MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
       Acting Staff Director

FROM: Lawrence H. Norton
       General Counsel
       Rosemary C. Smith
       Associate General Counsel
       Brad C. Deutsch
       Assistant General Counsel
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       Attorney

SUBJECT: Final Rules and Explanation and Justification: $5,000 Exemption for the Disbursements of Levin Funds by State, District, and Local Party Committees and Organizations

Attached are draft Final Rules and Explanation and Justification eliminating from the regulations the $5,000 Exemption for the disbursements of Levin funds by State, district, and local party committees and organizations pursuant to the Court of Appeals decision in Shays v. FEC, 337 F.Supp.2d 28 (D.D.C. 2004), aff'd, 414 F.3d 76 (D.C. Cir. July 15, 2005), reh'g en banc denied (October 21, 2005) (No. 04-5352).

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 – ]

$5,000 Exemption for Disbursements of Levin Funds by

State, District, and Local Party Committees and Organizations

AGENCY: Federal Election Commission.

ACTION: Final Rules.

SUMMARY: The Federal Election Commission is eliminating from its regulations an exemption allowing State, district, and local committees and organizations of a political party to use only Levin funds to pay for certain types of Federal election activity aggregating $5,000 or less in a calendar year. In Shays v. FEC, the District Court invalidated the exemption and remanded the regulation to the Commission for further action consistent with the court’s opinion. The Commission appealed this ruling, and the Court of Appeals for the D.C. Circuit affirmed the District Court’s decision. The repeal of this rule means that State, district, and local political party committees and organizations must pay for these specific types of Federal election activity either entirely with Federal funds, or with a mix of Federal funds and Levin funds. Further information is provided in the supplementary information that follows.
DATES: The rules at 11 CFR 300.32(c)(4) are effective on [Insert date 30 days after the date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Brad C. Deutsch, Assistant General Counsel, or Ms. Cheryl A.F. Hemsley, Attorney, 999 E Street NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

The Commission issued a Notice of Proposed Rulemaking ("NPRM") proposing to eliminate from its regulations at 11 CFR 300.32(c)(4) an exemption that had allowed State, district, and local committees of a political party\(^1\) to pay for certain types of Federal election activity ("FEA")\(^2\) aggregating $5,000 or less in a calendar year entirely with Levin funds\(^3\) ("$5,000 Exemption"). The NPRM also requested comments on the possibility of creating a new, restructured exemption. The NPRM was published in the Federal Register on February 2, 2005. 70 FR 5385 (February 2, 2005). The comment period closed on March 4, 2005. The Commission received five comments from ten

\(^1\) In addition to political party committees, these regulations are equally applicable to State, district, and local party organizations that do not qualify as political committees. See 11 CFR 300.33(a)(1) and (2).

\(^2\) There are four types of FEA: Type 1 - Voter registration activity during the period that begins on the date that is 120 days before a regularly scheduled Federal election is held and ends on the date of the election; Type 2 - Voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot; Type 3 - A public communication that promotes or supports, or attacks or opposes a clearly identified candidate for Federal office; and Type 4 - Services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of his or her compensated time during that month on activities in connection with a Federal election. See 2 U.S.C. 431(20) and 11 CFR 100.24.

\(^3\) Levin funds are funds that are raised by State, district, or local party committees and organizations 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).
commenters on the proposed rules.\textsuperscript{4} Eight commenters favored elimination of the $5,000 Exemption and one commenter favored maintaining the $5,000 Exemption.

Additionally, the Commission received a comment from the Internal Revenue Service, indicating “the proposed rules do not pose a conflict with the Internal Revenue Code or the regulations thereunder.” The Commission is issuing final rules eliminating the $5,000 Exemption and is declining to adopt a restructured exemption.

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 rule that follows was transmitted to Congress on ___, 2005.

\textbf{Explanation and Justification}

11 CFR 300.32(c) – Conditions and Restrictions on Spending Levin Funds

The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107-155, 116 Stat. 81 (2002), amended the Federal Election Campaign Act of 1971 (the “Act”), 2 U.S.C. 431 et seq., in many respects. Section 441i(b)(1) of the Act, as added by BCRA, provides that State, district, and local political party committees generally must use Federal funds\textsuperscript{5} to pay for FEA. However, the Levin Amendment (2 U.S.C. 441i(b)(2)) provides an exception for two types of FEA, for which State, district, and local political party committees may allocate disbursements between Federal funds and

\textsuperscript{4} All comments on the NPRM are available at http://www.fec.gov/law/law_rulemakings.shtml#levin.

\textsuperscript{5} “Federal funds” are funds that comply with the limits, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g).
Levin funds in accordance with allocation ratios determined by the Commission.

2 U.S.C. 441i(b)(2); see also 11 CFR 300.2(i), 300.32, and 300.33. Types 1 and 2 FEA, which involve certain voter registration, get-out-the-vote, voter identification, and generic campaign activity, are allocable between Federal and Levin funds, so long as the activities do not refer to a clearly identified Federal candidate ("allocable Type 1&2 FEA"). See 2 U.S.C. 441i(b)(2)(B)(i) and 11 CFR 300.32(c).

In 2002, the Commission promulgated regulations at 11 CFR Part 300 implementing BCRA. See Final Rules and Explanation and Justification for Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR 49064 (July 29, 2002). Specifically, 11 CFR 300.32(c)(4) required any State, district, or local committee or organization of a political party that disburses more than $5,000 for allocable Type 1&2 FEA in a calendar year either to pay for such allocable FEA entirely with Federal funds or to allocate the disbursements between Federal funds and Levin funds. The same provision also created a "de minimis exemption" for any State, district, or local party committee or organization whose disbursements for allocable Type 1&2 FEA aggregate $5,000 or less in a calendar year, thereby permitting such party committees and organizations to pay for these expenses entirely with Levin funds.

The $5,000 Exemption was one of several regulations at issue in Shays v. FEC, 337 F.Supp.2d 28 (D.D.C. 2004) ("Shays District"), aff'd, 414 F.3d 76 (D.C. Cir. July 15, 2005) ("Shays Appeal"), reh'g en banc denied (October 21, 2005) (No. 04-5352). The District Court in Shays District held that the $5,000 Exemption in 11 CFR 300.32(c)(4) was inconsistent with Congress's intent, as expressed in BCRA, to require State, district, and local party committees to pay for allocable Type 1&2 FEA either solely with Federal
funds or with an allocated mix of Federal funds and Levin funds. *Shays District* at 114-17.

The Commission appealed the District Court’s ruling regarding several of its regulations, including 11 CFR 300.32(c)(4). On July 15, 2005, the Court of Appeals for the D.C. Circuit affirmed the District Court’s invalidation of the $5,000 Exemption. *Shays Appeal* at 115. In affirming the District Court’s invalidation of the $5,000 Exemption, the Court of Appeals concluded that the Commission had failed to establish that the $5,000 Exemption was “in fact de minimis.” *Shays Appeal* at 114. The Court of Appeals also concluded that because Congress had exercised its judgment in enacting the Levin Amendment, “Congress’s rationale for including activities in the Levin Amendment obviously affords no justification for excluding them from Levin allocation, the very form of regulation Congress chose.” *Id.* (emphasis in original).

The NPRM proposed to eliminate entirely the $5,000 Exemption in 11 CFR 300.32(c)(4). In response to the NPRM, eight commenters urged the Commission to eliminate the $5,000 Exemption altogether. These commenters stated that BCRA was clear on its face and argued that the Levin Amendment itself reflected Congress’s narrowly-drawn exception allowing State, district, and local party committees to use only Federal funds or to allocate between Federal and Levin funds for allocable Type 1&2 FEA. Four of the commenters noted that the Levin Amendment was, itself, a compromise reached during Congressional deliberation. These commenters asserted that Congress had contemplated that Levin funds always would be used in combination with Federal funds for allocable Type 1&2 FEA, recognizing that FEA activities influence Federal elections.
On the other hand, one commenter favored retaining the $5,000 Exemption, stating that the exemption did not undermine Congressional intent. Specifically, this commenter asserted that absent the $5,000 Exemption, a strict application of the Levin Amendment would lead to suppression of “local grassroots activity in favor of non-party or large institutional party activity” and that this was “an unlikely objective” for Congress.

1. Elimination of the Current $5,000 Exemption

In light of the conclusions reached by the Court of Appeals in Shays Appeal, which precluded retaining the current rule, the Commission has decided to eliminate the $5,000 Exemption from paragraph (c)(4) of section 300.32. Thus, revised paragraph (c)(4) requires State, district, and local committees and organizations of political parties to pay for all allocable Type 1 & 2 FEA either entirely with Federal funds or with an allocated mix of Federal funds and Levin funds, without regard to the total amount of their annual disbursements. The wording of revised 11 CFR 300.32(c)(4) also includes a conforming revision that replaces the word “may” with “must” to reflect unambiguously that State, district, and local party committees and organizations must choose between paying for such expenditures either entirely with Federal funds or with an allocated mix of Federal funds and Levin funds.

2. Rejection of a Restructured Exemption

As noted above, the NPRM also requested comments on a possible restructuring of the exemption in section 300.32(c)(4) to mirror the reporting exception contained in section 434(e)(2)(A) of the Act, which exempts State, district, and local party committees from reporting FEA if they have combined receipts and disbursements for FEA (whether
allocable or not) that together aggregate to less than $5,000 in a calendar year. Seven
commenters addressed the restructuring proposal, all of them asserting that any
restructured exemption would be contrary to Congressional intent.

As discussed above, the Court of Appeals held that the careful balance already
reflected in the Levin Amendment represents Congress’s exercise of its judgment, and
effectively precludes the Commission from promulgating a further exemption unless such
an exemption were “truly de minimis.” Shays Appeal at 114. In light of the comments
received in this rulemaking and the decision of the Court of Appeals, the Commission has
decided not to adopt the restructuring proposal contained in the NPRM.

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

[Regulatory Flexibility Act]

The Commission certifies that the attached final rule does 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 final rule are State, district, and
local party committees and organizations, 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
final rule is not substantial.

List of Subjects

11 CFR Part 300

Campaign funds, Nonprofit organizations, Political candidates, Political committees and
parties, Reporting and recordkeeping requirements.
For the reasons set out in the preamble, the Federal Election Commission is amending 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 continues to read as follows:

   Authority: 2 U.S.C. 434(e), 438(a)(8), 441a(a), 441i, 453.

2. Section 300.32 is amended by revising paragraph (c)(4) to read as follows:

   § 300.32 Expenditures and disbursements.

   (c) Conditions and restrictions on spending Levin funds.

   (4) The disbursements for allocable Federal election activity that exceed in the aggregate $5,000 in a calendar year must be paid for either entirely with Federal funds or may be by allocated between Federal funds and Levin funds according to 11 CFR 300.33. Disbursements for Federal election activity that may be allocated and that aggregate $5,000 or less in a calendar year may be paid for entirely with Federal funds, entirely with Levin funds, or may be allocated between Federal funds and Levin funds according to 11 CFR 300.33.

   ____________________________
   Scott E. Thomas
   Chairman
   Federal Election Commission

DATED ____________
BILLING CODE: 6715-01-P