



FEDERAL ELECTION COMMISSION
Washington, DC 20463

SECRETARIAT

2007 MAY 30 P 4: 12

May 30, 2007

MEMORANDUM

AGENDA ITEM

For Meeting of: 05-31-07

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *TFD (AGC)*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Ron B. Katwan *RBK*
Assistant General Counsel

Margaret G. Perl *MGP*
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking for Federal Election Activity and Non-Federal Elections

Attached is a draft Notice of Proposed Rulemaking for Federal Election Activity and Non-Federal Elections. The proposed rule would make permanent the Interim Final Rule at 11 CFR 100.24(a)(1)(iii) which excluded from FEA certain voter identification and get-out-the-vote activities conducted exclusively for non-Federal elections held on a date separate from any Federal election. The Interim Final Rule expires on September 1, 2007. The proposed rule includes minor technical and stylistic revisions to the language of the Interim Final Rule, as explained in the draft.

We request that this draft be placed on the agenda for May 31, 2007.

Attachment

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FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2007 - >>]

Federal Election Activity and Non-Federal Elections

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comments on proposed revisions to the definition of the phrase “in connection with an election in which a candidate for Federal office appears on the ballot.” This phrase is part of the definition of “Federal election activity” (“FEA”) and is used to determine whether voter identification, get-out-the-vote activity, and generic campaign activities are FEA, subject to certain funding limits and prohibitions under the Federal Election Campaign Act of 1971 (“FECA”). The proposed rule would make permanent, with certain minor revisions, an Interim Final Rule that excluded from FEA certain voter identification and get-out-the-vote activities conducted exclusively for non-Federal elections. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

1 **ADDRESSES:** All comments must be in writing, must be addressed to Mr. Ron B.
2 Katwan, Assistant General Counsel, and must be submitted in
3 email, facsimile, or paper copy form. Commenters are strongly
4 encouraged to submit comments by email or fax to ensure timely
5 receipt and consideration. Email comments must be sent to either
6 [fea.nonfederal@fec.gov] or submitted through the Federal
7 eRegulations Portal at www.regulations.gov. If email comments
8 include an attachment, the attachment must be in Adobe Acrobat
9 (.pdf) or Microsoft Word (.doc) format. Faxed comments must be
10 sent to (202) 219-3923, with paper copy follow-up. Paper copy
11 comments and paper copy follow-up of faxed comments must be
12 sent to the Federal Election Commission, 999 E Street, NW.,
13 Washington, DC 20463. All comments must include the full name
14 and postal service address of the commenter or they will not be
15 considered. The Commission will post comments on its website
16 after the comment period ends.

17 **FOR FURTHER**
18 **INFORMATION**
19 **CONTACT:**

 Mr. Ron B. Katwan, Assistant General Counsel, or Ms. Margaret
20 G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463,
21 (202) 694-1650 or (800) 424-9530.

22

1 **SUPPLEMENTARY**
2 **INFORMATION:**

3 **I. Background**

4 The Bipartisan Campaign Reform Act of 2002, Public Law No. 107-155, 116
5 Stat. 81 (2002) (“BCRA”), amended FECA by adding a new term, “Federal election
6 activity,” to describe certain activities that State, district, and local party committees must
7 pay for with either Federal funds or a combination of Federal and Levin funds.¹ See 2
8 U.S.C. 431(20) and 441i(b)(1). The FEA requirements apply to all State, district, and
9 local party committees and organizations, regardless of whether they are registered as
10 political committees with the Commission. The term also affects fundraising on behalf of
11 tax-exempt organizations.²

12 A. FEA Statutory and Regulatory Provisions

13 BCRA specifies that voter identification, get-out-the-vote activity (“GOTV
14 activity”), and generic campaign activity (collectively “Type II FEA”)³ constitute FEA
15 only when these activities are conducted “in connection with an election in which a
16 candidate for Federal office appears on the ballot.” 2 U.S.C. 431(20)(A)(ii).
17 Commission regulations define “in connection with an election in which a candidate for
18 Federal office appears on the ballot” as the period of time beginning on the earliest filing

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).

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. See 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. See 2 U.S.C. 441i(e)(4).

³ Commission regulations specifically define each kind of Type II FEA activity. See 11 CFR 100.24(a)(3) (GOTV activity), 100.24(a)(4) (voter identification), 100.25 (generic campaign activity).

1 deadline for access to the primary election ballot for Federal candidates in each particular
2 State, and ending on the date of the general election, up to and including any runoff date.
3 See 11 CFR 100.24(a)(1)(i). For States that do not hold primary elections, the period
4 begins on January 1 of each even-numbered year. Id. For special elections in which
5 Federal candidates are on the ballot, the period begins when the date of the special
6 election is set and ends on the date of the special election. See 11 CFR 100.24(a)(1)(ii).

7 Certain activities by State, district and local parties are exempt from the definition
8 of FEA by BCRA and Commission regulations. See 2 U.S.C. 431(20)(B); 11 CFR
9 100.24(c). One of these exceptions covers public communications that refer solely to
10 State or local candidates and do not promote, support, attack or oppose a Federal
11 candidate, as long as these communications do not constitute voter registration, voter
12 identification or GOTV activity. See 2 U.S.C. 431(20)(B)(i); 11 CFR 100.24(c)(1).
13 Costs of traditional “grassroots campaign materials” such as buttons, bumper stickers,
14 yard signs and posters that name only State or local candidates are also excluded from the
15 definition of FEA. See 2 U.S.C. 431(20)(B)(iv); 11 CFR 100.24(c)(4).

16 B. Interim Final Rule for Voter Identification and GOTV Activities Connected to
17 Non-Federal Elections

18 One of the principal sponsors of BCRA described its FEA provisions as “a
19 balanced approach which addresses the very real danger that Federal contribution limits
20 could be evaded by diverting funds to State and local parties,” while “not attempt[ing] to
21 regulate State and local party spending where this danger is not present, and where State
22 and local parties engage in purely non-Federal activities.” 148 Cong. Rec. S2138 (daily
23 ed. Mar. 20, 2002) (statement of Sen. McCain). Because Type II FEA is limited to

1 activities in connection with an election in which a Federal candidate is on the ballot, the
2 Commission interprets the FEA provisions of BCRA as not regulating voter identification
3 and GOTV activities by State, district, and local political party committees and certain
4 other groups that are exclusively in connection with non-Federal elections.

5 Some municipalities, counties, and States conduct entirely separate non-Federal
6 elections in even-numbered years that fall within the Type II FEA time periods based on
7 Federal elections held later that year.⁴ The Type II FEA time period in some States
8 begins almost a year before the general election, and the start date of this period is likely
9 to extend even farther back into odd-numbered years as many States move up
10 Presidential primaries into the first few months of the Presidential election year. Thus,
11 the potential also exists for more activity by State, district and local parties connected to
12 non-Federal elections held in odd-numbered years to be swept into the FEA restrictions
13 based on the Type II FEA time periods.⁵ The effects of the timing of the Type II FEA
14 time period is compounded by recent revisions to the FEA definitions of “GOTV
15 activity” and “voter identification,” which bring non-partisan associations of local
16 candidates within the FEA funding requirements if their activity targets their local
17 election and occurs within the Type II FEA time period. See Final Rules on the

⁴ See, e.g., http://www.sbe.virginia.gov/cms/documents/06_10Calendar.pdf (Virginia municipal elections); <http://www.state.tn.us/sos/election/2008%20ElectionScheduleevdatesandreg.pdf> (Tennessee county elections); <http://elections.state.wi.us/docview.asp?docid=2924&locid=47> (Wisconsin county and judicial elections); http://www.lavote.net/VOTER/PDFS/SCHEDULED_ELECTIONS_2008.pdf (LA County municipal elections).

⁵ See, e.g., http://www.sbe.virginia.gov/cms/documents/06_10Calendar.pdf (Virginia state-wide election); <http://elect.ky.gov/NR/rdonlyres/F98ADBAA-79E2-4D25-AA35-A85ABB921BEC/0/electionschedule.pdf> (Kentucky state-wide officer election); <http://vote.nyc.ny.us/electioncalendar.html> (New York City election); <http://www.usmayors.org/uscm/elections/electioncitiesfall2007.pdf> (various municipal elections).

1 Definition of Federal Election Activity, 71 FR 8926, 8931 (Feb. 22, 2006) (“2006 FEA
2 Final Rules”).⁶

3 In light of these considerations, the Commission published an Interim Final Rule
4 on March 22, 2006 refining the definition of “in connection with an election in which a
5 candidate for Federal office appears on the ballot” to specify when activities and
6 communications are in connection with a non-Federal election, instead of a Federal
7 election, and are therefore not Type II FEA. See Interim Final Rule Regarding Definition
8 of Federal Election Activity, 71 FR 14357 (Mar. 22, 2006) (“Interim Final Rule”).⁷ The
9 Interim Final Rule added new paragraph (a)(1)(iii) to 11 CFR 100.24 to “ensure[] that the
10 FEA requirements do not extend to activities that are solely in connection with these
11 upcoming non-Federal elections and are therefore beyond the scope of FECA.” See
12 Interim Final Rule, 71 FR at 14357. New section 100.24(a)(1)(iii) exempts “any activity
13 or communication that is in connection with a non-Federal election that is held on a date
14 separate from a date of any Federal election” and that refers exclusively to: (1) non-
15 Federal candidates participating in the non-Federal election, provided the non-Federal
16 candidates are not also Federal candidates; (2) ballot referenda or initiatives scheduled for
17 the date of the non-Federal election; or (3) the date, polling hours and locations of the
18 non-Federal election. See 11 CFR 100.24(a)(1)(iii)(A)(1)-(3); Interim Final Rule, 71 FR
19 at 14359-60.

⁶ The district court ruling in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), aff’d, 414 F.3d 76 (D.C. Cir. 2005), required certain changes to the rules defining GOTV activity and voter identification activity at 11 CFR 100.24(a)(3) and (a)(4).

⁷ A proposed exception to the Type II FEA time periods for activity in the time period leading up to a municipal election was included in the proposed rules but was not adopted. See Notice of Proposed Rulemaking on the Definition of Federal Election Activity, 70 FR 23068, 23071-72 (May 4, 2005).

1 This rule was promulgated as an Interim Final Rule and expires on September 1,
2 2007. See 11 CFR 100.24(a)(1)(iii)(B); Interim Final Rule, 71 FR at 14358. The
3 Commission sought public comment on the Interim Final Rule, and received two
4 comments. The comments are available at
5 http://www.fec.gov/law/law_rulemakings.shtml under the heading “Definition of Federal
6 Election Activity.”

7 **II. Proposed Revisions to 11 CFR 100.24(a)(1) – Type II FEA Time Periods**

8 The proposed rule would make permanent section 100.24(a)(1)(iii) as added by
9 the Interim Final Rule (with some stylistic and technical changes explained below). The
10 Commission seeks public comment on whether non-Federal candidates and State, district
11 or local party committees conducted voter identification and GOTV activities under the
12 exemption in the Interim Final Rule in the 2006 election cycle, and invites commenters to
13 suggest modifications of the proposed rule based on their experience, if any, with the
14 Interim Final Rule. Would such a rule exclude “purely non-Federal” voter identification
15 and GOTV activities by State, district and local committees? Would such a rule be
16 consistent with Congressional intent?

17 **A. Proposed 11 CFR 100.24(a)(1)(iii) – Activities Solely in Connection with Certain**
18 **Non-Federal Elections**

19 First, the proposed rule provides that voter identification or GOTV activities that
20 are “solely in connection with a non-Federal election held on a date separate from any
21 Federal election” are exempt from Type II FEA. See proposed 11 CFR 100.24(a)(1)(iii)
22 (emphasis added). For example, a GOTV program offering to transport voters to the
23 polls on the day of an exclusively non-Federal election would be eligible for the proposed

1 exemption. However, a voter identification program collecting information both about
2 voters' preferences in a non-Federal election in March and a Federal primary election in
3 April would not qualify. Thus, the proposed rule would not exclude all activities by
4 State, district and local parties in the weeks (or months) between the start of the Type II
5 FEA time period and a non-Federal election. The Commission seeks comment on this
6 approach.

7 In addition, the proposed rule would only apply if the non-Federal election were
8 held on a wholly separate date from any Federal election. See proposed 11 CFR
9 100.24(a)(1)(iii). This proposed rule is based on the premise that this voter identification
10 and GOTV activity for non-Federal elections held on a different date from any Federal
11 election will have no effect on previous or subsequent Federal elections. The
12 Commission intends the proposed exemption to be narrowly tailored and not to apply to
13 activities that are also in connection with a Federal election.⁸ For example, if a GOTV
14 communication provides the date of a non-Federal election and offers transportation to
15 voters for such a non-Federal election, is it likely that such activity would have any effect
16 on voter turnout for a Federal election held on a separate, and perhaps much later, date?
17 The Commission seeks comments, especially in the form of empirical data, on whether
18 voter identification and GOTV efforts in connection with a non-Federal election have a
19 measurable effect on voter turnout in a subsequent Federal election, or otherwise confer
20 benefits on Federal candidates. Are there any relevant data from the 2006 elections to
21 indicate whether activities conducted under the interim rule had any effect on turnout in
22 2006 Federal elections?

⁸ The Interim Final Rule did not include the word "solely," but explained that "[a]ny activity that is also in connection with a Federal election renders the interim final rule inapplicable." Interim Final Rule, 71 FR at 14359-60.

1 Should the exemption take into account the proximity of the next Federal
2 election? For example, should the rule distinguish between situations where the next
3 Federal election is only six days later, as opposed to six months?

4 The proposed exemption would not extend to any activities conducted in
5 connection with a non-Federal election held on the same date as a Federal election, even
6 if the activity does not refer to any Federal candidates. Are there certain conditions under
7 which an activity in connection with a non-Federal election held on the same date as a
8 Federal election should also be exempted from the Type II FEA time periods? For
9 example, should the proposed rule apply if both elections were held at the same polling
10 sites but used separate ballots?

11 B. Proposed 11 CFR 100.24(a)(1)(iii)(A)-(C) – Content of Voter Identification and
12 GOTV Communications

13 The final requirement to be eligible for the proposed exemption is that the voter
14 identification or GOTV activity must involve a communication that refers exclusively to
15 one or more of the following: (1) the non-Federal candidates on the non-Federal election
16 ballot who are not also Federal candidates; (2) ballot initiatives or referenda included in
17 the non-Federal election; or (3) the date, times, or polling locations of the non-Federal
18 election.⁹ See proposed 11 CFR 100.24(a)(1)(iii)(A)-(C). This proposed requirement
19 implements proposed section 100.24(a)(1)(iii)'s general restriction that the voter
20 identification or GOTV activity be solely in connection with the non-Federal election.

⁹ Under Commission regulations, “voter identification” activity includes “acquiring information about potential voters” and creating or modifying voter lists with information regarding “voters’ likelihood of voting in an upcoming election or their likelihood of voting for specific candidates.” See 11 CFR 100.24(a)(4). GOTV activity includes contacting voters “to assist them in engaging in the act of voting,” such as providing information about date, times and locations of polling places and offering transport to polling places. See 11 CFR 100.24(a)(3).

1 The proposed rule’s formulation is also consistent with statutory exclusions from the
2 definition of FEA that are limited to certain types of activity that refer only to State or
3 local candidates, as discussed above. See 2 U.S.C. 431(20)(B)(i) and (iv); 11 CFR
4 100.24(c)(1) and (4). Should the ballot initiative prong be limited to ballot issues that
5 have no impact on Federal elections?

6 The Commission seeks comments on whether this proposed list of subjects in
7 proposed section 100.24(a)(1)(iii)(A) through (C) should be expanded or narrowed.
8 Should the Commission require that communications include a reference to the date of
9 the non-Federal election for the proposed exemption to apply? Should the exception be
10 expanded to include communications discussing specific issues that are exclusively a
11 state or local concern? Should “the date, polling hours, or polling locations of the non-
12 Federal election” be defined to include absentee ballot or vote-by-mail information?

13 With respect to candidate references, the proposed rule would specify that if a
14 non-Federal candidate is also seeking Federal office and satisfies FECA’s definition of
15 “candidate,” then the proposed exemption would not apply. See proposed
16 11 CFR 100.24(a)(1)(iii)(A). The proposed rule would apply to communications
17 containing specific references to non-Federal candidates by name, nickname, photograph
18 or other likeness, as well as to general references to non-Federal candidates by party. For
19 example, assuming that the non-Federal election is held on a date separate from a Federal
20 election, a GOTV phone bank that urges voters to vote for “Smith for Mayor” and that
21 also refers to “the great Democratic team” would qualify under the proposed rule. The
22 proposed exemption would also apply to a communication that otherwise meets the

1 definition of GOTV¹⁰ if such a communication also includes language such as “Vote
2 Republican on May 5” even though no individual non-Federal candidate is mentioned by
3 name, because it refers exclusively to non-Federal candidates on the ballot on the date of
4 the non-Federal election. The Commission seeks comment on this approach. Moreover,
5 should the exception be limited to cover only references to clearly identified non-Federal
6 candidates?

7 With regard to references to the date or the polling hours or the polling locations
8 of the non-Federal election, this proposed rule would revise the Interim Final Rule to
9 clarify that it is not necessary to include all three categories of information in order to
10 qualify for the proposed exemption. For example, a GOTV communication that refers
11 only the date of the non-Federal election without any information regarding polling hours
12 or locations would satisfy this proposed requirement. The Commission seeks comment
13 on this approach

14 C. Type II FEA Activity Included in Proposed Rule

15 As discussed above, three kinds of activity are governed by the Type II FEA time
16 periods in 11 CFR 100.24(a)(1): voter identification, GOTV, and generic campaign
17 activity. See 2 U.S.C. 431(20)(A)(ii). The proposed rule would only apply to voter
18 identification and GOTV activity in connection with non-Federal elections. See proposed
19 11 CFR 100.24(a)(1)(iii). The Commission seeks comment on this approach. These
20 types of activities, such as identifying voter preferences for updating a voter list or phone
21 calls reminding voters to vote for a particular candidate on Election Day, are usually for

¹⁰ See 11 CFR 100.24(a)(3) (2006); Final Rule: Definition of Federal Election Activity, 71 FR 8926 (Feb. 22, 2006); Advisory Opinion 2006-19 (Los Angeles County Democratic Party Central Committee).

1 the purpose of promoting specific candidates and can be conducted solely in connection
2 with a non-Federal election.

3 The proposed rule does not exempt generic campaign activity. Generic campaign
4 activity is defined as “a public communication that promotes or opposes a political party
5 and does not promote or oppose a clearly identified Federal candidate or a non-Federal
6 candidate.” See 2 U.S.C. 431(21); 11 CFR 100.25. For example, “Vote for the
7 Democrats on May 4th” could constitute generic campaign activity under this definition.
8 The Commission notes that some generic campaign activity could be presumed to be in
9 connection with both Federal and non-Federal elections. Should the Commission include
10 generic campaign activity in the final rule? How could the Commission draft such a rule
11 to ensure that only generic campaign activity affecting (and made solely in connection
12 with) non-Federal elections is exempted? Does the inclusion of the phrase “on May 4th”
13 in the above example serve to ensure that the communication will affect only the election
14 held on May 4th? Alternatively, should generic campaign activity be excluded from the
15 final rule?

16 Although voter identification is included in the proposed rule, initial acquisition
17 or purchase of voter lists generally would not meet the requirements of the proposed rule
18 because most State, district and local party committees and organizations will acquire
19 voter lists for use in connection with more than one election. However, if a State, district,
20 or local party committee or organization were able to show that it acquired a voter list to
21 conduct GOTV activities and/or voter identification solely for a non-Federal election held

1 on a date separate from any Federal election, acquisition of the voter list could meet the
2 requirements of the proposed rule.¹¹

3 To qualify for the proposed exemption, the voter list must be the closest available
4 to the list of eligible voters in the qualifying non-Federal election. For example, a
5 county-wide voter list may not be the closest matching voter list for some non-Federal
6 elections (e.g., a municipal election), unless there were no more specific list available.
7 Choosing a list of voters that goes beyond the voters participating in a municipal election
8 would demonstrate that the voter identification program is not exclusively in connection
9 with the municipal election. Accordingly, the costs of such a voter list would be treated
10 as FEA. Are there situations in which this conclusion would not be warranted? For
11 example, if the smaller voter list were significantly more expensive than the larger list,
12 should acquisition of the larger list be permitted?

13 Similarly, if a list is acquired and used for a non-Federal election, but is then also
14 used for any activity in connection with a subsequent Federal election, or for a non-
15 Federal election held on the same date as a Federal election, the acquisition of the list
16 would not meet the requirements of the proposed rule and the cost of the voter list would
17 be treated as FEA. Should the party organization be permitted to allocate the cost of the
18 list in proportion to its use in connection with non-Federal and Federal elections?

19 The Commission seeks comment on this approach to voter list acquisition under
20 the proposed rule. Is it feasible for State, district and local parties to show that the
21 acquisition of a voter list was solely in connection with a non-Federal election by
22 tracking when a certain voter list is “used” in connection with certain elections? Section

¹¹ State, district and local party committees would also have to use the voter list for a communication that refers exclusively to one or more of the three topics listed in proposed section 100.24(a)(1)(iii)(A) through (C), as discussed above.

1 100.24(a)(4) states that the date the list was purchased governs whether the costs of the
2 voter list must be treated as FEA, regardless of the party's use of that list. However, the
3 proposed exemption for voter identification would depend upon when and how the party
4 uses a voter list. Is the proposed rule's approach to voter list acquisition inconsistent with
5 the general definition of "voter identification?"

6 How should the Commission apply the proposed rule to other types of voter
7 identification activities, such as updating a voter list with revised contact information or
8 voter preferences? Should a State, district or local party that expends time and resources
9 to update and add voter information to a list in connection with a non-Federal election be
10 barred from using updated information in subsequent Federal elections, or would the
11 costs be allocated if the list is used in a subsequent Federal election? As an alternative,
12 should the Commission eliminate voter list acquisition and maintenance, i.e. voter
13 identification, from the proposed exemption?

14 D. Allocating the Costs for Activity Under the Proposed Exemption

15 Although voter identification and GOTV activities meeting the requirements of
16 the proposed rule would not be considered FEA, a State, district or local party committee
17 may be required to pay the costs of those activities using a ratio of Federal and non-
18 Federal funds under the Commission's existing allocation rules at 11 CFR 106.7. State,
19 district or local party committees that conduct activities in connection with non-Federal
20 elections, but do not conduct any activity in connection with Federal elections, are not
21 subject to the allocation rules in section 106.7. See 11 CFR 106.7(b). Under the
22 proposed rule and section 106.7, those organizations may continue to pay for the
23 activities described in the proposed rule entirely with non-Federal funds. However, State,

1 district, and local political party committees that make expenditures and disbursements in
2 connection with both Federal and non-Federal elections during an election cycle are
3 required to use an allocable mix of Federal and non-Federal funds to pay for certain
4 expenses that are not FEA pursuant to 11 CFR 100.24. See 11 CFR 106.7(b) and (c).¹²

5 Section 106.7(c) lists five categories of costs which must be allocated between
6 Federal and non-Federal funds according to specific ratios: (1) certain salaries and wages;
7 (2) administrative costs; (3) exempt party activities that are not FEA (such as slate cards
8 and sample ballots); (4) certain fundraising costs; and (5) certain voter drive activities
9 that are not FEA or party exempt activities. Some voter identification and GOTV
10 activities that are eligible for the proposed exemption may also qualify as allocable voter
11 drive activities under section 106.7(c)(5). Section 106.7(c)(5) requires allocation of
12 certain voter identification, voter registration, GOTV activities, and any other activities
13 that urge the general public to register or vote, or that promote or oppose a political party
14 without promoting or opposing a Federal or non-Federal candidate. Thus, for example, a
15 GOTV communication that exclusively refers to the date and polling location for a non-
16 Federal election held on a date separate from any Federal election would be eligible for
17 the proposed exemption under proposed section 100.24(a)(1)(iii)(C). This GOTV
18 communication would, however, also be considered voter drive activity subject to
19 allocation under section 106.7(c)(5) because it is not FEA or exempt party activity and it
20 encourages the general public to vote without promoting or opposing any Federal or non-
21 Federal candidates.

¹² 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. As an alternative to allocating expenses, party committees may pay allocable expenses entirely with Federal funds. See 11 CFR 106.7(b).

1 Thus, even under the proposed rule, use of non-Federal funds would be limited
2 for those voter identification and GOTV activities that are conducted “solely in
3 connection with a non-Federal election,” but also qualify as allocable voter drive activity.
4 The Commission seeks comment on this application of the allocation rules to activities
5 eligible for the proposed exemption.

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

7 The Commission certifies that the attached proposed rule, if adopted, will not
8 have a significant economic impact on a substantial number of small entities. The basis
9 for this certification is that the organizations affected by this proposed rule are State,
10 district, and local political party committees, which are not “small entities” under
11 5 U.S.C. 601. These not-for-profit committees do not meet the definition of “small
12 organization,” which requires that the enterprise be independently owned and operated
13 and not dominant in its field. 5 U.S.C. 601(4). State political party committees are not
14 independently owned and operated because they are not financed and controlled by a
15 small identifiable group of individuals, and they are affiliated with the larger national
16 political party organizations. In addition, the State political party committees
17 representing the Democratic and Republican parties have a major controlling influence
18 within the political arena of their State and are thus dominant in their field. District and
19 local party committees are generally considered affiliated with the State committees and
20 need not be considered separately. To the extent that any State party committees
21 representing minor political parties might be considered “small organizations,” the
22 number affected by this proposed rule is not substantial. Finally, the proposed rule would

1 operate to relieve funding restrictions, which reduces the economic impact on any
2 affected entities.

3 **List of Subjects**

4 11 CFR Part 100

5 Elections

6

1 For the reasons set out in the preamble, the Federal Election Commission
2 proposes to amend Subchapter A of Chapter 1 of Title 11 of the Code of Federal
3 Regulations as follows:

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

5 1. The authority citation for 11 CFR part 100 would continue to read as follows:

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

7 2. In section 100.24, paragraph (a)(1)(iii) would be revised to read as follows:

8 **§ 100.24 Federal Election Activity (2 U.S.C. 431(20)).**

9 (a) * * *

10 (1) * * *

11 (iii) Notwithstanding paragraphs (a)(1)(i) and (ii) of this section, in
12 connection with an election in which a candidate for Federal office
13 appears on the ballot does not include any voter identification or
14 get-out-the-vote activity that is solely in connection with a non-
15 Federal election held on a date separate from any Federal election,
16 and that involves a communication that refers exclusively to:

17 (A) Non-Federal candidates participating in the non-Federal
18 election, provided the non-Federal candidates are not also
19 Federal candidates;

20 (B) Ballot referenda or initiatives scheduled for the date of the
21 non-Federal election; or
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(C) The date, polling hours or polling locations of the non-Federal election.

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Robert D. Lenhard
Chairman
Federal Election Commission

11 DATED _____
12 BILLING CODE: 6715-01-U