MEMORANDUM

TO: The Commission
THROUGH: James A. Pehrkon
          Staff Director
FROM: Lawrence H. Norton
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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
Candidate Solicitation at State, District, and Local Party Fundraising Events

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rule regarding appearances by Federal officeholders and candidates at State, district, and local party fundraising events under the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"). The current regulation contains an exemption permitting Federal officeholders and candidates to speak at State, district, and local party fundraising events "without restriction or regulation." This regulation was challenged in Shays v. FEC. The U.S. District Court for the District of Columbia held that this regulation implementing the Bipartisan Campaign Reform Act of 2002 was based on a permissible construction of the statute. However, the district court also held that the Commission had not provided adequate explanation of its decision to permit Federal candidates and officeholders to speak "without restriction or regulation," and therefore had not satisfied the reasoned analysis requirement of the Administrative Procedure Act. The district court remanded the regulation to the Commission for further action.
consistent with the court’s opinion. Accordingly, in order to comply with the court’s decision, the Commission now revisits the exemption for candidate and Federal officeholder speech at State, district, and local party fundraising events. The Commission has made no final decision 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 this proposed rule. 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 statepartyfundraisers@sec.gov and may also be submitted through the Federal eRegulations Portal at www.regulations.gov. All electronic comments must include the full name, electronic mail address, and postal service address of the commenter. Electronic 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 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. 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 the Commission’s ninth floor meeting room, 999 E Street, N.W., Washington, D.C.

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

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

circumstances. See 2 U.S.C. 441i(e); 11 CFR part 300, subpart D.

Section 441i(e)(3) states that “notwithstanding” the prohibition on raising non-
Federal funds, including Levin funds, in connection with a Federal or non-Federal

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

The Commission considered a range of comments on the scope of the fundraising
provision. Ultimately, the Commission decided to construe the statutory provision
broadly, permitting Federal officeholders and candidates to attend, speak, and appear as a
featured guest at State, district, and local fundraising events “without restriction or
regulation.” See Final Rules on Prohibited and Excessive Contributions; Non-Federal
Funds or Soft Money, 67 FR 49064, 49108 (July 29, 2002); 11 CFR 300.64(b).
In *Shays v. FEC*, 337 F. Supp.2d 28 (D.D.C. 2004), the district court held that the Commission’s explanation and justification for the fundraising provision in 11 CFR 300.64(b) did not satisfy the reasoned analysis requirement of the Administrative Procedure Act ("APA") in two respects. First, the district court held that the Commission’s construction of BCRA as permitting Federal officeholders and candidates to speak at State, district, and local party fundraising events "without restriction or regulation" is not compelled by the language of the statute. *Id.* at 92-93. The court concluded that the BCRA provision "is ambiguous in that it can be read in more than one way." *Id.* at 89. Specifically, the court concluded that the statute "can be read to either be a carve-out for unabashed solicitation by federal candidates and officeholders at state, district or local committee fundraising events, or to simply make clear that merely attending, speaking or being the featured guest at such an event is not to be construed as constituting solicitation per se." *Id.* Second, the district court stated "the FEC has not explained how examining speech at fundraising events implicates constitutional concerns that are not present when examining comments made at other venues." *Id.* at 93. The

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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 ‘creating 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”).
court remanded the regulation to the Commission for further action consistent with its opinion. Id. at 130.

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

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

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

"In promulgating current 11 CFR 300.64(b), the Commission construed 2 U.S.C. 441i(e)(3) to exempt Federal officeholders and candidates from the general solicitation ban, so that they may attend and speak ‘without restriction or regulation’ at party fundraising events. The district court recognized that section 441i(e)(3) was ambiguous and upheld the Commission’s interpretation of this section as a permissible reading under Chevron step one. See 337 F. Supp.2d at 89-90. The district court also upheld the current section 300.64(b) under Chevron step two review because the regulation did not unduly compromise FECA. Id. at 92."
“Section 300.64 effectuates the balance Congress struck between the appearance of corruption engendered by soliciting sizable amounts of soft money and the legitimate and appropriate role Federal officeholders and candidates play in raising funds for their political parties. Just as Congress expressly permitted these individuals to raise non-Federal funds when they themselves run for non-Federal office (see 2 U.S.C. 441i(e)(2)), and to solicit limited amounts of non-Federal funds for certain 501(c) organizations (see 2 U.S.C. 441i(e)(4)), Congress also enacted 2 U.S.C. 441i(e)(3) to provide a mechanism whereby Federal officeholders and candidates could continue to play a role at State, district and local party committee fundraising events at which non-Federal funds are raised. The limited nature of this statutory exemption embodied in 11 CFR 300.64 is evident in that it does not permit Federal officeholders and candidates to solicit non-Federal funds for State, district or local party committees in pre-event publicity or through other mechanisms. Nor does it extend to fundraising on behalf of national party committees.

“In implementing this statutory scheme, the Commission is mindful that evaluating speech in the context of a party fundraising event raises First Amendment concerns where it is difficult to discern what specific words would be merely ‘speaking’ at such an event without crossing the line into soliciting or directing non-Federal funds. See 11 CFR 300.2(m) (definition of ‘to solicit’) and 300.2(n) (definition of ‘to direct’).

As the U.S. Supreme Court has observed, ‘solicitation is characteristically entwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views.’ Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 632 (1980).

A regulation that permitted speaking at a party event, the central purpose of which is
fundraising, but prohibited soliciting would require candidates to tease out words of
general support for the political party and its causes from words of solicitation for non-
Federal funds for that political party. A complete exemption in section 300.64(b) that
allows Federal officeholders and candidates, in these limited circumstances, to speak and
attend without restriction or regulation, including solicitation of non-Federal or Levin
funds, avoids these concerns.2

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

The Commission also notes, as the Shays court observed, that under BCRA,
outside the context of State, district and local party fundraisers, "nonfederal money
solicitation is almost completely barred." Id. at 92. From time to time, the Commission
has been asked to permit attendance and participation by Federal officeholders and
candidates at various functions other than those for State, district and local parties, where
non-Federal funds will be raised. Subject to various restrictions, the Commission has
allowed this. See, e.g., Advisory Opinions 2003-36 and 2003-03. The Commission
requests comment on whether those 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.
functions, struck the proper balance. Alternatively, are these advisory opinions inconsistent with BCRA’s language and intent? Does the permission granted in 2 U.S.C. 441i(e)(3) to attend, speak, or be a featured guest at State, district and local party events, by implication, prohibit Federal officeholders and candidates from doing so at other fundraising events unless such events are solely and exclusively raising Federal funds?3

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

Alternative Proposed 11 CFR 300.64

Although providing a revised explanation and justification for current 11 CFR 300.64 would comply with the district court’s decision in Shays v. FEC, the Commission is also considering an alternative approach. This approach would replace current section 300.64 with a rule barring candidates and Federal officeholders from soliciting, receiving, directing, transferring or spending any non-Federal funds, including Levin funds, when 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(c)(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).
The proposed rule would redesignate the introductory paragraph of 11 CFR 300.64 as paragraph (a) and amend it to state that Federal officeholders and candidates may not solicit, receive, direct, transfer, or spend non-Federal funds at any such event. Current section 300.64(a) would be redesignated as paragraph (b) without any substantive changes, and current section 300.64(b) would be deleted entirely.

Proposed 11 CFR 300.64(a)

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

The district court in Shays v. FEC held that this interpretation is another permissible reading of the statute. See 337 F. Supp. 2d at 89-90. The Commission seeks public comment on this alternative approach. In addition, if the Commission were to adopt this alternative approach, would it be appropriate to permit written notices or oral disclaimers similar to those discussed in Advisory Opinions 2003-03 and 2003-36 for
other fundraising events? The opinions addressed appearances, speeches, and
solicitations by covered persons at fundraising events where non-Federal funds were
being raised. Those opinions permitted covered persons to solicit funds and comply with
2 U.S.C. 441i(e)(1) by using either written notices or oral disclaimers. Alternatively,
would another type of notice or disclaimer be more appropriate?

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

[Regulatory Flexibility Act]

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

List of Subjects

11 CFR Part 300

Campaign funds, nonprofit organizations, political committees and parties,
political candidates, reporting and recordkeeping requirements.
For reasons set out in the preamble, Subchapter C of Chapter 1 of title 11 of the Code of Federal Regulations would be amended to read 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. Section 300.64 would be revised to read as follows:

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

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

(ba) State, district, or local committees of a political party may advertise, announce or otherwise publicize that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, publicizing such appearance in pre-event invitation materials and in other party committee communications; and
(b) Candidates and individuals holding Federal office may speak at such events without restriction or regulation.

Scott E. Thomas
Chairman
Federal Election Commission

DATED: ____________________________
BILLING CODE: 6715-01-U