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FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2006-7]

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 comments received. Further information is provided in the **SUPPLEMENTARY INFORMATION** that follows.

DATES: The interim final rule is effective on March 24, 2006. Comments must be received on or before May 22, 2006.

ADDRESSES: All comments must be in writing, must be addressed to Ms. Mai T. Dinh, Assistant General Counsel, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail or fax to ensure timely receipt and consideration. E-mail comments must be sent to either

nonfederal.election@fec.gov or submitted through the Federal eRegulations Portal at *www.regulations.gov*. If e-mail comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219-3923, with paper copy follow-up. Paper copy comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends. **FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Assistant General Counsel, or Mr. J. Duane Pugh Jr., Senior Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002, Public Law 107-155, 116 Stat. 81 (2002), amended FECA by adding a new term, “Federal election activity,” to describe certain activities that State, district, and local party committees must pay for with either Federal funds or a combination of Federal and Levin funds.¹ 2 U.S.C. 431(20) and 441i(b)(1). The FEA requirements apply to all State, district, and local party committees and organizations, regardless of whether they are registered as political committees with the Commission. The term also affects fundraising on behalf of tax-exempt organizations.²

BCRA specifies that voter identification, get-out-the-vote activity (“GOTV activity”), and generic

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. 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 U.S.C. 501(c) whose principal purpose is to conduct certain types of FEA. 2 U.S.C. 441i(e)(4).

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

Under the Administrative Procedure Act (“APA”), 5 U.S.C. 553(b), agencies must provide public notice and an opportunity for comment (“notice and comment”) before they may promulgate final rules. However, the “good cause” exemption allows an agency to waive this requirement if the agency determines that notice and comment is “impracticable, unnecessary or contrary to the public interest.” See 5 U.S.C. 553(b)(B). For the reasons stated below, the Commission determines that providing notice and comment for the interim final rule would be impracticable and contrary to the public interest.

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

the FEA regulations to cover improperly activities that as a matter of law are *not* in connection with an election for Federal office.

Additionally, other regulatory changes in 2006 enhance the need to distinguish activities that are “in connection with” a Federal election from those activities that are not. See *Final Rules on the Definition of Federal Election Activity*, 71 FR 8926 (Feb. 22, 2006) (“*2006 Final Rules*”). These other changes were required by the *Shays* district court and will take effect March 24, 2006. In order to have one consistent definition of “FEA” for the remainder of this election cycle, the interim final rule needs to be effective on the same date that the *2006 Final Rules* are effective. Therefore, it would be impracticable and contrary to the public interest to delay promulgation of the interim final rule to provide notice and comment prior to the implementation of new section 100.24(a)(1)(iii). See 5 U.S.C. 553(b)(B).

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

The Commission seeks public comment on the interim final rule. The Commission will consider such comments, along with the written comments and hearing testimony on the issues raised in the Notice of Proposed Rulemaking on the Definition of Federal Election Activity, 70 FR 23068 (May 4, 2005) (“*2005 NPRM*”), and it intends to promulgate a Final Rule addressing activities that are limited to elections for non-Federal offices as soon as its rulemaking calendar permits. Seeking public comment on a rule that has taken effect permits the Commission simultaneously to implement FECA properly, to comply with the requirements of the *Shays* district court decision in a timely manner, and to seek and consider additional public comment before promulgating a Final Rule in this area. The interim final rule provides that it will not apply to activities or communications that take place after September 1, 2007. See new 11 CFR 100.24(a)(1)(iii)(B). The Commission expects to consider any public comments and may adopt a Final Rule that can be effective on or before that date.

Under the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1)(A), agencies must submit final

rules to the Speaker of the House of Representatives and the President of the Senate before they take effect. The interim final rule was transmitted to Congress on March 17, 2006. Unless the final rules are major rules, the effective date for final rules is the date they become effective under the APA. Because the interim final rule is not a major rule, it takes effect on March 24, 2006 for the reasons stated above.

Explanation and Justification for 11 CFR 100.24(a)(1)(iii)

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

2005 Notice of Proposed Rulemaking

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

The *2005 NPRM* sought comment on three proposed exceptions to the Type II FEA time period in 11 CFR 100.24(a)(1). See *2005 NPRM*, 70 FR at 23071 and 23072. The first proposed exception would have applied to special elections for Federal office that are scheduled to be held on the same date as previously scheduled State or local elections. *Id.*, 70 FR at 23071. The second proposed exception would have applied to municipal elections that take place during the Type II FEA time period, but on dates other than Federal election dates. *Id.*, 70 FR at 23071 and

23072. The third proposed exception would have taken a narrower approach, excepting only GOTV activities within 72 hours before a non-Federal election. *Id.*, 70 FR at 23071.

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

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

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

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

BCRA does not authorize the Commission to regulate voter identification and GOTV activity by State, district, and local political party committees and certain other groups that are exclusively in connection with non-Federal elections. Yet under the current regulation, that is exactly what can happen. Scores of communities of all sizes—from large cities like Orlando, Florida; Sacramento, California; and Norfolk, Virginia; to small cities like Sand Springs, Oklahoma—conduct entirely non-Federal elections that fall within Type II FEA time periods because of Federal elections that are held on a later date in the election cycle. See, e.g., <http://www.usmayors.org/uscm/elections/99elections.asp?Action=View> (listing previous mayoral elections by date) (last visited Mar. 8, 2006). Moreover, some of the amendments adopted in the 2006 *Final Rules*, adopted pursuant to the *Shays* decision, bring FEA conducted by associations of local candidates within BCRA’s funding restrictions. Under the regulations as revised by the 2006 *Final Rules*, even a non-partisan association of non-Federal candidates would be required to use Federal funds for FEA.

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

First, proposals in the 2005 *NPRM* would have excepted all forms of Type II Federal election activities based only on the fact that they preceded the date of a municipal election. Instead of using timing as the dispositive factor, the interim final rule includes affirmative requirements for the content of the communications and activities that must be satisfied to ensure that the interim final rule applies only to communications and activities that are solely in connection with an election in which no Federal candidate appears on the ballot. Second, the interim final rule does not apply to purely generic campaign activity, as discussed further below. The interim final rule’s approach of focusing on the nature of the voter identification and GOTV efforts, both of which relate to specific candidates or particular elections, represents a more tailored approach that would avoid imposing Federal funding restrictions on efforts related to non-Federal elections that simply happen to fall within the Type II FEA time periods. Finally, the interim final rule is effective for a limited duration. See new section 100.24(a)(1)(iii)(B).

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

Under the interim final rule, the activity or communication must refer exclusively to one or more of the following three topics: (1) The non-Federal candidates on the ballot; (2) ballot initiatives or referenda; or (3) the date, time, and polling locations of the non-Federal election. 11 CFR 100.24(a)(1)(iii)(A)(1) to (3). If a non-Federal candidate is also seeking Federal office and has satisfied FECA’s definition of “candidate,” then references to that candidate would not qualify for the interim final rule. The “exclusive” requirement of new section 100.24(a)(1)(iii)(A) means that the activity or communication may not refer to candidates or elections other than the non-Federal election that triggers new section 100.24(a)(1)(iii). For an activity to be covered by the interim final rule, it must include a communication that addresses one or more of the three topics listed in section 100.24(a)(1)(iii)(A)(1) to (3).

In contrast, generic campaign activity, by definition, promotes a political party and does not promote a Federal or non-Federal candidate, so generic campaign activity cannot satisfy the requirement

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

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

Voter list acquisition generally will not qualify for the interim final rule because most State, district and local party committees and organizations will acquire voter lists for use in connection with more than one election.⁴ However, if a State, district, or local party committee or organization were to acquire a voter list to conduct GOTV activities and/or voter identification exclusively for a municipal election,⁵ acquisition of the voter list would not be Type II FEA. Under these circumstances, the interim final rule permits a State, district or local party committee or organization to use an allocable mix of Federal and non-Federal funds under 11 CFR 106.7(b), (c)(3), and (c)(5) to acquire this voter list.⁶

For example, if a local party committee chooses to acquire a list of voters for a municipal election during the Type II FEA time period, the voter list must be the closest available to the list of eligible voters in the non-Federal election. If a municipality is conducting an election during the Type II FEA time

⁴ State, district and local party committees would also have to use at 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)(1) through (3).

⁵ References to municipal elections are exemplary only; new section 100.24(a)(1)(iii) applies to all types of non-Federal elections that are held on dates separate from dates of any Federal elections.

⁶ 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.

period, but only a countywide voter list is available, acquisition of the that voter list would still fall within new section 100.24(a)(1)(iii) and would not be Type II FEA. However, if the local party committee acquires a voter list that is for a geographic region that is larger than the municipality conducting the non-Federal election and a small voter list covering the municipality is available, the acquisition of the larger voter list would be Type II FEA. Choosing a list of voters that goes beyond the voters participating in the municipal election demonstrates that the voter identification program is not exclusively in connection with the municipal election.

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

The interim final rule will not lead to circumvention of BCRA. The definition of "FEA" as amended by the interim final rule fully captures the activities Congress sought to subject to BCRA's funding restrictions. As noted above, the FEA provisions in BCRA address "the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties," and it does so "while preserving the rights and abilities of our State and local parties to engage in truly local activity." See 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (Statement of Sen. McCain). The new interim final rule does not create an opportunity for such evasion because the communications and activities that fall within the rule are "purely non-Federal activities," which the FEA provisions were not intended to reach. See *id.* Lastly, State, district, and local political party committees and organizations must continue to use an allocable mix of Federal and non-Federal funds to pay for any communications or activities covered by

the new interim final rule. See 11 CFR 106.7(b), (c)(3), and (c)(5). Therefore, even under the new interim final rule, use of non-Federal funds for those communications and activities remains limited.

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

The Commission certifies that the attached interim final rule will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the organizations affected by this rule are State, district, and local political party committees, which are not "small entities" under 5 U.S.C. 601. These not-for-profit committees do not meet the definition of "small organization," which requires that the enterprise be independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately. To the extent that any State party committees representing minor political parties might be considered "small organizations," the number affected by this rule is not substantial. Finally, new § 100.24(a)(1)(iii) operates to relieve funding restrictions, which reduces the economic impact on any affected entities.

List of Subjects in 11 CFR Part 100

Elections.

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

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

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

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

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

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

(a) * * *

(1) * * *

(iii) *Voter Identification and Get-Out-the-Vote Activities Limited to Non-Federal Elections.*

(A) Notwithstanding paragraphs (a)(1)(i) and (ii) of this section, in connection with an election in which a candidate for Federal office appears on the ballot does not include any activity or communication that is in connection with a non-Federal election that is held on a date separate from a date of any Federal election and that refers exclusively to:

(1) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates;

(2) Ballot referenda or initiatives scheduled for the date of the non-Federal election; or

(3) The date, polling hours and locations of the non-Federal election.

(B) Paragraph (a)(1)(iii) of this section shall not apply to any activities or communications after September 1, 2007.

* * * * *

Dated: March 16, 2006.

Michael E. Toner,

Chairman, Federal Election Commission.

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BILLING CODE 6715-01-P

EXPORT-IMPORT BANK OF THE UNITED STATES

12 CFR Part 404

Production of Records and Testimony of Personnel of the Export-Import Bank of the United States in Legal Proceedings

AGENCY: Export-Import Bank of the United States ("Ex-Im Bank").

ACTION: Final rule.

SUMMARY: Ex-Im Bank is adopting a regulation that establishes policy and prescribes procedures with respect to the testimony of Ex-Im Bank personnel, both current and former, and the production of agency records, in legal proceedings. The regulation is designed to balance concerns such as preserving the time of Ex-Im Bank personnel for the conduct of official business against concerns such as whether the disclosure of information requested is necessary to prevent fraud or injustice. A proposed rule on this subject was published in the **Federal Register** on October 24, 2005 (70 FR 61395). Ex-Im Bank did not receive any comments on the proposed rule. Ex-Im Bank is accordingly