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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2005 FEB 11 A 10: 28

February 11, 2005

MEMORANDUM

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

J. Duane Pugh Jr.
Senior Attorney

Margaret G. Perl
Attorney

SUBJECT: Notice of Proposed Rulemaking on Candidate Solicitation at State,
District and Local Party Fundraising Events (11 CFR 300.64).

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that revisits the exemption allowing candidates and Federal officeholders to speak "without restriction or regulation" at State, district and local party fundraising events at 11 CFR 300.64, in order to comply with the district court's decision in Shays v. FEC, 337 F. Supp.2d 28 (D.D.C. 2004).

Recommendation:

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

Attachment

AGENDA ITEM
For Meeting of: 2-14-05

SUBMITTED LATE

RS
by LHM

MTD by JAP

J.P.

MGP

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 300**

3 **[Notice 2005 -]**

4 **Candidate Solicitation at State, District, and Local Party Fundraising Events**

5 **AGENCY:** Federal Election Commission.

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

7 **SUMMARY:** The Federal Election Commission seeks comments on proposed
8 changes to its rule regarding appearances by Federal officeholders
9 and candidates at State, district, and local party fundraising events
10 under the Federal Election Campaign Act of 1971, as amended
11 ("FECA" or the "Act"). The current regulation contains an
12 exemption permitting Federal officeholders and candidates to
13 speak at State, district, and local party fundraising events "without
14 restriction or regulation." This regulation was challenged in Shays
15 v. FEC. The U.S. District Court for the District of Columbia held
16 that this regulation implementing the Bipartisan Campaign Reform
17 Act of 2002 was based on a permissible construction of the statute.
18 However, the district court also held that the Commission had not
19 provided adequate explanation of its decision to permit Federal
20 candidates and officeholders to speak "without restriction or
21 regulation," and therefore had not satisfied the reasoned analysis
22 requirement of the Administrative Procedure Act. The district
23 court remanded the regulation to the Commission for further action

1 consistent with the court's opinion. Accordingly, in order to
2 comply with the court's decision, the Commission now revisits the
3 exemption for candidate and Federal officeholder speech at State,
4 district, and local party fundraising events. The Commission has
5 made no final decision on the issues presented in this rulemaking.
6 Further information is provided in the supplementary information
7 that follows.

8 **DATES:**

Comments must be received on or before [INSERT DATE 30
9 DAYS AFTER THE DATE OF PUBLICATION IN THE
10 FEDERAL REGISTER]. If the Commission receives sufficient
11 requests to testify, it may hold a hearing on this proposed rule.

12 Commenters wishing to testify at the hearing must so indicate in
13 their written or electronic comments.

14 **ADDRESSES:**

All comments should be addressed to Ms. Mai T. Dinh, Assistant
15 General Counsel, and must be submitted in either electronic or
16 written form. Commenters are strongly encouraged to submit
17 comments electronically to ensure timely receipt and
18 consideration. Electronic mail comments should be sent to
19 statepartyfundraisers@fec.gov and may also be submitted through
20 the Federal eRegulations Portal at www.regulations.gov. All
21 electronic comments must include the full name, electronic mail
22 address, and postal service address of the commenter. Electronic
23 comments that do not contain the full name, electronic mail

1 address, and postal service address of the commenter will not be
2 considered. If the electronic comments include an attachment, the
3 attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word
4 (.doc) format. Faxed comments should be sent to (202) 219-3923,
5 with printed copy follow-up. Written comments and printed copies
6 of faxed comments should be sent to the Federal Election
7 Commission, 999 E Street, N.W., Washington, D.C. 20463. The
8 Commission will post public comments on its Web site. If the
9 Commission decides that a hearing is necessary, the hearing will
10 be held in the Commission's ninth floor meeting room, 999 E
11 Street, N.W., Washington, D.C.

12 **FOR FURTHER**
13 **INFORMATION**
14 **CONTACT:**

Ms. Mai T. Dinh, Assistant General Counsel, Mr. J. Duane Pugh
15 Jr., Senior Attorney, or Ms. Margaret G. Perl, Attorney, 999 E
16 Street, N.W., Washington, DC 20463 (202) 694-1650 or (800)
17 424-9530.

18 **SUPPLEMENTARY**
19 **INFORMATION:**

The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L.
20 No. 107-155, 116 Stat. 81 (2002), places limits on the amounts and types of funds that
21 can be raised by Federal officeholders and candidates for both Federal and State
22 elections. See 2 U.S.C. 441i(e). These restrictions also apply to their agents, and entities
23 directly or indirectly established, financed, maintained, or controlled by, or acting on
24 behalf of, any such candidate(s) or Federal officeholder(s) ("covered persons"). Covered
25 persons may not "solicit, receive, direct, transfer or spend" non-Federal funds in

1 connection with an election for Federal, State, or local office except under limited
2 circumstances. See 2 U.S.C. 441i(e); 11 CFR part 300, subpart D.

3 Section 441i(e)(3) states that “notwithstanding” the prohibition on raising non-
4 Federal funds, including Levin funds, in connection with a Federal or non-Federal
5 election in section 441i(b)(2)(C) and (e)(1), “a candidate or an individual holding Federal
6 office may attend, speak, or be a featured guest at a fundraising event for a State, district,
7 or local committee of a political party.” Id. During the rulemaking implementing this
8 provision, the Commission initially sought comment on a rule proposing that, while such
9 individuals could attend, speak, or be a featured guest at a party fundraising event, they
10 could not say anything that could be construed as soliciting or otherwise seeking non-
11 Federal funds, including Levin funds. See Notice of Proposed Rulemaking on Prohibited
12 and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 35654, 35672
13 (May 20, 2002). In the alternative, the NPRM sought comment on whether the
14 fundraising event provision was a total exemption from the general solicitation ban,
15 whereby Federal officeholders and candidates and their agents may attend and speak
16 freely at such events without restriction or regulation. Id.

17 The Commission considered a range of comments on the scope of the fundraising
18 provision. Ultimately, the Commission decided to construe the statutory provision
19 broadly, permitting Federal officeholders and candidates to attend, speak, and appear as a
20 featured guest at State, district, and local fundraising events “without restriction or
21 regulation.” See Final Rules on Prohibited and Excessive Contributions; Non-Federal
22 Funds or Soft Money, 67 FR 49064, 49108 (July 29, 2002); 11 CFR 300.64(b).

1 In Shays v. FEC, 337 F. Supp.2d 28 (D.D.C. 2004), the district court held that the
2 Commission’s explanation and justification for the fundraising provision in 11 CFR
3 300.64(b) did not satisfy the reasoned analysis requirement of the Administrative
4 Procedure Act (“APA”) in two respects.¹ First, the district court held that the
5 Commission’s construction of BCRA as permitting Federal officeholders and candidates
6 to speak at State, district, and local party fundraising events “without restriction or
7 regulation” is not compelled by the language of the statute. Id. at 92-93. The court
8 concluded that the BCRA provision “is ambiguous in that it can be read in more than one
9 way.” Id. at 89. Specifically, the court concluded that the statute “can be read to either
10 bc a carve-out for unabashed solicitation by federal candidates and officeholders at state,
11 district or local committee fundraising events, or to simply make clear that merely
12 attending, speaking or being the featured guest at such an event is not to be construed as
13 constituting solicitation per se.” Id. Second, the district court stated “the FEC has not
14 explained how examining speech at fundraising events implicates constitutional concerns
15 that are not present when examining comments made at other venues.” Id. at 93. The

¹ Although the court held that the fundraising exemption regulation failed to satisfy the APA, it found the regulation did not necessarily run contrary to Congress’s intent in creating the fundraising exemption and was based on a permissible construction of the statute. Id. at 90, 92 (finding the regulation survived Chevron review). Moreover, the court stated that it “cannot find on the current record that the Commission’s regulation on its face ‘unduly compromises the Act’s purposes’ by ‘creat[ing] the potential for gross abuse.’” Id. at 91 (quoting Orloski v. FEC, 795 F.2d 156, 164, 165 (D.C. Cir. 1986)). See also Shays, 337 F. Supp.2d. at 92 (“the court cannot find that the Commission has unduly compromised FECA’s purposes”).

1 court remanded the regulation to the Commission for further action consistent with its
2 opinion. Id. at 130.

3 To comply with the district court's order, the Commission is issuing this notice of
4 proposed rulemaking to provide proposed revisions to the explanation and justification
5 for the final rules it adopted concerning the provision allowing Federal officeholders and
6 candidates to speak without restriction or regulation at fundraising events for State,
7 district, and local party committees. See 11 CFR 300.64. As an alternative to providing
8 a new explanation for the current rule, this NPRM also includes a proposed rule that
9 would replace current section 300.64 with a rule barring candidates and Federal
10 officeholders from soliciting or directing non-Federal funds when attending or speaking
11 at party fundraising events. Both approaches are explained below.

12 **Proposed Revisions to the Explanation and Justification for Current 11 CFR 300.64**

13 The Commission seeks comment on the following proposed three paragraphs to
14 be included in a revised explanation and justification for current 11 CFR 300.64:

15 "In promulgating current 11 CFR 300.64(b), the Commission construed 2 U.S.C.
16 441i(e)(3) to exempt Federal officeholders and candidates from the general solicitation
17 ban, so that they may attend and speak 'without restriction or regulation' at party
18 fundraising events. The district court recognized that section 441i(e)(3) was ambiguous
19 and upheld the Commission's interpretation of this section as a permissible reading under
20 Chevron step one. See 337 F. Supp.2d at 89-90. The district court also upheld the
21 current section 300.64(b) under Chevron step two review because the regulation did not
22 unduly compromise FECA. Id. at 92.

1 “Section 300.64 effectuates the balance Congress struck between the appearance
2 of corruption engendered by soliciting sizable amounts of soft money and the legitimate
3 and appropriate role Federal officeholders and candidates play in raising funds for their
4 political parties. Just as Congress expressly permitted these individuals to raise non-
5 Federal funds when they themselves run for non-Federal office (see 2 U.S.C. 441i(e)(2)),
6 and to solicit limited amounts of non-Federal funds for certain 501(c) organizations (see
7 2 U.S.C. 441i(e)(4)), Congress also enacted 2 U.S.C. 441i(e)(3) to provide a mechanism
8 whereby Federal officeholders and candidates could continue to play a role at State,
9 district and local party committee fundraising events at which non-Federal funds are
10 raised. The limited nature of this statutory exemption embodied in 11 CFR 300.64 is
11 evident in that it does not permit Federal officeholders and candidates to solicit non-
12 Federal funds for State, district or local party committees in pre-event publicity or
13 through other mechanisms. Nor does it extend to fundraising on behalf of national party
14 committees.

15 “In implementing this statutory scheme, the Commission is mindful that
16 evaluating speech in the context of a party fundraising event raises First Amendment
17 concerns where it is difficult to discern what specific words would be merely ‘speaking’
18 at such an event without crossing the line into soliciting or directing non-Federal funds.
19 Sec 11 CFR 300.2(m) (definition of ‘to solicit’) and 300.2(n) (definition of ‘to direct’).
20 As the U.S. Supreme Court has observed, ‘solicitation is characteristically entwined with
21 informative and perhaps persuasive speech seeking support for particular causes or for
22 particular views.’ Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 632 (1980).
23 A regulation that permitted speaking at a party event, the central purpose of which is

1 fundraising, but prohibited soliciting would require candidates to tease out words of
2 general support for the political party and its causes from words of solicitation for non-
3 Federal funds for that political party. A complete exemption in section 300.64(b) that
4 allows Federal officeholders and candidates, in these limited circumstances, to speak and
5 attend without restriction or regulation, including solicitation of non-Federal or Levin
6 funds, avoids these concerns.²

7 The Commission seeks comments on these proposed revisions to the explanation
8 and justification or comments that provide alternative rationales for the complete
9 exemption in current 11 CFR 300.64(b). Additionally, the district court voiced concern
10 that the current 300.64(b) “creates the potential for abuse.” See 337 F. Supp.2d at 91.
11 The Commission seeks public comment as to any potential for abuse under the current
12 rule.

13 The Commission also notes, as the Shays court observed, that under BCRA,
14 outside the context of State, district and local party fundraisers, “nonfederal money
15 solicitation is almost completely barred.” Id. at 92. From time to time, the Commission
16 has been asked to permit attendance and participation by Federal officeholders and
17 candidates at various functions other than those for State, district and local parties, where
18 non-Federal funds will be raised. Subject to various restrictions, the Commission has
19 allowed this. See, e.g., Advisory Opinions 2003-36 and 2003-03. The Commission
20 requests comment on whether these advisory opinions, allowing attendance at such

² These concerns are more of an issue for these types of party fundraisers where Federal funds and non-Federal funds may both be raised than for national party committee fundraisers where only Federal funds may be raised.

1 functions, struck the proper balance. Alternatively, are these advisory opinions
2 inconsistent with BCRA's language and intent? Does the permission granted in 2 U.S.C.
3 441i(e)(3) to attend, speak, or be a featured guest at State, district and local party events,
4 by implication, prohibit Federal officeholders and candidates from doing so at other
5 fundraising events unless such events are solely and exclusively raising Federal funds?³

6 Should the Commission specifically bar attendance by a Federal officeholder or
7 candidate at a non-State, district or local party fundraising event when the officeholder or
8 candidate knows or reasonably should know that solicitations otherwise prohibited when
9 made by the candidate or officeholder will take place at the event? Alternatively, should
10 Advisory Opinions 2003-03 and 2003-36 be incorporated into the Commission's
11 regulations? If so, should other modifications be added?

12 **Alternative Proposed 11 CFR 300.64**

13 Although providing a revised explanation and justification for current 11 CFR
14 300.64 would comply with the district court's decision in Shays v. FEC, the Commission
15 is also considering an alternative approach. This approach would replace current section
16 300.64 with a rule barring candidates and Federal officeholders from soliciting, receiving,
17 directing, transferring or spending any non-Federal funds, including Levin funds, when
18 speaking at party fundraising events.

³ See 2 U.S.C. 441i(e)(1)(B) (permitting solicitations by Federal candidates for State candidates so long as such solicitations comply with the source prohibitions and amount restrictions under the Act for Federal candidates). See also 2 U.S.C. 441i(e)(4) (permitting certain solicitations, with restrictions, by Federal officeholders and candidates for funds to be used by certain tax-exempt organizations to be used for certain types of Federal election activity).

1 The proposed rule would redesignate the introductory paragraph of 11 CFR
2 300.64 as paragraph (a) and amend it to state that Federal officeholders and candidates
3 may not solicit, receive, direct, transfer, or spend non-Federal funds at any such event.
4 Current section 300.64(a) would be redesignated as paragraph (b) without any substantive
5 changes, and current section 300.64(b) would be deleted entirely.

6 Proposed 11 CFR 300.64(a)

7 The proposed rule would limit the scope of section 300.64 by replacing the
8 complete exemption for speaking “without restriction or regulation” in current 11 CFR
9 300.64(b) with a narrower exception under which Federal candidates and officeholders
10 would still be able to speak at or attend any party fundraising event (as the statute clearly
11 authorizes), but they would not be able to solicit, receive, direct, transfer or spend non-
12 Federal funds, including Levin funds, at the party fundraising event. This proposed rule
13 would interpret section 441i(e)(3) as an exception that makes clear that the mere
14 attendance or speaking by a candidate in this circumstance should not be equated with a
15 solicitation prohibited by section 441i(e)(1). However, this safe harbor would not apply
16 to a candidate or Federal officeholder who uses words that solicit or direct non-Federal
17 funds. See 11 CFR 300.2(m) (definition of “to solicit”) and 300.2(n) (definition of “to
18 direct”).

19 The district court in Shays v. FEC held that this interpretation is another
20 permissible reading of the statute. See 337 F. Supp.2d at 89-90. The Commission seeks
21 public comment on this alternative approach. In addition, if the Commission were to
22 adopt this alternative approach, would it be appropriate to permit written notices or oral
23 disclaimers similar to those discussed in Advisory Opinions 2003-03 and 2003-36 for

1 other fundraising events? The opinions addressed appearances, speeches, and
2 solicitations by covered persons at fundraising events where non-Federal funds were
3 being raised. Those opinions permitted covered persons to solicit funds and comply with
4 2 U.S.C. 441i(e)(1) by using either written notices or oral disclaimers. Alternatively,
5 would another type of notice or disclaimer be more appropriate?

6

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

8 **[Regulatory Flexibility Act]**

9 The Commission certifies that the attached proposed rule, if promulgated, would
10 not have a significant economic impact on a substantial number of small entities. The
11 basis for this certification is that the proposed rule is an exception from the requirements
12 of a general rule applicable to Federal officeholders and candidates. In addition, the other
13 organizations affected by this rule are State, district and local party committees of the two
14 major political parties, which are not “small entities” under 5 U.S.C. 601 because they are
15 not small businesses, small organizations, or small governmental jurisdictions. To the
16 extent that any of these political party committees may fall within the definition of “small
17 entities,” their number is not substantial.

18 **List of Subjects**

19 11 CFR Part 300

20 Campaign funds, nonprofit organizations, political committees and parties,
21 political candidates, reporting and recordkeeping requirements.

22

1 For reasons set out in the preamble, Subchapter C of Chapter 1 of title 11 of the
2 Code of Federal Regulations would be amended to read 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. Section 300.64 would be revised to read as follows:

7 **§ 300.64 ~~Exemption~~ Exception for attending, speaking, or appearing as a**
8 **featured guest at fundraising events (2 U.S.C. 441i(e)(3)).**

9 (a)—Notwithstanding the provisions of 11 CFR 100.24, 300.61 and 300.62, a Federal
10 candidate or individual holding Federal office may attend, speak, or be a featured guest at
11 a fundraising event for a State, district, or local committee of a political party, including
12 but not limited to a fundraising event at which Levin funds are raised, or at which non-
13 Federal funds are raised. Such candidate or individual holding Federal office shall not
14 solicit, receive, direct, transfer or spend non-Federal funds, including Levin funds at any
15 such event. ~~In light of the foregoing:~~

16 (ba) State, district, or local committees of a political party may advertise, announce or
17 otherwise publicize that a Federal candidate or individual holding Federal office will
18 attend, speak, or be a featured guest at a fundraising event, including, but not limited to,
19 publicizing such appearance in pre-event invitation materials and in other party
20 committee communications; ~~and~~

1 ~~(b) — Candidates and individuals holding Federal office may speak at such events~~
2 ~~without restriction or regulation.~~

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Scott E. Thomas
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U