement of Sen. McCain). The new interim final
8 rule does not create an opportunity for such evasion because the communications and
9 activities that fall within the rule are “purely non-Federal activities,” which the FEA
10 provisions were not intended to reach. See id. Lastly, State, district, and local political
11 party committees and organizations must continue to use an allocable mix of Federal and
12 non-Federal funds to pay for any communications or activities covered by the new
13 interim final rule. See 11 CFR 106.7(b), (c)(3), and (c)(5). Therefore, even under the
14 new interim final rule, use of non-Federal funds for those communications and activities
15 remains limited.

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

17 The Commission certifies that the attached interim final rule will not have a
18 significant economic impact on a substantial number of small entities. The basis for this
19 certification is that the organizations affected by this rule are State, district, and local
20 political party committees, which are not “small entities” under 5 U.S.C. 601. These not-
21 for-profit committees do not meet the definition of “small organization,” which requires
22 that the enterprise be independently owned and operated and not dominant in its field. 5
23 U.S.C. 601(4). State political party committees are not independently owned and

1 operated because they are not financed and controlled by a small identifiable group of
2 individuals, and they are affiliated with the larger national political party organizations.
3 In addition, the State political party committees representing the Democratic and
4 Republican parties have a major controlling influence within the political arena of their
5 State and are thus dominant in their field. District and local party committees are
6 generally considered affiliated with the State committees and need not be considered
7 separately. To the extent that any State party committees representing minor political
8 parties might be considered “small organizations,” the number affected by this rule is not
9 substantial. Finally, new section 100.24(a)(1)(iii) operates to relieve funding restrictions,
10 which reduces the economic impact on any affected entities.

11 **List of Subjects**

12 **11 CFR Part 100**

13 **Elections**

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

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

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

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

6 2. In section 100.24, paragraph (a)(1)(iii) is added to read as follows:

7 **§ 100.24 Federal Election Activity (2 U.S.C. 431(20)).**

8 (a) * * *

9 (1) * * *

10 (iii) Voter Identification and Get-Out-the-Vote Activities Limited to
11 Non-Federal Elections. Notwithstanding paragraphs (a)(1)(i) and
12 (j) of this section, in connection with an election in which a
13 candidate for Federal office appears on the ballot does not include
14 any activity or communication that is in connection with a non-
15 Federal election that is held on a date separate from a date of any
16 Federal election and that refers exclusively to:
17 (A) Non-Federal candidates participating in the non-Federal
18 election;
19 (B) Ballot referenda or initiatives scheduled for the date of the
20 non-Federal election; or

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(C) The date, polling hours and locations of the non-Federal

2

election.

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Michael E. Toner
Chairman
Federal Election Commission

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DATED _____

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