

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2004 NOV 23 P 3:17

November 23, 2004

MEMORANDUM

AGENDA ITEM

For Meeting of: 12-02-04

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Albert J. Kiss
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking on Political Party Committees Donating Funds to Certain Tax-Exempt Organizations and Political Organizations

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that would make the changes to 11 CFR 300.11, 300.37, 300.50 and 300.51 necessary to conform those sections to the Supreme Court's decision in McConnell v. FEC, 540 U.S. 93, 124 S.Ct. 619, 678-682 (2003), regarding 2 U.S.C. 441i(d). The NPRM would also make technical changes in sections 300.11 and 300.50, and would invite comments regarding whether the Supreme Court's rationale in McConnell for limiting section 441i(d)'s prohibition to non-Federal funds applies to Levin funds.

Recommendation:

The Office of General Counsel recommends that the Commission approve the attached NPRM for publication in the Federal Register.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 300**

3 **[Notice 2004 - >]**

4 **Political Party Committees Donating Funds to**
5 **Certain Tax-Exempt Organizations and Political Organizations**

6
7
8 **AGENCY:** Federal Election Commission.

9 **ACTION:** Notice of Proposed Rulemaking.

10 **SUMMARY:** The Federal Election Commission requests comments on proposed
11 amendments to its rules governing limitations on national, State, district,
12 and local political party committees making or directing donations to
13 certain tax-exempt organizations and political organizations. These
14 proposed rules would conform to the decision of the U.S. Supreme Court
15 in McConnell v. FEC, which included a narrowing construction of section
16 101 of the Bipartisan Campaign Reform Act of 2002. The Commission
17 has not made any final decisions on the issues presented in this
18 rulemaking. Further information is provided in the supplementary
19 information that follows.

20 **DATES:** Comments must be received on or before [INSERT DATE 30 DAYS
21 AFTER THE DATE OF PUBLICATION IN THE FEDERAL
22 REGISTER]. If the Commission receives sufficient requests to testify, it
23 may hold a hearing on these proposed rules. Commenters wishing to

1 testify at the hearing must so indicate in their written or electronic
2 comments.

3 **ADDRESSES:**

4 All comments should be addressed to Ms. Mai T. Dinh, Assistant General
5 Counsel, and must be submitted in either electronic or written form.

6 Commenters are strongly encouraged to submit comments electronically

7 to ensure timely receipt and consideration. Electronic mail comments

8 should be sent to partytaxexempts@fec.gov, and must include the full

9 name, electronic mail address and postal service address of the

10 commenter. Electronic mail comments that do not contain the full name,

11 electronic mail address and postal service address of the commenter will

12 not be considered. If the electronic mail comments include an attachment,

13 the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word

14 (.doc) format. Faxed comments should be sent to (202) 219-3923, with

15 printed copy follow-up to ensure legibility. Written comments and printed

16 copies of faxed comments should be sent to the Federal Election

17 Commission, 999 E Street, N.W., Washington, D.C. 20463. The

18 Commission will post public comments on its Web site. If the

19 Commission decides that a hearing is necessary, the hearing will be held

in its ninth floor meeting room, 999 E Street N.W., Washington, D.C.

20 **FOR FURTHER**
21 **INFORMATION**
22 **CONTACT:**

Ms. Mai T. Dinh, Assistant General Counsel, or Mr. Albert J. Kiss,

23 Attorney, 999 E Street N.W., Washington, D.C. 20463, (202) 694-1650 or

24 (800) 424-9530.

1 **SUPPLEMENTARY**

2 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Public Law 107-155, 116
3 Stat. 81 (Mar. 27, 2002) (“BCRA”), contained extensive and detailed amendments to the Federal
4 Election Campaign Act of 1971 (“FECA” or “the Act”), as amended, 2 U.S.C. 431 et seq. The
5 Supreme Court upheld most of BCRA in McConnell v. FEC, 540 U.S. 93, 124 S. Ct.
6 619 (2003). Under BCRA section 101(a), a national, State, district or local political party
7 committee must not solicit any funds for, or make or direct donations to, certain tax-exempt
8 organizations. 2 U.S.C. 441i(d). Section 441i(d)’s restrictions apply to solicitations for, and
9 making or directing donations to, two types of tax-exempt organizations (“certain tax-exempt
10 organizations”). These consist of (1) organizations described in 26 U.S.C. 501(c) that are
11 exempt from tax under 26 U.S.C. 501(a) (or that have submitted an application for determination
12 of tax exempt status under section 501(a)) and that make expenditures or disbursements in
13 connection with an election for Federal office (including expenditures or disbursements for
14 Federal election activity); and (2) political organizations described in 26 U.S.C. 527 (other than a
15 political committee, a State, district or local committee of a political party, or the authorized
16 campaign committee of a candidate for State or local office).

17 In 2002, the Commission promulgated rules at 11 CFR 300.11, 300.37, 300.50, and
18 300.51 implementing 2 U.S.C. 441i(d). Explanation and Justification for Rules on Prohibited
19 and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49,064, 49,089-49,091,
20 and 49,105-49,106 (July 29, 2002). Except for the title of each, the final rule at 11 CFR 300.11
21 is identical to the final rule at 11 CFR 300.50, and the final rule at 11 CFR 300.37 is identical to
22 the final rule at 11 CFR 300.51. Id. at 49,106.

23 Subsequently, the Supreme Court upheld 2 U.S.C. 441i(d)’s prohibitions on the
24 solicitation of funds for certain tax-exempt organizations. In a separate analysis, however, the

1 Supreme Court stated that 2 U.S.C. 441i(d) raises overbreadth concerns “if read to restrict
2 donations from a party’s federal account—i.e., funds that have already been raised in compliance
3 with FECA’s source, amount and disclosure limitations.” McConnell, 124 S. Ct. at 680-681.
4 The Court found “no evidence that Congress was concerned about, much less that it intended to
5 prohibit, donations of money already fully regulated by FECA ... [t]hus, political parties remain
6 free to make or direct donations of money to any tax-exempt organization that has otherwise
7 been raised in compliance with FECA.” Id. at 681-682. Accordingly, the Commission now
8 proposes to modify its regulations at 11 CFR 300.11, 300.37, 300.50 and 300.51 to provide that
9 the prohibition on political party committees¹ making or directing donations to certain tax-
10 exempt organizations is limited to donations of non-Federal funds and thus would not apply to
11 donations of Federal funds to these organizations.

12 **I. Proposed 11 CFR 300.11 -- Prohibitions on fundraising for and donating to certain**
13 **tax-exempt organizations**

14 The Commission proposes to revise 11 CFR 300.11 by modifying the prohibition in
15 current section 300.11 on national party committees, making or directing any donations to
16 certain tax-exempt organizations. As modified, section 300.11 would prohibit the making or

¹ These restrictions also apply to the national congressional campaign committees and to “an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State, district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity ...” and references to political party committees in this Notice of Proposed Rulemaking also include these entities, agents and officers. See 2 U.S.C. 441i(d); 11 CFR 300.11(b), 300.37(b), 300.50(b), and 300.51(b); see also Advisory Opinion 2004-25 (concluding that the chairman of a national congressional campaign committee is acting in his personal capacity and not as an officer or agent of a national congressional campaign committee when donating his personal funds to organizations engaged in voter registration activity).

1 directing of donations of non-Federal funds to these organizations. Section 300.2(k) defines
2 “non-Federal funds” as funds that are not subject to the limitations and prohibitions of the Act.
3 11 CFR 300.2(k).

4 As revised, section 300.11 would be consistent with 2 U.S.C. 441i(a)(1) and 11 CFR
5 300.10, under which national party committees may not solicit, receive, or direct to another
6 person a contribution, donation or transfer of funds or any other thing of value, or spend any
7 funds, that is not subject to the amount limitations, source prohibitions and reporting
8 requirements of the Act, because national party committees are barred from accepting non-
9 Federal funds.

10 Although only national party committees are the subject of the prohibitions in section
11 300.11, current paragraph 300.11(b)(3) erroneously expands the scope of these restrictions to
12 include “an agent of a national, State, district, or local party committee of a political party”
13 [emphasis added]. Accordingly, the Commission also proposes to make a technical correction to
14 paragraph 300.11(b)(3) which would strike the reference to a State, district, or local party
15 committee.

16 **II. Proposed 11 CFR 300.37 – Prohibitions on fundraising for and donating to certain**
17 **tax-exempt organizations**

18 The Commission proposes revisions to 11 CFR 300.37, which applies to State, district
19 and local party committees, that are similar to the proposed revisions to 11 CFR 300.11
20 discussed above. Under the draft amendments, a State, district, or local committee of a political
21 party would be prohibited from soliciting any funds for, or making or directing any donations of
22 non-Federal funds to, certain tax-exempt organizations.

1 The Commission invites comment on whether the Supreme Court’s rationale for limiting
2 section 441i(d)’s prohibition on directing or donating non-Federal funds applies to Levin funds.
3 See McConnell, 124 S. Ct. at 680-682. Levin funds are funds that a State, district or local party
4 committee of a political party raises itself pursuant to State law, and are limited to \$10,000 per
5 calendar year from any person other than foreign nationals and those prohibited from making a
6 donation under State law. 2 U.S.C. 441i(b)(2)(A)(ii); 11 CFR 300.2(h) and (i). A State, district
7 or local committee of a political party may spend Levin funds on “[a]ny use that is lawful under
8 the laws of the State in which the committee is organized” other than two types of Federal
9 election activities: (1) public communications that promote, support, attack or oppose a Federal
10 candidate and (2) services provided by certain party committee employees. 11 CFR
11 300.32(b)(2). The donation of Levin funds is subject to amount limitations, certain source
12 prohibitions, and reporting requirements under the FECA, even though these amount limitations,
13 source prohibitions and reporting requirements are different than those applicable to Federal
14 funds. See, e.g., 11 CFR 300.31(c) and (d) and 300.36(b). Thus, Levin funds may fall within the
15 Supreme Court’s description of funds “already fully regulated by FECA,” and “otherwise . . .
16 raised in compliance with FECA” that are outside the Court’s narrow construction of the
17 prohibition in 2 U.S.C. 441i(d). However, the Commission has stated that Levin funds are a
18 “new type of non-Federal funds” and are “unlike Federal funds, which are fully subject to the
19 Act’s requirements, and unlike ordinary non-Federal funds because they are subject to certain
20 additional requirements under BCRA.” Explanation and Justification to Final Rules; Prohibited
21 and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49,064, 49,065, and
22 49,085 (July 29, 2002). The Commission invites comments on whether State, district and local

1 political party committees should be allowed to make or direct donations of Levin funds to
2 certain tax-exempt organizations to the extent permitted by State law.

3 **III. Proposed 11 CFR 300.50 – Prohibited fundraising by national party committees**

4 For the reasons addressed above in the discussion of proposed section 300.11, the
5 Commission proposes to revise 11 CFR 300.50 by modifying the prohibition in current section
6 300.50 on national party committees making or directing any donations to certain tax-exempt
7 organizations. As modified, section 300.50 would prohibit national party committees from
8 soliciting any funds for, or making or directing donations of non-Federal funds to, certain tax-
9 exempt organizations.

10 The Commission also proposes to make a technical correction to 11 CFR 300.50(b)(3)
11 that is similar to the proposed technical change to 11 CFR 300.11(b)(3) discussed above.

12 **IV. Proposed 11 CFR 300.51 – Prohibited fundraising by State, district, or local party**
13 **committees**

14 For the reasons addressed above in the discussion of proposed sections 300.11 and
15 300.37, the Commission proposes to revise 11 CFR 300.51 to provide a State, district, or local
16 committee of a political party is prohibited from soliciting any funds for, or making or directing
17 any donations of non-Federal funds to, certain tax-exempt organizations.

18 For the reasons addressed in the discussion of proposed section 300.37, the Commission
19 invites comment on whether or not Levin funds should be subject to the section 300.51
20 prohibition.

21 **V. 11 CFR 300.2(b) - Definition of Agent**

22 Although the Commission does not believe changes to 11 CFR 300.2(b) are needed to
23 conform section 300.2(b) to the Supreme Court’s interpretation of section 441i(d) in McConnell,

1 the Commission invites comment on whether it should make conforming changes similar to
2 those proposed for 11 CFR 300.11, 300.37, 300.50 and 300.51 to the definition of “agent” in 11
3 CFR 300.2(b), by limiting the language “make or direct any donations ...” to donations of non-
4 Federal funds to certain tax exempt organizations. *See* 11 CFR 300.2(b)(1)(ii) and (b)(2)(iv).

5

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

7 **[Regulatory Flexibility Act]**

8

9

10 The Commission certifies that the attached proposed rules, if promulgated, would not
11 have a significant economic impact on a substantial number of small entities. The basis for this
12 certification is that the national, State, district and local party committees of the two major
13 political parties are not small entities under 5 U.S.C. 601, and the number of other small entities
14 to which the rules would apply is not substantial. Moreover, the proposed rules narrow the scope
15 of certain restrictions applicable to the affected political party committees, and thus would not
16 have a significant economic impact on the affected entities.

16

17 **List of Subjects**

18 **11 CFR Part 300**

19 Campaign funds, nonprofit organizations, political committees and parties.

20

1 For the reasons set out in the preamble, the Federal Election Commission proposes to
2 amend subchapter C of chapter I of title 11 of the Code of Federal Regulations as follows:

3 **PART 300 – NON-FEDERAL FUNDS**

4 1. The authority citation for Part 300 would continue to read as follows:

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

6 2. In § 300.11, the introductory text of paragraph (a) and paragraph (b)(3) would be revised
7 to read as follows:

8 **§ 300.11 Prohibitions on fundraising for and donating to certain tax-exempt organizations**
9 **(2 U.S.C. 441i(d)).**

10 (a) Prohibitions. A national committee of a political party, including a national congressional
11 campaign committee, must not solicit any funds for, or make or direct any donations of non-
12 Federal funds to, the following organizations:

13 * * * * *

14 (b) * * *

15 (3) An entity that is directly or indirectly established, financed, maintained or
16 controlled by an agent of a national, ~~State, district or local~~ committee of a political
17 party, including a national congressional campaign committee.

18 * * * * *

19 3. In § 300.37, the introductory text of paragraph (a) would be revised to read as follows:

20 **§ 300.37 Prohibitions on fundraising for and donating to certain tax-exempt organizations**
21 **(2 U.S.C. 441i(d)).**

22 (a) Prohibitions. A State, district or local committee of a political party must not solicit any
23 funds for, or make or direct any donations of non-Federal funds to:

1 * * * * *

2 4. In § 300.50, the introductory text of paragraph (a) and paragraph (b)(3) would be revised
3 to read as follows:

4 **§ 300.50 Prohibited fundraising by national party committees (2 U.S.C. 441i(d)).**

5 (a) Prohibitions on fundraising and donations. A national committee of a political party,
6 including a national congressional campaign committee, must not solicit any funds for, or make
7 or direct donations of non-Federal funds to the following organizations:

8 * * * * *

9 (b) * * *

10 (3) An entity that is directly or indirectly established, financed, maintained or
11 controlled by an agent of a national, ~~State, district or local~~ committee of a political
12 party, including a national congressional campaign committee.

13 * * * * *

14 5. In § 300.51, the introductory text of paragraph (a) would be revised to read as follows:

15 **§ 300.51 Prohibited fundraising by State, district, or local party committees (2 U.S.C.**
16 **441i(d)).**

17 (a) Prohibitions. A State, district or local committee of a political party must not solicit any
18 funds for, or make or direct any donations of non-Federal funds to:

19 * * * * *

20 _____
21 Bradley A. Smith
22 Chairman
23 Federal Election Commission
24

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