November 23, 2004

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

Albert J. Kiss
Attorney

AGENDA ITEM

For Meeting of: 12-02-04

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
FEDERAL ELECTION COMMISSION

11 CFR Part 300

[Notice 2004 - >]

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

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

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

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If the Commission receives sufficient requests to testify, it may hold a hearing on these proposed rules. Commenters wishing to
testify at the hearing must so indicate in their written or electronic comments.

**ADDRESSES:**
All comments should be addressed to Ms. Mai T. Dinh, Assistant General Counsel, and must be submitted in either electronic or written form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic mail comments should be sent to partytaxexempts@fec.gov, and must include the full name, electronic mail address and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463. The Commission will post public comments on its Web site. If the 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.

**FOR FURTHER INFORMATION CONTACT:**
Ms. Mai T. Dinh, Assistant General Counsel, or Mr. Albert J. Kiss, Attorney, 999 E Street N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.
SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002, Public Law 107-155, 116 Stat. 81 (Mar. 27, 2002) ("BCRA"), contained extensive and detailed amendments to the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), as amended, 2 U.S.C. 431 et seq. The Supreme Court upheld most of BCRA in *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003). Under BCRA section 101(a), a national, State, district or local political party committee must not solicit any funds for, or make or direct donations to, certain tax-exempt organizations. 2 U.S.C. 441i(d). Section 441i(d)'s restrictions apply to solicitations for, and making or directing donations to, two types of tax-exempt organizations ("certain tax-exempt organizations"). These consist of (1) organizations described in 26 U.S.C. 501(c) that are exempt from tax under 26 U.S.C. 501(a) (or that have submitted an application for determination of tax exempt status under section 501(a)) and that make expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); and (2) political organizations described in 26 U.S.C. 527 (other than a political committee, a State, district or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

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

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

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

The Commission proposes to revise 11 CFR 300.11 by modifying the prohibition in
current section 300.11 on national party committees, making or directing any donations to
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).
directing of donations of non-Federal funds to these organizations. Section 300.2(k) defines
“non-Federal funds” as funds that are not subject to the limitations and prohibitions of the Act.
11 CFR 300.2(k).

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

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

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

The Commission proposes revisions to 11 CFR 300.37, which applies to State, district
and local party committees, that are similar to the proposed revisions to 11 CFR 300.11
discussed above. Under the draft amendments, a State, district, or local committee of a political
party would be prohibited from soliciting any funds for, or making or directing any donations of
non-Federal funds to, certain tax-exempt organizations.
The Commission invites comment on whether the Supreme Court’s rationale for limiting
section 441i(d)’s prohibition on directing or donating non-Federal funds applies to Levin funds.

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

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

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

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

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

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

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

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

Although the Commission does not believe changes to 11 CFR 300.2(b) are needed to
conform section 300.2(b) to the Supreme Court’s interpretation of section 441i(d) in McConnell.
the Commission invites comment on whether it should make conforming changes similar to
those proposed for 11 CFR 300.11, 300.37, 300.50 and 300.51 to the definition of “agent” in 11
CFR 300.2(b), by limiting the language “make or direct any donations …” to donations of non-
Federal funds to certain tax exempt organizations. See 11 CFR 300.2(b)(1)(ii) and (b)(2)(iv).

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

[Regulatory Flexibility Act]

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

List of Subjects

11 CFR Part 300

Campaign funds, nonprofit organizations, political committees and parties.
For the reasons set out in the preamble, the Federal Election Commission proposes to
amend subchapter C of chapter I of title 11 of the Code of Federal Regulations as follows:

PART 300 – NON-FEDERAL FUNDS

1. The authority citation for Part 300 would continue to read as follows:
   Authority: 2 U.S.C. 434(e), 438(a)(8), 441a(a), 441i, 453.

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

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

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

* * * * *

(b) * * *

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

* * * * *

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

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

(a) Prohibitions. A State, district or local committee of a political party must not solicit any
funds for, or make or direct any donations of non-Federal funds to:
4. In § 300.50, the introductory text of paragraph (a) and paragraph (b)(3) would be revised to read as follows:

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

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

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

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

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

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

Bradley A. Smith
Chairman
Federal Election Commission

DATED
BILLING CODE: 6715-01-U