FEDERAL ELECTION COMMISSION

11 CFR Part 300

[Notice 2010–11]

Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission ("Commission") is revising its rules 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. Consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays* v. *FEC,* Federal candidates and officeholders may no longer speak at State, district, and local party fundraising events "without restriction or regulation." The revised rules address participation by Federal candidates and officeholders at all non-Federal fundraising events that are in connection with an election for Federal office or any non-Federal election and in related publicity.

DATES: *Effective Date:* These rules are effective on June 4, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Attorneys, Mr. David C. Adkins or Mr. Neven F. Stipanovic, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 [1] ("BCRA") contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* ("the Act"). The Commission promulgated a number of rules to implement BCRA, including rules at 11 CFR 300.64 regarding Federal candidate and officeholder solicitations at State, district, and local party committee fundraising events. The Court of Appeals for the District of Columbia Circuit found aspects of these rules invalid in *Shays* v. *FEC,* 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"). The Commission is revising its rules at 11 CFR 300.64 to implement the *Shays III* decision.

I. Background Information

A. BCRA

In 2002, Congress amended the Act by restricting the fundraising activity of Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, controlled by, or acting on behalf of, Federal candidates or officeholders. *See* BCRA at Section 323(e) (codified at 2 U.S.C. 441i(e)). These persons may not "solicit, receive, direct, transfer or spend" funds in connection with an election for Federal office or any non-Federal election unless the funds comply with the amount limitations and source prohibitions of the Act.[2] *See* 2 U.S.C. 441i(e)(1)(A) and (e)(1)(B); 11 CFR 300.61 and 300.62. Furthermore, Congress prohibited State, district and local party committees from accepting or using as Levin funds [3] any funds that have been solicited, received, directed, transferred, or spent by or in the name of Federal candidates and officeholders. Thus, Federal candidates and officeholders were effectively prohibited from raising Levin funds. *See* 2 U.S.C. 441i(b)(2)(C)(i); 11 CFR 300.31(e).

As one principal BCRA sponsor noted, "The basic rule in the bill is that federal candidates and officials cannot raise non-federal (or soft) money donations—that is, funds that do not comply with federal contribution limits and source prohibitions." 148 Cong. Rec. H407 (daily ed. Feb. 13, 2002) (statement of Rep. Shays). As that ban related to party committees, another of BCRA's main sponsors noted: "The rule here is simple: Federal candidates and officeholders cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee—national, State, or local." 148 Cong. Rec. S2139 (daily ed. March 20, 2002) (statement of Sen. McCain).

Notwithstanding these restrictions, though, Section 323(e)(3) of BCRA states explicitly that Federal candidates and officeholders are permitted to "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." *See* 2 U.S.C. 441i(e)(3).

B. 2002 Rulemaking

In 2002, the Commission commenced a rulemaking to establish rules governing Federal candidate and officeholder participation in State, district, and local party committee fundraising events. The Commission proposed alternative interpretations of 2 U.S.C. 441i(e)(3). One interpretation would have allowed Federal candidates and officeholders only to attend, speak, or be a featured guest at State, district, and local party committee fundraising events, but, consistent with the Act's prohibition on the solicitation of funds outside the amount limitations and source prohibitions of the Act by Federal candidates and officeholders, would have prohibited those persons from soliciting, receiving, directing, transferring, or spending funds or participating in any other fundraising aspect of a State, district, or local party committee fundraising event. *See* Notice of Proposed Rulemaking on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR 35654, 35672, 35688 (May 20, 2002) ("2002 NPRM").

An alternative interpretation proposed a "total exemption from the general solicitation ban." 2002 NPRM at 35672–73; *see also* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. Under this interpretation, Federal candidates and officeholders would be permitted to "speak freely at [party fundraising events] without restriction or regulation." 2002 NPRM at 35672–73. The Commission separately explored how 2 U.S.C. 441i(e)(3)—specifically, its reference to "featured guests"—affected the role that Federal candidates and officeholders could play in publicizing State, district, and local party committee events. *See* 2002 NPRM at 35673. For example, the Commission sought comment on whether this provision of BCRA allowed Federal candidates and officeholders to be named in invitation materials and to appear as members of a host committee. *Id.*

The Commission concluded that Section 441i(e)(3) was a total exemption from the general solicitation ban. Under the Commission's regulation, Federal candidates and officeholders were permitted to attend, speak, and appear

[1] Public Law 107–155, 116 Stat. 81 (2002).

[2] The amount limitations on contributions depend on the type of contributor and the recipient. *See* 2 U.S.C. 441a(a)(1), (2), and (3). For example, an individual and a non-multicandidate PAC may each contribute up to $2,400 per election to a candidate, up to $5,000 per calendar year to a PAC, and up to $10,000 per year to a State party committee (or to a State party's respective district and local party committees, which share the State party committee's combined limit). A multicandidate PAC, by contrast, may contribute up to $5,000 per election to a candidate, up to $5,000 per calendar year to a PAC, and up to $5,000 per calendar year to a State party committee (or to a State party's respective district and local party committees, which share the State party committee's combined limit). Sources prohibited from making contributions under the Act include national banks, corporations, labor organizations, and foreign nationals. *See* 2 U.S.C. 441a, 441b, and 441e; *see also* 2 U.S.C. 441c (government contractors) and 441f (contributions made in the name of another). Furthermore, funds raised in connection with an election for Federal office are subject to the reporting requirements of the Act. *See* 2 U.S.C. 441i(e)(1)(A).

[3] "Levin funds" are funds raised by State, district, or 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).

as featured guests at State, district, and local party committee 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) ("2002 Final Rule"); 11 CFR 300.64(b). The Commission did not, however, interpret 2 U.S.C. 441i(e)(3) to allow unrestricted participation in publicity by Federal candidates and officeholders. Indeed, the Commission concluded that Federal candidates and officeholders were "prohibited from serving on 'host committees' for a party fundraising event or from personally signing a solicitation in connection with a State, local, or district party fundraising event on the basis that these pre-event activities are outside the permissible activities* * * flowing from a Federal candidate's or officeholder's appearance or attendance at the event." *See* 2002 Final Rule at 49108.

C. Shays I

The Commission's 2002 regulation implementing 2 U.S.C. 441i(e)(3) was challenged in *Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I*"). The district court held that the meaning of 2 U.S.C. 441i(e)(3) was ambiguous, and that the Commission's regulation was not necessarily contrary to congressional intent. *Shays I* at 90 (applying *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). And, while the court acknowledged that the regulation created "the potential for abuse," it did not find that the regulation unduly compromised BCRA's purpose such that it was not entitled to deference from the court. *Id.* at 91. The court did, however, find that the Commission's explanation of the rule was inadequate and, therefore, in violation of the Administrative Procedure Act, 5 U.S.C. 553. *Shays I* at 92–93. The Commission did not challenge this holding by the district court.

D. 2005 Rulemaking

Upon remand, the Commission commenced a rulemaking to implement the *Shays I* district court's opinion. *See* Revised Explanation and Justification, Candidate Solicitation at State, District and Local Party Fundraising Events, 70 FR 37649 (June 30, 2005) ("2005 Revised E&J"). This rulemaking provided additional explanation and justification of the 2002 Final Rule, but it did not change the text of that rule. The Commission, as it did in 2002, concluded that 2 U.S.C. 441i(e)(3) was a total exemption from the general solicitation ban. Thus, Federal candidates and officeholders could still attend, speak, and appear as featured guests at State, district, and local party committee fundraising events "without restriction or regulation." *See* 2005 Revised E&J at 37650–51.

E. Shays III

Against this backdrop, the Commission's rule implementing 2 U.S.C. 441i(e)(3) was again challenged in court. The District Court for the District of Columbia upheld the Commission's regulation. *Shays* v. *FEC,* 508 F. Supp. 2d. 10 (D.D.C. 2007).

On appeal, however, the United States Court of Appeals for the District of Columbia Circuit reversed the district court, concluding that the total exemption from the general solicitation ban "allows what BCRA directly prohibits." *Shays III* at 933. In addressing the Commission's regulation, the Court first concluded that 2 U.S.C. 441i(e)(3) did not create an ambiguity in the law, but should be read as "merely clarif[ying] that * * * federal candidates may still 'attend, speak, or be a featured guest' at State party events where soft money is being raised, which the statute might otherwise be read as forbidding." *Id.* The court then held that the Commission had "no basis" to read 2 U.S.C. 441i(e)(3) as creating "an implied fourth exception" to the solicitation restrictions at Section 441i(e)(1), given that Congress had explicitly enumerated the instances in which Federal candidates and officeholders could "solicit" funds outside BCRA's restrictions. *Id.* at 933–34. The court found compelling the specific language in the statute—noting that "Congress repeatedly used the term 'solicit' and 'solicitation' in Section 441i—over a dozen times—yet chose not to do so in Section 441i(e)(3)."

F. Advisory Opinions

The Commission has also issued several advisory opinions regarding aspects of participation by Federal candidates and officeholders in non-Federal fundraising events not specifically addressed by the Act and regulations. In particular, the Commission has provided guidance on the extent to which Federal candidates and officeholders may participate in non-Federal fundraising events for entities other than State, district, and local party committees and the degree to which that participation can be publicized before such an event.

In Advisory Opinions 2003–02 (Cantor) and 2003–36 (Republican Governors Association), the Commission stated that a Federal candidate or officeholder may attend and speak at non-Federal fundraising events for State and local candidates and other non-Federal political organizations, even if non-Federal funds are being raised at the event. The Commission concluded that this type of participation would not violate BCRA's restrictions on soliciting funds outside the limits and prohibitions of the Act because attending such an event or giving a speech at such an event is not a solicitation under Commission regulations.

In those same advisory opinions, the Commission also determined that Federal candidates and officeholders may solicit funds at events at which non-Federal funds are being raised if their solicitations are limited to funds that comply with the amount limitations and source prohibitions of the Act. To ensure that these solicitations are properly limited, Federal candidates and officeholders have had to either (1) make a specific solicitation such as "I am soliciting $500 from individuals only," or (2) condition a general solicitation with a disclaimer indicating that the solicitation is only for funds within the limitations and prohibitions of the Act. This disclaimer may be made orally by the Federal candidate or officeholder or, alternatively, in writing by posting at the event a clear and conspicuous notice limiting the solicitation.

The Commission also issued several advisory opinions addressing the role that Federal candidates and officeholders may play in publicizing non-Federal fundraising events for State, district, and local party committees and other non-Federal entities. *See* Advisory Opinions 2003–03 (Cantor), 2003–36 (Republican Governors Association), and 2007–11 (California State Party Committees). The Commission reasoned that if publicity does not contain a solicitation, then it is not subject to BCRA's solicitation restrictions. *Id.* If the publicity does contain a solicitation, and the Federal candidate or officeholder consents to be featured or appear in the publicity, then the publicity must contain a clear and conspicuous disclaimer limiting the solicitation to funds compliant with the amount limitations and source prohibitions of the Act. *See* Advisory Opinions 2003–03 (Cantor), and 2003–36 (Republican Governors Association). The Commission made clear, however, that Federal candidates and officeholders may not solicit funds in excess of the limitations and prohibitions of the Act and then qualify that impermissible solicitation with a limiting disclaimer. *See* Advisory

Opinion 2003–36 (Republican Governors Association).

The Commission was unable to resolve whether a Federal candidate or officeholder could be named as honorary chairperson or featured speaker in a solicitation for non-Federal funds that is not otherwise signed by the Federal candidate or officeholder. *See* Advisory Opinions 2003–36 (Republican Governors Association) and 2007–11 (California State Party Committees). In addition, the Commission was unable to resolve whether a Federal candidate or officeholder may be named as a featured speaker on publicity that is mailed with (*e.g.,* in the same envelope as) a solicitation for non-Federal funds that does not name a Federal candidate or officeholder. *See* Advisory Opinion 2007–11 (California State Party Committees).

G. Present Rulemaking

In response to the circuit court's decision in *Shays III,* the Commission published a Notice of Proposed Rulemaking on December 7, 2009. *See* Notice of Proposed Rulemaking on Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 74 FR 64016 (Dec. 7, 2009) ("NPRM"). The NPRM proposed three alternative revisions to the Commission's rule at 11 CFR 300.64. The first alternative proposed a surgical revision to the rule, striking the "without restriction or regulation" language but leaving the other language unchanged. The other two alternatives effected the same change but also proposed new rules governing Federal candidate and officeholder participation in all non-Federal fundraising events—those for State, district, and local party committees as well as other entities, including State and local candidates and State political committees and organizations—and related publicity.

The initial public comment period for the NPRM closed on February 8, 2010, and a reply comment period concluded on February 22, 2010. In total, the Commission received seven comments (six initial comments and one reply comment) from seven commenters. The Commission held a public hearing on the proposed rules on March 16, 2010, at which four witnesses testified. All comments and a public transcript of the hearing are available at *http://www.fec.gov/law/law_rulemakings.shtml#solicitationshays3*. For purposes of this document, the terms "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

These final rules address participation by Federal candidates and officeholders at all fundraising events in connection with an election for Federal office or any non-Federal election—both those for State, district, and local party committees and those for other entities—at which funds outside the amount limitations and source prohibitions of the Act, or Levin funds, are solicited, even if funds that comply with the amount limitations and source prohibitions are also solicited at the event. The final rules cover participation by Federal candidates and officeholders at the event as well as participation by Federal candidates and officeholders in publicizing the event. Importantly, they set forth the manner in which Federal candidates, officeholders, and their agents can be involved in such activities without making a solicitation of funds outside the amount limitations and source prohibitions of the Act.

Under the APA, 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 April 30, 2010.

II. Explanation and Justification

The Commission is amending 11 CFR 300.64 in response to the circuit court's decision in *Shays III.* In the NPRM, the Commission proposed three alternative rules. Alternative 1 would have removed the "without restriction or regulation" language from 11 CFR 300.64 pursuant to the decision of the *Shays III* court, and would have left the rest of the rule largely intact. Under Alternative 1, 11 CFR 300.64 would have continued to address only fundraising events for State, district, and local party committees.

Alternatives 2 and 3 proposed more extensive revisions of 11 CFR 300.64. Like Alternative 1, and in response to the court of appeals' decision, both Alternatives 2 and 3 would have removed the "without restriction or regulation" language from 11 CFR 300.64. Unlike Alternative 1, Alternatives 2 and 3 also proposed addressing more broadly participation by Federal candidates and officeholders at all fundraising events at which funds outside the limits and prohibitions of the Act are raised ("non-Federal fundraising events"), and not just party committee events. Alternatives 2 and 3 proposed detailed guidance on Federal candidate and officeholder participation at non-Federal fundraising events. In addition, the alternatives proposed guidance on the manner in which Federal candidates and officeholders could participate in publicizing such events. While Alternatives 2 and 3 addressed the same range of activities, their treatment of those activities differed. Alternative 2 proposed a single set of rules for all non-Federal fundraising events and related publicity; it did not distinguish State, district, and local party events from other non-Federal fundraising events. Alternative 3, though, proposed two different standards: One for State, district, and local party committee fundraising events and another for non-party fundraising events.

The contrasting approaches in Alternatives 2 and 3 were rooted in differing interpretations of 2 U.S.C. 441i(e)(3), particularly in the wake of the *Shays III* decision. Alternative 2 was predicated on the statement in the *Shays III* decision that 2 U.S.C. 441i(e)(3) "merely clarifies" that Federal candidates may attend, speak, and appear as featured guests at State, district, and local party committee events without such activities constituting an unlawful "solicitation." *Shays III* at 933. As a "mere[ ] clarif[ication]," 2 U.S.C. 441i(e)(3) neither affords special permissions with regard to Federal candidate and officeholder participation in State, district, and local party committee fundraising events, nor does it imply any restrictions with regard to other non-Federal fundraising events. Accordingly, Alternative 2 did not distinguish between State, district, and local party events and other non-Federal fundraising events.

Alternative 3 was instead informed by an interpretation of 2 U.S.C. 441i(e)(3) as establishing a limited statutory exception for Federal candidates to attend, speak and be featured guests at State, district, and local party committee fundraisers—activities that the court in *Shays III* acknowledged "might otherwise be read as forbid[den]" by the Act's fundraising restrictions—which did not extend to non-party fundraisers because they were not addressed by the statutory provision. *Shays III* at 933. Accordingly, Alternative 3 proposed one standard for Federal candidate and officeholder participation at State, district, and local party committee events and another—more restrictive—standard for Federal candidate and officeholder participation at other non-Federal fundraising events.

The Commission sought comments on the three alternatives, specifically

asking whether each would faithfully implement the statute, whether each was responsive to the *Shays III* decision, and whether each would provide sufficient guidance to Federal candidates and officeholders; State, district, and local party committees; and other affected entities.

Regarding Alternative 1, commenters acknowledged that it was technically responsive to the *Shays III* opinion, but that it would leave unanswered many important questions regarding Federal candidate and officeholder participation in non-Federal fundraising events. In particular, the commenters pointed out that Alternative 1 would not address the Commission's previous guidance regarding Federal candidate and officeholder participation in publicity for non-Federal fundraising events and whether—or how—a Federal candidate or officeholder could solicit funds at a State, district, or local party committee non-Federal fundraising event.[4] One commenter suggested that failure to address these related areas would create "uncertainty and trepidation for State and local parties" that would chill involvement between them and Federal candidates and officeholders and ultimately limit the parties' ability "to communicate their message and to fully participate in the political process." No commenters objected to the Commission's proposal to establish rules addressing more broadly Federal candidate and officeholder participation at all non-Federal fundraising events.

A number of commenters supported the approach of Alternative 2, which applied the same framework to non-Federal fundraising events for State, district, and local party committees and to other non-Federal fundraising events. These commenters stated that Alternative 2 properly balanced the concerns of the *Shays III* court with the congressional intent behind BCRA, and that it better implemented the court's interpretation of 441i(e)(3). None of the commenters objected to this alternative.

With regard to Alternative 3, commenters generally did not favor its distinction between party committee events and other non-Federal fundraising events. Those commenters suggested that Alternative 3's approach went further than is required by the court's holding in *Shays III,* and that it would reverse previous Commission guidance that had come to be relied on by Federal candidates, officeholders, and party committees alike. One commenter predicted that Alternative 3 would effectively end participation by Federal candidates and officeholders at non-Federal fundraising events. The commenters that did not object to Alternative 3 nevertheless noted that the Act did not require "a distinction between different types of nonfederal fundraising events," as proposed in Alternative 3.

The Commission agrees that Alternative 1, while responsive to the *Shays III* decision, would leave unanswered many important questions regarding Federal candidate and officeholder participation in non-Federal fundraising events. Although the *Shays III* decision does not mandate the adoption of a single rule that addresses participation by Federal candidates and officeholders at all non-Federal fundraising events, Federal candidates and officeholders, as well as entities that solicit non-Federal funds in connection with elections, would benefit from the explicit guidance of a more comprehensive rule.

Accordingly, the Commission is revising 11 CFR 300.64 to provide guidance on participation by Federal candidates and officeholders in all non-Federal fundraising events in connection with an election for Federal office or any non-Federal election. As set forth in more detail below, the Commission's final rule explicitly addresses participation by Federal candidates and officeholders at such fundraising events, as well as participation by Federal candidates, officeholders, and their agents in publicizing these events. In addition, the rule covers participation by Federal candidates and officeholders regardless of whether the entity sponsoring the event is a State or local candidate committee, State political committee, or any other organization that hosts a fundraising event in connection with an election for Federal office or any non-Federal election.

The Commission's final rule is based on Alternative 2 in the NPRM. The Commission has determined that Alternative 2 best accomplishes two important goals: (1) Implementing 2 U.S.C. 441i(e) in accordance with the *Shays III* decision, and (2) providing clear, comprehensive guidance regarding Federal candidate and officeholder participation in non-Federal fundraising events and related publicity.

A. 300.64(a)—Scope

The scope of new 11 CFR 300.64 is set out in paragraph (a). The rule applies to all fundraising events in connection with an election for Federal office or any non-Federal election at which funds outside the limitations and source prohibitions of the Act, or Levin funds, are solicited. The rule applies even if funds within the amount limitations and source prohibitions of the Act are also solicited at an event or in publicity. The rule does not cover events at which funds outside the amount limitations and source prohibitions of the Act or Levin funds are not solicited but are, nevertheless, received. Nor does the rule cover fundraising events at which only Federal funds are solicited or fundraising events in connection with any non-Federal election at which only funds subject to the limitations and prohibitions of the Act are solicited, such as an event soliciting small-dollar, non-corporate, non-union funds for a State candidate.

The rule covers only non-Federal fundraising events that are "in connection with an election for Federal office or any non-Federal election." It does not apply to Federal candidate and officeholder participation in fundraising events that are not in connection with an election, consistent with the Act's prohibition on Federal candidates and officeholders from soliciting, receiving, directing, transferring, spending, or disbursing funds in connection with an election for Federal office or any non-Federal elections. *See* 2 U.S.C. 441i(e)(1)(B).

The scope of the final rule is very similar to the scope proposed in the NPRM, except that the proposed rule would have covered non-Federal fundraising events at which funds outside the limitations and prohibitions of the Act are raised, and the final rule covers non-Federal fundraising events at which funds outside the limitations and prohibitions of the Act are solicited. The Commission made this change in response to a comment that a solicitation-based standard more accurately captured the intent behind 2 U.S.C. 441i(e), which governs solicitations by Federal candidates and officeholders. The commenter expressed concern that a standard based on whether non-Federal funds are raised at an event could be triggered when, for example, a donor spontaneously donates a large, corporate check at a non-Federal fundraising event, even though no one, including the participating Federal candidate or

[4] While the latter issue was addressed by the Commission in advisory opinions with respect to non-Federal fundraising events for State candidates and 527 political organizations, *see* Advisory Opinions 2003–03 (Cantor) and 2003–36 (Republican Governors Association), the advisory opinions did not address Federal candidate and officeholder solicitation at State, district, or local party committee non-Federal fundraising events because 11 CFR 300.64 permitted Federal candidates and officeholders to solicit funds at such events "without restriction or regulation." The invalidation of this aspect of 11 CFR 300.64 in *Shays III* raised the question for the first time.

officeholder, had solicited funds outside the amount limitations or source prohibitions of the Act. The Commission agrees that a solicitation-based standard is more consistent with the Act's prohibition on solicitation than a standard based on whether funds are raised at an event. See 2 U.S.C. 441i(e)(1).

Commenters generally supported the proposed scope of the Commission's rule in the NPRM. They differed, however, on whether the rule's applicability should be limited to fundraising events that are "in connection with an election for Federal office or any non-Federal election." One commenter supported the proposal to limit the scope of the rule in this manner, while noting the Commission's articulation of the standard in previous advisory opinions, such as Advisory Opinions 2003–12 (Flake) and 2005–10 (Berman/Doolittle). One commenter urged the Commission to supersede Advisory Opinion 2005–10 (Berman/Doolittle), which, in the commenter's view, had incorrectly applied the "in connection with an election for Federal office or any non-Federal election" standard. Another commenter explicitly urged the Commission not to supersede the same.

The Commission declines to supersede Advisory Opinion 2005–10 (Berman/Doolittle) in this rulemaking and continues to be guided by its prior advisory opinions on the "in connection with an election for Federal office or any non-Federal election" standard. *See, e.g.,* Advisory Opinions 2005–10 (Berman/Doolittle) (solicitation of donations by Federal officeholders to a State ballot measure committee was not in connection with any election under the circumstances described in the request); 2004–14 (Davis) (solicitation of donations by a Federal officeholder to a charity was not in connection with any election); 2003–20 (Hispanic College Fund) (solicitation of donations by a Federal officeholder to a scholarship fund was not in connection with any election); and 2003–12 (Flake) (solicitation of donations by Federal officeholders for a political organization supporting a State referendum was in connection with an election under the circumstances described in the request). Further guidance from the Commission on which activities are in connection with an election for Federal office or any non-Federal election, and which are not, is best offered through the advisory opinion process.

The rule does not alter the fundraising exception for Federal candidates and officeholders who are also State candidates, found at 11 CFR 300.63, or the fundraising exceptions for certain tax-exempt organizations, found at 11 CFR 300.65. *See also* 2 U.S.C. 441i(e)(2) and (e)(4). Thus, in the event of any inconsistencies with new 11 CFR 300.64, the provisions of 11 CFR 300.63 and 300.65 govern.

B. 300.64(b)—Participation at Non-Federal Fundraising Events

Paragraph (b) of new 11 CFR 300.64 addresses participation by Federal candidates and officeholders at non-Federal fundraising events. Paragraph (b)(1) addresses attendance, speeches, and appearances as featured guests by Federal candidates and officeholders at non-Federal fundraising events. Paragraph (b)(2) addresses solicitations made by Federal candidates and officeholders at non-Federal fundraising events.

1. 300.64(b)(1)—Attending, Speaking or Being a Featured Guest at Non-Federal Fundraising Events

New 11 CFR 300.64(b)(1) provides that Federal candidates and officeholders may attend, speak at, and be featured guests at non-Federal fundraising events. This provision is consistent with the *Shays III* decision, which stated that 2 U.S.C. 441i(e)(3) "merely clarifies that despite the statute's ban on soliciting soft money, federal candidates may still 'attend, speak or be a featured guest' at state party events where soft money is raised, which the statute might otherwise be read as forbidding." *Shays III* at 933. If 2 U.S.C. 441i(e)(3) is a "mere[ ] clarifi[cation]," it follows that the same underlying framework applies to all fundraising events. Thus, if the statutory ban on soliciting soft money does not prohibit a Federal candidate or officeholder from attending, speaking at, or being a featured guest at a State, district, or local party committee's non-Federal fundraising event, then the statutory ban also does not prohibit the same person from engaging in the same activities at any other non-Federal fundraising event.

This portion of the final rule is identical to that proposed in Alternative 2 of the NPRM. No comments were received on this provision, although the commenters generally supported the Commission's broader proposal to treat Federal candidates' and officeholders' participation in all non-Federal fundraising events the same.

2. 300.64(b)(2)—Solicitations at Non-Federal Fundraising Events

Under new 11 CFR 300.64(b)(2), Federal candidates and officeholders may solicit funds at non-Federal fundraising events, provided that the solicitation is limited to funds that comply with the limitations and prohibitions of the Act and that are consistent with State law. Federal candidates and officeholders may no longer speak "without restriction or regulation" at any non-Federal fundraising event, consistent with the circuit court's decision in *Shays III.*

New 11 CFR 300.64(b)(2) provides that Federal candidates and officeholders may limit solicitations made at non-Federal fundraising events by displaying at the event a clear and conspicuous written notice or by making a clear and conspicuous oral statement that the solicitation is not for Levin funds (if the beneficiary of the fundraiser has a Levin fund account and is raising funds for that account), does not seek funds in excess of Federally permissible amounts, and does not seek funds from sources prohibited under the Act, including corporations, labor organizations, national banks, Federal contractors, or foreign nationals. A notice or statement limiting a solicitation will not be considered "clear and conspicuous" for purposes of the final rule if it is difficult to read or hear or if its placement is easily overlooked by any significant number of those in attendance. The Commission's regulation at 11 CFR 100.11(c) further informs the "clear and conspicuous" standard.

One example of a limited solicitation under new 11 CFR 300.64(b)(2) is for the Federal candidate or officeholder to say at a non-Federal fundraising event for a State or local candidate: "I am only asking for donations of up to $[applicable Federally permissible amount, currently $2,400 per election] from individuals and for donations of up to $[applicable Federally permissible amount, currently $5,000 per year] from multi-candidate political committees. I am not asking for donations in excess of these amounts or for donations from corporations, labor organizations, foreign nationals, Federal contractors, or national banks." When delivered to the general audience, this type of statement need be made only once; Federal candidates and officeholders are not obligated to repeat it during one-on-one discussions with individuals at the fundraising event. Federal candidates and officeholders may not, however, recite a limitation publicly, and then encourage event attendees to disregard the limitation during one-on-one discussions.

If a Federal candidate or officeholder wishes to make a general solicitation that does not expressly refer to the amount limitations and source

prohibitions of the Act at a non-Federal fundraising event, then the candidate or officeholder may limit the solicitation by displaying a clear and conspicuous written notice or by making a clear and conspicuous oral statement at the event that the solicitation is limited to funds that comply with the limitations and prohibitions of the Act. An example of an adequate written notice is a placard prominently displayed so that it cannot be overlooked at the entrance to a fundraising event for a State or local candidate at which the Federal candidate or officeholder is appearing, or a card placed on every table at the event, stating:

> Solicitations made by Federal candidates and officeholders at this event are limited by Federal law. The Federal candidates and officeholders speaking tonight are soliciting only donations of up to $[applicable Federally permissible amount, currently $2,400 per election] from individuals and up to $[applicable Federally permissible amount, currently $5,000 per year] from multi-candidate political committees. They are not soliciting donations in any amount from corporations, labor organizations, national banks, Federal contractors, or foreign nationals.

Alternatively, an event official or the Federal candidate or officeholder could make the same or a similar statement orally before any general solicitations are made by the Federal candidate or officeholder, such as in welcoming remarks to persons attending the fundraising event. These types of public, limiting statements need not be repeated in one-on-one discussions between the Federal candidate or officeholder and event attendees, so long as the Federal candidate or officeholder does not encourage event attendees to disregard the limitation during one-on-one discussions.

The provisions of new 11 CFR 300.64(b) are substantially the same as those proposed in paragraph (b) of Alternative 2 of the NPRM. Most of the comments on the proposal focused on the requirement that Federal candidates and officeholders limit their solicitations at non-Federal fundraising events. Two commenters asked the Commission to provide in its final rule more explicit guidance on how to limit such solicitations. In particular, the commenters requested additional examples of acceptable oral and written limitations and a clearer articulation of the "clear and conspicuous" standard. In response to these commenters, and to facilitate compliance with the regulations, the Commission has provided examples of acceptable statements.

Two other commenters suggested that it would be unnecessary and "awkward and confusing" to require Federal candidates and officeholders to limit their solicitations at non-Federal fundraising events with clear and conspicuous oral or written statements. The Commission concludes that any solicitation that is not limited either by its express terms or otherwise (such as through a clear and conspicuous oral statement or written notice) risks being understood as soliciting donations in amounts and from sources prohibited under the Act, especially if other individuals at the fundraising event explicitly solicit funds that are not consistent with the limitations and prohibitions of the Act. *See* 11 CFR 300.2(m) (defining "to solicit" to include "an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message, asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value").

C. 300.64(c)—Publicity for Non-Federal Fundraising Events

Paragraph (c) of new 11 CFR 300.64 addresses participation by Federal candidates and officeholders in publicity for non-Federal fundraising events. The final rule applies to Federal candidate and officeholder participation in all types of publicity for non-Federal fundraising events, including publicity soliciting funds. The term "publicity" as used in new 11 CFR 300.64 includes all methods used to publicize a non-Federal fundraising event, including advertisements, announcements, and pre-event invitations, regardless of form or medium (and includes phone calls, mail, e-mail, facsimile, and text messages), as well as follow-up contacts. New paragraph (c) is intended to ensure that Federal candidates and officeholders do not, in the course of publicizing a non-Federal fundraising event, solicit funds outside the amount limitations and source prohibitions of the Act.

Paragraph (c) of the final rules is substantially similar to paragraph (c) of Alternative 2 in the NPRM, except as described below. All commenters supported the Commission's proposal to address publicity for non-Federal fundraising events in the rule and to clarify guidance provided by the Commission in previous advisory opinions and Matters Under Review. As one commenter noted, "these rules regarding pre-event publicity in practice are what * * * really matter." Another commenter expressed a similar sentiment: "Frankly, once you're at the event, it's very rare that solicitations are ever made regardless. So it is appropriate that you've opened the door to revisiting the guidance and the rules regarding pre-event publicity. And clarity really is an important thing in these rules[.]"

1. 300.64(c)(1)—Publicity Not Containing a Solicitation

Paragraph (c)(1) of new 11 CFR 300.64 provides that if publicity for, or information about, a non-Federal fundraising event does not solicit funds, then Federal candidates, officeholders, or their agents may approve, authorize, agree to, or consent to the use of the Federal candidates' or officeholders' name and likenesses in it. Such publicity may, for example, use the name or likeness of a Federal candidate or officeholder to indicate that such person will attend, speak, or be a featured guest at the event. The publicity may also indicate the Federal candidate's or officeholder's involvement or role in the event. *See* discussion of paragraph (c)(3), below. No Federal disclaimer or attribution statement is required on such publicity.

Paragraph (c)(1) is nearly identical to proposed paragraph (c)(1) in Alternative 2 of the NPRM, except that it now explicitly applies to agents of Federal candidates and officeholders.

The Commission did not receive any comments specifically addressing this provision, although the commenters generally supported the Commission's proposed treatment of publicity for non-Federal fundraising events. One commenter, for example, indicated that the mere listing of a Federal candidate or officeholder on an invitation for a non-Federal fundraising event does not constitute a solicitation.

The Commission agrees that, in the context of publicity that does not otherwise contain a solicitation, merely approving, authorizing, agreeing to, or consenting to the use of the Federal candidate's or officeholder's name or likeness does not, in and of itself, constitute a solicitation by that Federal candidate or officeholder.

The Commission also concludes that paragraph (c)(1) gives full effect to 2 U.S.C. 441i(e)(3), as interpreted by the court in *Shays III,* which states that Federal candidates and officeholders may be featured guests at State, district, and local party committee fundraising events. One aspect of being a featured guest is being identified as such in publicity. Thus, paragraph (c)(1) is consistent with the Act and the *Shays III* court decision.

2. 300.64(c)(2)—Publicity Containing a Solicitation Limited to Funds That Comply With the Amount Limitations and Source Prohibitions of the Act

Paragraph (c)(2) of new 11 CFR 300.64 provides that Federal candidates, officeholders, or their agents may approve, authorize, agree to, or consent to the use of the Federal candidates' or officeholders' names and likenesses in publicity for a non-Federal fundraising event if the publicity solicits only funds that comply with the amount limitations and source prohibitions of the Act. Federal candidates and officeholders may be identified on the publicity in a manner specifically related to fundraising, such as honorary chairperson of the fundraising event, and may also sign the solicitation letters themselves, if the solicitation is limited to funds that comply with the amount limitations and source prohibitions of the Act.

This provision merely makes explicit what was implicit in the proposed rule, and reiterates what is expressly provided for in 2 U.S.C. 441i(e)(1): That Federal candidates and officeholders may solicit funds that comply with the amount limitations and source prohibitions of the Act.

3. 300.64(c)(3)—Publicity Containing a Solicitation Outside the Amount Limitations and Source Prohibitions of the Act

Paragraph (c)(3) of new 11 CFR 300.64 addresses publicity that solicits funds outside the amount limitations and source prohibitions of the Act or Levin funds. This provision is based on the Commission's determination that a Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness on publicity for a non-Federal fundraising event in a manner that does not result in the solicitation being attributed to the Federal candidate or officeholder.

Under paragraph (c)(3)(i), a Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds, but only if: (1) The Federal candidate or officeholder is identified in the publicity in a manner not specifically related to fundraising, and (2) the publicity includes a clear and conspicuous disclaimer that the solicitation is not being made by the Federal candidate or officeholder.

New 11 CFR 300.64(c)(3)(i)(A) provides nonexhaustive examples of the positions that a Federal candidate or officeholder may be identified as holding that are not specifically related to fundraising. They include featured guest, honored guest, special guest, featured speaker, or honored speaker. Thus, merely identifying a Federal candidate or officeholder as holding a position not specifically related to fundraising on publicity does not constitute a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds by the Federal candidate or officeholder. The Commission is not requiring that all Federal candidates or officeholders be identified by one of the listed titles. Rather, the Federal candidate or officeholder may be identified in any manner not specifically related to fundraising. For example, the Federal candidate or officeholder may be identified simply by name, as in "Please join the State Party at a reception with Senator Jones and Governor Smith."

To avoid any confusion in this regard, paragraph (c)(3)(i)(B) requires the publicity to include a clear and conspicuous disclaimer stating that the solicitation is not being made by the Federal candidate or officeholder. New 11 CFR 300.64(c)(3)(ii) provides that disclaimers on written publicity must meet the requirements in 11 CFR 110.11(c)(2). For publicity disseminated via non-written means, such as by telephone calls, a disclaimer is required if the publicity is recorded, follows any form of a written script, or is conducted according to a structured or organized program. A script for these purposes means any written text that callers use to guide their conversations with potential attendees, regardless of whether it takes the form of complete paragraphs, bullet points, notes, or other written prompts. As long as the text includes appropriate disclaimers, the Commission will presume (absent evidence to the contrary) that the requirements of the rule were met. When non-written solicitations are conducted according to a structured or organized program, the Commission will similarly presume that the requirements of the rule were met where a sworn statement that appropriate disclaimers were made is submitted by the person making the solicitation or by the Federal candidate or officeholder who authorized the use of his or her name. A structured or organized program includes the making, at a designated time, of telephone calls that invite people to and solicit funds for a non-Federal fundraising event, and which is authorized, requested, or agreed to by the Federal candidate or officeholder.

New paragraph (c)(3)(iv) provides two examples of disclaimers that would satisfy the requirement. Both examples state that the Federal candidate or officeholder is not soliciting funds in connection with the fundraising event. These examples are intended to serve as guidance for Federal candidates, officeholders, and sponsors of non-Federal fundraising events. Importantly, written disclaimers, including those that conform to the examples provided in the rule, are not sufficient unless they are "clear and conspicuous" under 11 CFR 110.11(c)(2). To the extent the publicity already has a disclaimer required by 11 CFR 100.11 (Federal disclaimer), the disclaimer required by this paragraph may be included in the same box as the Federal "Paid for by" disclaimer. Some additional limitations on the use of disclaimers are addressed in new paragraph (c)(3)(v) of 11 CFR 300.64, as discussed below.

Paragraph (c)(3)(v) of new 11 CFR 300.64 states that a Federal candidate, officeholder, or an agent of either may not approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity that contains a solicitation of non-Federal or Levin funds if the Federal candidate or officeholder is identified in the publicity as serving in a position specifically related to fundraising. Positions specifically related to fundraising include, for example, honorary chair of the fundraising event or member of the host committee. Nor may a Federal candidate, officeholder, or an agent of either approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness if the Federal candidate or officeholder is identified on publicity containing a solicitation of non-Federal or Levin funds as extending an invitation to the event. For example, an invitation stating "Featured guest Congressman X invites you to join him at next week's reception" would fall into this category, as would an invitation signed by the Federal candidate or officeholder.

The Commission has concluded that participation by the Federal candidate or officeholder in this manner would be an impermissible solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds. As such, no disclaimer, even one that complies with paragraph (c)(3)(i)(B) of new 11 CFR 300.64, would be capable of curing the violation of 2 U.S.C.

441i(e), no matter how clear or conspicuous the disclaimer may be.

Finally, paragraph (c)(3)(vi) prohibits Federal candidates, officeholders, and their agents from disseminating publicity for a non-Federal fundraising event if the publicity solicits funds outside the amount limitations and source prohibitions of the Act or Levin funds. This paragraph is a logical outgrowth of the proposal in the NPRM; the Commission has decided to implement this provision to prohibit conduct that could result in an impermissible solicitation by Federal candidates and officeholders.

The final rule covers much of the same activity as the rule proposed in Alternative 2 of the NPRM, but is organized differently. The proposed rule did not, for example, explicitly address publicity that solicits only funds within the limitations and prohibitions of the Act, whereas the final rule does. More significantly, the structure of the proposed rule depended on whether the solicitation in the publicity was made by the Federal candidate or officeholder. By contrast, the structure of the final rule depends on whether the publicity solicits funds within the amount limitations and source prohibitions of the Act. The final rule also applies to the agents of Federal candidates and officeholders.

The comments received on this aspect of the proposed rule focused for the most part on the disclaimer requirement for publicity naming a Federal candidate or officeholder and including a solicitation by a person other than the Federal candidate or officeholder. Four commenters disagreed with the disclaimer requirement, arguing that the disclaimers would confuse the average person. These commenters observed that the average recipient of publicity could easily conclude that the mere listing of a Federal candidate or officeholder—as a featured guest, for example—on publicity was not a solicitation by that Federal candidate or officeholder, even if the publicity included a solicitation of funds outside the amount limitations and source prohibitions of the Act. Moreover, one commenter opined that fundraising hosts would bear a substantial burden if employees and volunteers were required to issue such disclaimers during the telephone calls and conversations that frequently follow the distribution of written publicity for a non-Federal fundraising event. Instead, two commenters suggested that the Commission require such disclaimers only when a Federal candidate or officeholder signs a solicitation or explicitly solicits funds.

Other commenters supported the Commission's proposed disclaimer requirement, stating that it would make "infinitely clear to the recipient of the solicitation" that the Federal candidate or officeholder was not asking for funds outside the limitations or prohibitions of the Act. Another commenter asked the Commission to provide specific examples of statements that would satisfy the disclaimer requirement.

The Commission has considered the comments and has concluded that identifying a Federal candidate or officeholder as serving in a role not specifically related to fundraising does not, by itself, result in a solicitation by the Federal candidate or officeholder. However, just as the circuit court concluded in *Shays III* that 2 U.S.C. 441i(e)(3) "merely clarifies" the reach of "the statute's ban on soliciting soft money," the Commission also seeks to make it unmistakably clear that Federal candidates and officeholders who participate at non-Federal fundraising events and in publicity are not making a solicitation that would be prohibited under the law. *Shays III* at 933. The disclaimer requirement helps to ensure that persons receiving publicity for non-Federal fundraising events understand that any solicitation of funds outside the amount limitations and source prohibitions of the Act is made by a person other than the Federal candidate or officeholder identified in the publicity. The disclaimer requirement may also help to protect Federal candidates and officeholders against complaints filed with the Commission that result from a misunderstanding as to who is soliciting funds in connection with the fundraising event.

D. Effect of This Rulemaking on Prior Commission Advisory Opinions

The Commission has addressed the issue of participation by Federal candidates and officeholders in non-Federal fundraising events in Advisory Opinions 2007–11 (California State Party Committees), 2005–02 (Corzine II), 2004–12 (Democrats for the West), 2003–36 (Republican Governors Association), and 2003–03 (Cantor). As explained below, the Commission is superseding the aspects of these advisory opinions that address this issue.

In Advisory Opinions 2005–02 (Corzine II) and 2004–12 (Democrats for the West), the Commission concluded, in part, that Federal candidates and officeholders could appear, speak, and be featured guests at non-Federal fundraising events "without restriction or regulation" under former 11 CFR 300.64(b). Given that this provision of the rule was explicitly struck down by the *Shays III* court and has been removed by the Commission, the Commission is superseding the parts of Advisory Opinions 2004–12 (Democrats for the West) and 2005–02 (Corzine II) that apply the "without restriction or regulation" standard. Specifically, the Commission is superseding the answer to Question 7 in Advisory Opinion 2004–12 (Democrats for the West), as to whether Democrats for the West may invite Federal candidates, officeholders, or their agents to appear as guests or featured speakers at fundraising events, and the second paragraph in the answer to Question 2 in Advisory Opinion 2005–02 (Corzine II), regarding Federal candidate and officeholder participation in raising funds for the non-Federal accounts of State and local party committees.

Advisory Opinions 2007–11 (California State Party Committees), 2003–36 (Republican Governors Association), and 2003–03 (Cantor) also addressed participation by Federal candidates and officeholders at non-Federal fundraising events in connection with elections, and related publicity. Some of the conclusions are consistent with new 11 CFR 300.64, such as the conclusion in Advisory Opinions 2003–36 (Republican Governors Association) and 2003–03 (Cantor) that the mere attendance of a Federal candidate or officeholder at a non-Federal fundraiser does not, in and of itself, give rise to a violation of the Act or Commission regulations. On the other hand, some of the conclusions in these prior advisory opinions may not be consistent with new 11 CFR 300.64.

To help avoid potential confusion as to which parts of the prior advisory opinions are consistent with the new rule and which parts are inconsistent, the Commission is superseding Advisory Opinion 2003–03 (Cantor), except for the answer to Question 6 regarding agency, and Advisory Opinion 2003–36 (Republican Governors Association), except for the answer to Question 3 regarding corporate donations to the Republican Governors Association's conference account and the last paragraph of the answer to Question 2 regarding whether the conference account's activities are in connection with an election. The Commission is also superseding in its entirety Advisory Opinion 2007–11 (California State Party Committees), which addressed three types of proposed communications related to State party fundraising events that identified Federal candidates or officeholders as featured speakers or honored guests.

These actions are consistent with a comment received in response to the NPRM. The comment noted the potential tension and confusion that could result from having to reconcile past advisory opinions with the Commission's new rule. The comment suggested that the Commission indicate explicitly that the series of advisory opinions on this issue no longer articulate the correct standard of law and are thus superseded.

The Commission agrees that where the new rule addresses the same issue as a prior advisory opinion, the new rule provides the applicable standard of law, and the advisory opinion is superseded. However, the Commission declines to supersede the entire series of advisory opinions that reference this issue. As discussed above, sections of certain advisory opinions are not affected by the new rule and hence remain in force. Accordingly, the Commission has explicitly indicated which advisory opinions are now superseded, in whole or in part. Although new 11 CFR 300.64 is in part informed by, and adopts, some of the Commission's conclusions in prior advisory opinions, the new rule is based entirely on the reasoning set forth in this explanation and justification and does not rely on any prior Commission advisory opinions.

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

The Commission certifies that the attached final rule will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the entities affected by this rule do not meet the definition of "small entity" under 5 U.S.C. 601. That definition requires that the enterprise be independently owned and operated and not dominate in its field. 5 U.S.C. 601(4).

This final rule affects State, district, and local party committees, as well as Federal candidates and their campaign committees. Federal candidates, as individuals, do not fall within the definition at 5 U.S.C. 601, and campaign committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals.

State, district, and local party committees also fall outside the definition of "small entity." These 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 arenas of their States and are thus dominant in their fields. 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 in 11 CFR Part 300

Campaign funds, nonprofit organizations, political committees and parties, political candidates, reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, Subchapter C of Chapter 1 of title 11 of the Code of Federal Regulations is amended to read 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 300.64 is revised to read as follows:

§ 300.64 Participation by Federal candidates and officeholders at non-Federal fundraising events (2 U.S.C. 441i(e)(1) and (3)).

(a) *Scope.* This section covers participation by Federal candidates and officeholders at fundraising events in connection with an election for Federal office or any non-Federal election at which funds outside the amount limitations and source prohibitions of the Act or Levin funds are solicited. This section also covers participation by Federal candidates and officeholders in publicity related to such non-Federal fundraising events. This section applies even if funds that comply with the amount limitations and source prohibitions of the Act are also solicited at the event. Nothing in this section shall be construed to alter the fundraising exception for State candidates at 11 CFR 300.63 or the fundraising exceptions for certain tax-exempt organizations at 11 CFR 300.65.

(b) *Participation at non-Federal fundraising events.* A Federal candidate or officeholder may:

(1) Attend, speak at, or be a featured guest at a non-Federal fundraising event.

(2) Solicit funds at a non-Federal fundraising event, provided that the solicitation is limited to funds that comply with the amount limitations and source prohibitions of the Act and that are consistent with State law.

(i) A Federal candidate or officeholder may limit such a solicitation by displaying at the fundraising event a clear and conspicuous written notice, or making a clear and conspicuous oral statement, that the solicitation is not for Levin funds (when applicable), does not seek funds in excess of $[Federally permissible amount], and does not seek funds from corporations, labor organizations, national banks, federal government contractors, or foreign nationals.

(ii) A written notice or oral statement is not clear and conspicuous if it is difficult to read or hear or if its placement is easily overlooked by any significant number of those in attendance.

(c) *Publicity for non-Federal fundraising events.* For the purposes of this paragraph, publicity for a non-Federal fundraising event includes, but is not limited to, advertisements, announcements, or pre-event invitation materials, regardless of format or medium of communication.

(1) *Publicity not containing a solicitation.* A Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that does not contain a solicitation.

(2) *Publicity containing a solicitation limited to funds that comply with the amount limitations and source prohibitions of the Act.* A Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that solicits only funds that comply with the amount limitations and source prohibitions of the Act.

(3) *Publicity containing a solicitation of funds outside the amount limitations and source prohibitions of the Act.*

(i) A Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds only if:

(A) The Federal candidate or officeholder is identified as a featured guest, honored guest, special guest,

featured speaker, or honored speaker, or in any other manner not specifically related to fundraising; and

(B) The publicity includes a clear and conspicuous disclaimer that the solicitation is not being made by the Federal candidate or officeholder.

(ii) The disclaimer required in paragraph (c)(3)(i)(B) of this section must meet the requirements in 11 CFR 110.11(c)(2) if the publicity is written.

(iii) Where publicity is disseminated by non-written means, the disclaimer described in paragraph (c)(3)(i)(B) of this section is required only if the publicity is recorded or follows any form of written script or is conducted according to a structured or organized program.

(iv) Examples of disclaimers that satisfy paragraph (c)(3)(i)(B) of this section include, but are not limited to:

(A) "[Name of Federal candidate/officeholder] is appearing at this event only as a featured speaker. [Federal candidate/officeholder] is not asking for funds or donations"; or

(B) "All funds solicited in connection with this event are by [name of non-Federal candidate or entity], and not by [Federal candidate/officeholder]."

(v) A Federal candidate, officeholder, or an agent of either may not approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds if:

(A) The Federal candidate or officeholder is identified as serving in a position specifically related to fundraising, such as honorary chairperson or member of a host committee, or is identified in the publicity as extending an invitation to the event, even if the communication contains a written disclaimer as described in paragraph (c)(3)(i)(B) of this section; or

(B) The Federal candidate or officeholder signs the communication, even if the communication contains a written disclaimer as described in paragraph (c)(3)(i)(B) of this section.

(vi) A Federal candidate, officeholder, or an agent of either, may not disseminate publicity for a non-Federal fundraising event that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds by someone other than the Federal candidate or officeholder.

Dated: April 30, 2010.

On behalf of the Commission.

Matthew S. Petersen,

Chairman, Federal Election Commission.

[FR Doc. 2010–10571 Filed 5–4–10; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1381]

Reserve Requirements of Depository Institutions Policy on Payment System Risk

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to authorize Reserve Banks to offer term deposits. Term deposits are intended to facilitate the conduct of monetary policy by providing a tool for managing the aggregate quantity of reserve balances. Institutions eligible to receive earnings on their balances in accounts at Federal Reserve Banks ("eligible institutions") may hold term deposits and receive earnings at a rate that does not exceed the general level of short-term interest rates. Term deposits are separate and distinct from balances maintained in an institution's master account at a Reserve Bank ("master account") as well as from those maintained in an excess balance account. Term deposits do not satisfy an institution's required reserve balance or contractual clearing balance and do not constitute excess balances. Term deposits are not available to clear payments and may not be used to reduce an institution's daylight or overnight overdrafts. The Board is also making minor amendments to the posting rules for intraday debits and credits to master accounts as set forth in the Board's Policy on Payment System Risk to address transactions associated with term deposits.

DATES: The amendments are effective on June 4, 2010.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Counsel (202) 452–3565, or Dena L. Milligan, Staff Attorney (202) 452–3900), Legal Division, or Seth Carpenter, Associate Director (202) 452–2385, or Margaret Gillis DeBoer, Assistant Director (202) 452–3139, Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Summary of Proposal

In order to help the Federal Reserve implement monetary policy, on December 31, 2009, the Board requested public comment on a proposal to amend Regulation D to authorize Reserve Banks to offer term deposits to eligible institutions.[1] "Eligible institution" is defined in Regulation D and includes the depository institutions defined in section 19(b)(1)(A) of the Act, including banks, savings associations, savings banks and credit unions that are federally insured or eligible to apply for federal insurance. "Eligible institution" also includes trust companies, Edge and agreement corporations, and U.S. agencies and branches of foreign banks.[2] Under the proposal, the Reserve Banks would accept term deposits subject to such terms and conditions as the Board may establish from time to time, including but not limited to conditions regarding the maturity of the term deposits being offered, maximum and minimum amounts that may be maintained by an eligible institution in a term deposit, the interest rate or rates offered and, if term deposits are offered through an auction mechanism, the size of the offering, and maximum and minimum bid amounts. Term deposits would not satisfy required reserve balances or contractual clearing balances and would not be available for general payments or other activities.

The Board also proposed to amend section 204.10(b)(3) of Regulation D to reflect the fact that term deposits would earn interest, and that like other balances maintained at Reserve Banks by or on behalf of eligible institutions, the interest rate on term deposits could not exceed the general level of short-term interest rates, consistent with the limitation in the Federal Reserve Act.[3] For purposes of that statutory requirement, the Board proposed to amend section 204.10(b)(3) to define the term "short-term interest rates" as including "the primary credit rate and rates on obligations with maturities of up to one year in which eligible institutions may invest, such as rates on term federal funds, term repurchase agreements, commercial paper, term Eurodollar deposits, and other similar rates."

[1] 74 FR 69301 (Dec. 31, 2009).

[2] "Eligible institution" does not include all entities for which the Reserve Banks hold accounts. For example, the term does not include entities for which the Reserve Banks act as fiscal agents, such as Federal Home Loan Banks, Fannie Mae, and Freddie Mac. 12 CFR 204.2(y).

[3] *See* 12 U.S.C. 461(b)(12).