MEMORANDUM

TO: The Commission

THROUGH: James A. Pehkon
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: Final Rules and Explanation and Justification on Political Party Committees Donating Funds to Certain Tax-Exempt Organizations and Political Organizations

March 3, 2005

On December 9, 2004, the Commission published a Notice of Proposed Rulemaking ("NPRM"), entitled "Political Party Committees Donating Funds to Certain Tax-Exempt Organizations and Political Organizations." See 69 FR 71388 (Dec. 9, 2004). The NPRM proposed certain changes needed to conform the Commission’s regulations in 11 CFR Part 300 to the decision of the Supreme Court in McConnell v. FEC, 540 U.S. 93, 174-181 (2003), which included a narrowing construction of BCRA section 101 (2 U.S.C. 441i(d)). Under this narrowing construction, party committees “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 180-181.

After reviewing the comments and considering the issues presented in the NPRM, the Office of the General Counsel has prepared the attached Final Rules and Explanation and Justification for Commission consideration. The draft Final Rules are the same as the rules proposed in the NPRM, except that revised 11 CFR 300.37 and 300.51 explicitly encompass Levin funds, which are a type of non-Federal funds, and typographical errors in sections 300.37(b)(2) and 300.51(b)(2) are corrected.
Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached Final Rules and Explanation and Justification for publication in the Federal Register and transmittal to Congress.

Attachment
FEDERAL ELECTION COMMISSION

11 CFR Part 300

[Notice 2005 - >]

Political Party Committees Donating Funds to

Certain Tax-Exempt Organizations and Political Organizations

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is revising its regulations governing donations made or directed by national, State, district, and local political party committees to certain tax-exempt organizations and political organizations. The final rules allow these political party committees to make or direct donations of Federal funds to certain 501(c) tax-exempt organizations and certain 527 political organizations. These revisions conform the Commission’s rules to the decision of the U.S. Supreme Court in McConnell v. Federal Election Commission, which included a narrowing construction of section 101 of the Bipartisan Campaign Reform Act of 2002. Further information is provided in the supplementary information that follows.

EFFECTIVE DATE: The effective date for the revisions to 11 CFR 300.11, 300.37, 300.50 and 300.51 is [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].
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:

Section 441i(d) of the Federal Election Campaign Act of 1971 (the “Act”), 2 U.S.C. 431 et seq., prohibits national, State, district and local political party committees from soliciting any funds for, or making or directing donations to, two types of tax-exempt organizations (“tax-exempt organizations that actively participate in Federal elections”). 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). 2 U.S.C. 441i(d)(1) and (2). This statutory provision was added to the Act by section 101 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107-155, 116 Stat. 81, 82-85 (2002).

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 49064, 49089-49091, and 49105-49106 (July 29, 2002) (“Soft Money Final Rules”). 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 49106.

Subsequently, in *McConnell v. Federal Election Commission*, 540 U.S. 93, 174-178 (2003), the Supreme Court upheld 2 U.S.C. 441i(d)’s prohibitions on the solicitation of funds for tax-exempt organizations that actively participate in Federal elections. The Supreme Court also upheld restrictions on making and directing donations of non-Federal funds to such tax-exempt organizations. Here, the Supreme Court stated that, “[a]bsent such a restriction, state and local party committees could accomplish directly what the antisolicitation restrictions prevent them from doing indirectly—namely, raising large sums of soft money to launder through tax-exempt organizations engaging in federal election activities.” Id. at 178-179. However, the Supreme Court stated that section 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.” Id. at 179. 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” and concluded that “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 180-181.

To conform its regulations to the Supreme Court’s decision in *McConnell*, the Commission proposed modifying 11 CFR 300.11, 300.37, 300.50 and 300.51 to provide that political party committees, while prohibited from soliciting funds for tax-exempt organizations that actively participate in Federal elections, are now free to make or direct donations of Federal
funds to any tax-exempt organization. The Notice of Proposed Rulemaking ("NPRM") containing this proposal was published in the Federal Register on December 9, 2004.

69 FR 21388 (Dec. 9, 2004). The public comment period closed on January 10, 2005. The Commission received two written comments (both jointly submitted) in response to the NPRM. Both groups of commenters supported the proposed rules.

These final rules are the same as the rules proposed in the NPRM, except that revised 11 CFR 300.37 and 300.51 explicitly encompass Levin funds, which are a type of non-Federal funds, and typographical errors in sections 300.37(b)(2) and 300.51(b)(2) are corrected.

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the Federal Register at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on ______, 2005.

EXPLANATION AND JUSTIFICATION

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

Section 300.11 implements 2 U.S.C. 4411(d) by prohibiting national committees of a political party from soliciting any funds for, or making or directing any donations to, tax-exempt organizations that actively participate in Federal elections. To implement the Supreme Court’s decision in McConnell, the Commission is amending paragraph (a) of 11 CFR 300.11 to allow

1 "Federal funds" are funds that comply with the limitations, prohibitions, and reporting requirements of the Act. 11 CFR 300.2(g). "Non-Federal funds" are funds that are not subject to the limitations and prohibitions of the Act. 11 CFR 300.2(k).

2 The comments are available at http://www.fec.gov/register.html under "Political Party Committees Donating Funds to Certain Tax-Exempt Organizations and Political Organizations."
national party committees to make or direct donations of Federal funds to tax-exempt
organizations that actively participate in Federal elections. Under the revised rule, national party
committees must not make or direct donations of non-Federal funds to such tax-exempt
organizations. This statutory and regulatory prohibition is consistent with 2 U.S.C. 441i(a) and
11 CFR 300.10(a), which more generally prohibit national party committees from spending
funds or directing to another person donations of funds not subject to the limitations, prohibitions
and reporting requirements of the Act. The prohibition on the solicitation of funds by national
party committees for tax-exempt organizations that actively participate in Federal elections
remains unchanged in section 300.11(a). The Commission is also making a technical
amendment to section 300.11(b)(3) by removing the reference to a State, district, or local party
committee, because only national party committees are the subject of section 300.11. Both
groups of commenters agreed with the Commission’s proposed modifications to section 300.11.
The final rules for section 300.11 are identical to the proposed rules.

11 CFR 300.37 -- Prohibitions on fundraising for and donating to certain tax-exempt
organizations

Section 300.37 implements 2 U.S.C. 441i(d) by prohibiting State, district and local
committees of a political party from soliciting any funds for, or making or directing any
donations to, tax-exempt organizations that actively participate in Federal elections, similar to
the restrictions placed on national committees of a political party in 11 CFR 300.11. As
discussed above, restrictions on making or directing donations of Federal funds by these party
committees are unconstitutional under McConnell. Consequently, the Commission is revising
paragraph (a) of 11 CFR 300.37 to permit the use of Federal funds in this manner. Thus, revised
section 300.37(a) limits the prohibition on making or directing donations to donations of non-
Federal funds. The prohibition on soliciting funds for tax-exempt organizations that actively
participate in Federal elections remains in revised section 300.37(a).

Additionally, the NPRM sought comment on whether State, district and local party
committees should be allowed to make or direct donations of Levin funds to tax-exempt
organizations that actively participate in Federal elections if permitted by State law. State,
district and local party committees may use an allocable mix of Federal funds and Levin funds to
pay for certain types of Federal election activity, including voter registration activity during the
120 days preceding a regularly scheduled Federal election, and voter identification, get-out-the-
vote, and generic campaign activity that is conducted in connection with an election in which a
candidate for Federal office appears on the ballot. 2 U.S.C. 431(20), 441i(b)(1) and (2); 11 CFR
100.24; see also 300.32 and 300.33. State, district and local party committees may not use Levin
funds, or other non-Federal funds, for any public communication that promotes or supports or
attacks or opposes a clearly identified candidate for Federal office. 2 U.S.C. 441i(b)(1); 11 CFR
300.32(c).

In the Soft Money Final Rules, the Commission concluded that Levin funds are a “new
type of non-Federal funds.” 67 FR at 49065. The Commission found that Levin funds 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.” Id.
at 49085. Levin funds are generally described as non-Federal funds; e.g., when presenting the
Levin amendment to Congress, the sponsor of the Levin amendment stated “this amendment will
allow the use of some non-Federal dollars by State parties for voter registration and get out the
added]. Consequently, State, district and local party committees may deposit Levin funds in their non-Federal account if they do not maintain a separate Levin account. 11 CFR 300.30(c)(3). Thus, Schedules H5 and H6 to FEC Form 3X and the related instructions treat Levin funds as one type of non-Federal funds.

Both groups of commenters agreed with the Commission’s proposed modifications to section 300.37. One group of commenters supported the restriction on the donation of Levin funds for several reasons. These commenters observed that the Supreme Court’s statements about BCRA provide “no basis to think that the [Supreme] Court was including Levin funds in its reference to funds from a ‘party’s federal account.’” Second, the commenters relied on the legislative history of section 441i(b)(2), which allows State parties to use only limited amounts of non-Federal funds for voter registration and get-out-the-vote activities. Third, the commenters noted the Commission’s prior interpretation of section 441i(b)(2) in the Soft Money Final Rules, where the Commission explicitly treated Levin funds as a new type of non-Federal funds. Lastly, the commenters pointed to the danger that BCRA’s Levin fund spending restrictions could easily be circumvented if State, district and local party committees are allowed to make or direct donations of Levin funds to tax-exempt organizations that actively participate in Federal elections because such organizations are not subject to section 441i(b)’s spending restrictions. Thus, these commenters find that “[t]he statutory language and legislative history of the Levin amendment establish that Levin funds are most accurately characterized as non-Federal funds.”

2 Similarly, in the Explanation and Justification for the regulations implementing the Levin Amendment, the Commission noted that “BCRA’s Levin Amendment provides that State, district, and local political party committees may spend certain non-Federal funds for Federal election activities if those funds comply with certain requirements. 2 U.S.C. 441i(b)(2)(A)(ii). Thus, these funds are unlike Federal funds, which are fully subject to the Act’s requirements ...” 67 FR at 49085.
These commenters conclude that “Levin funds are not the kind of funds that the [Supreme Court in McConnell] intended to permit state parties to donate or direct to tax exempt groups.”

The Commission concludes that, consistent with its previous treatment of Levin funds as non-Federal funds, Levin funds may not be donated or directed to tax-exempt organizations that actively participate in Federal elections. Levin funds are funds donated to State, district or local party committees, in accordance with State law, from corporations, labor organizations, or other “persons” in amounts up to $10,000 per calendar year. 2 U.S.C. 441i(b)(2); 11 CFR 300.2(i).

There would be a danger of circumvention of BCRA’s soft money restrictions if State, district and local party committees could donate corporate and labor union funds of up to $10,000 per donor to tax-exempt organizations that may use these funds for voter identification, voter registration, get-out-the-vote and other activities, and for communications that promote, support, attack or oppose Federal candidates, because State, district and local party committees may not use Levin funds for Federal election activity that refers to a clearly identified Federal candidate, and may not use Levin funds, or other non-Federal funds, for public communications that promote or support or attack or oppose a clearly identified Federal candidate. 2 U.S.C. 441i(b)(1) and (b)(2)(B)(i); 11 CFR 300.32(c).

For these reasons, the final rules for section 300.37(a) are identical to the proposed rules, except that the final rules explicitly include Levin funds as a type of non-Federal funds subject to section 441i(d). The Commission is also correcting a typographical error in section 300.37(b)(2). The phrase “State, district or local committee of a political party” [emphasis added] is revised to read “State, district or local committee of a political party” [emphasis added].

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4 Foreign nationals may not donate Levin funds. 2 U.S.C. 441e; 11 CFR 300.31(c).
11 CFR 300.50 -- Prohibited fundraising by national party committees

For the reason discussed above regarding the revision to section 300.11, the Commission is revising paragraph (a) of 11 CFR 300.50 to specify that a national committee of a political party may not make or direct donations of non-Federal funds to tax-exempt organizations that actively participate in Federal elections. The prohibition on soliciting funds for these groups remains in revised section 300.50(a). Similarly, the Commission is revising section 300.50(b)(3) by removing the reference to a State, district, or local party committee, because only national party committees are the subject of section 300.50. Both groups of commenters agreed with the Commission's proposed modifications to section 300.50. The final rules for section 300.50 are identical to the proposed rules.

11 CFR 300.51 -- Prohibited fundraising by State, district, or local party committees

For the reasons discussed above regarding the revision to section 300.37, the Commission is revising paragraph (a) of 11 CFR 300.51 to specify that a State, district or local committee of a political party may not make or direct donations of non-Federal funds, including Levin funds, to tax-exempt organizations that actively participate in Federal elections. The prohibition on soliciting funds for these groups remains in revised section 300.51(a).

Both groups of commenters agreed with the Commission's proposed modifications to section 300.51. The final rules for section 300.51(a) are identical to the proposed rules, except that the final rules state explicitly that Levin funds are non-Federal funds. The Commission is also amending section 300.51(b)(2) to correct a typographical error. The phrase “State, district or local committee or a political party” [emphasis added] is revised to read “State, district or local committee of a political party” [emphasis added].
Other issues

One group of commenters urged the Commission to amend 11 CFR 102.17, 300.31(e) and 300.31(f) regarding the use of jointly raised or transferred Federal funds for Federal election activity by State, district and local party committees. These changes are beyond the scope of this rulemaking.

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

The Commission certifies that the attached rules do not have a significant economic impact on a substantial number of small entities for two reasons. First, the national, State, district and local party committees of the two major political parties 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 other national, State, district and local party committees may fall within the definition of “small entities,” their numbers are not substantial. Second, the final rules narrow the scope of restrictions applicable to national, State, district and local political party committees, and thus do 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 amends
subchapter C of chapter 1 of title 11 of the Code of Federal Regulations as follows:

PART 300 – NON-FEDERAL FUNDS

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

2. In section 300.11, the introductory text of paragraph (a) and paragraph (b)(3) are 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 section 300.37, the introductory text of paragraph (a) and paragraph (b)(2) are 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, including Levin funds, to:

(b) *

(2) An entity that is directly or indirectly established, financed, maintained or controlled by a State, district or local committee of a political party or an officer or agent acting on behalf of such an entity; or

* *

4. In section 300.50, the introductory text of paragraph (a) and paragraph (b)(3) are revised to read as follows:

§ 300.50 Prohibited fundraising by national party committees (2 U.S.C. 441f(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 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.

* *

5. In section 300.51, the introductory text of paragraph (a) and paragraph (b)(2) are revised to read as follows:
§ 300.51 Prohibited fundraising by State, district, or local party committees (2 U.S.C. 441j(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, including Levin funds, to:

(b) (2) An entity that is directly or indirectly established, financed, maintained or controlled by a State, district or local committee of a political party or an officer or agent acting on behalf of such an entity; or

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Scott E. Thomas
Chairman
Federal Election Commission

DATED
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