

inconsistent with the Commission's recent revision of § 73.1.

The Petitioner also requested that the NRC consider amending the DBT to include use of explosive devices and other weapons larger than those commonly considered to be hand-carried or hand-held, and the use of vehicles other than four wheel drive civilian land vehicles. Well-trained and dedicated adversaries could conceivably obtain and use military attack vehicles or military aircraft armed with bombs, missiles, or other powerful weapons.

The NRC is denying this request. The specific details of the adversary's capabilities are now contained in adversary characteristics documents which contain classified or SGI information. The adversary characteristics documents are derived largely from intelligence information. These documents must be withheld from public disclosure and made available on a need to know basis to those who are cleared for access. The petitioner's suggested changes to this regulation would not be consistent with the Commission's recent revision to § 73.1.

## 2. Comprehensive Assessment of the Consequences of Terrorist Attacks

The petitioner requested that the NRC conduct a comprehensive assessment of the consequences of terrorist attacks that have the capability of radiological sabotage to include: Attacks against transportation infrastructure used by nuclear waste shipments, attacks involving capture of a nuclear waste shipment and use of high energy explosives against the cask, and direct attacks upon a nuclear waste shipping cask using antitank missiles.

The NRC is denying this request because it does not involve (*i.e.*, contain) a request to amend, create, or revise the NRC's existing regulations, as is required by the provisions of 10 CFR 2.802, "Petition for Rulemaking." Instead of requesting changes to the NRC's regulations (as it has specified for other topics elsewhere in its petition) the Petitioner has requested the NRC complete a comprehensive assessment. A comprehensive assessment is not a change to the language of the NRC's regulations.

It is important to note however, that relevant studies (which accomplish the objectives of the Petitioner) were performed at the request of the Commission following the September 11, 2001, terrorist attacks. As a result of these studies, the staff has developed a security assessment decision-making framework to be used as a tool for NRC to determine the appropriate level of

security measures and mitigating strategies required for a given threat scenario, including threat scenarios involving spent fuel storage casks and certified radioactive material transportation package designs.

## Consideration in Rulemaking

The NRC will consider the issues raised in PRM-73-10 and the remainder of the petitioner's requests in a proposed SNF transportation security rulemaking, which is expected to be available for public comment in 2010. The NRC has determined that the underlying technical considerations regarding the physical security of SNF shipments are sufficiently related to this ongoing rulemaking activity; therefore, the issues raised in PRM-73-10, other than the requests that are being denied, are being considered in the rulemaking activity.

Specifically, the NRC is considering a proposed SNF transportation security rulemaking which will require that licensees plan and coordinate SNF shipments, including routes and safe havens, with the States through which the shipment will pass. The proposed rulemaking would also require including armed escorts along the entire length of the route, continuous and active monitoring of the SNF shipment, redundant communications capabilities among the transport, local law enforcement agencies and a licensee movement control center, and planning and development of normal and contingency procedures.

The NRC is continuing work to develop this proposed rulemaking. Although the NRC will consider the issues raised in the petition, other than the requests being denied, the petitioner's concerns may not be addressed exactly as the petitioner has requested. During the rulemaking process, the NRC will solicit comments from the public and will consider all comments before issuing a final rule. If the NRC does not issue a proposed rule, the NRC will issue a document in the **Federal Register** that addresses why the petitioner's requested rulemaking changes were not adopted by the NRC.

For the reasons provided above, the NRC is denying the petition, in part, and considering the remainder of the petitioner's requests in the NRC's ongoing rulemaking process. With this action the NRC closes the docket for PRM-73-10.

Dated at Rockville, Maryland, this 10th day of November, 2009.

For the Nuclear Regulatory Commission.

**R.W. Borchardt,**

*Executive Director for Operations.*

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 300

[Notice 2009-26]

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

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Election Commission seeks comments on proposed changes to its rules regarding participation by Federal candidates and officeholders at non-Federal fundraising events under the Federal Election Campaign Act of 1971, as amended. These proposed changes are in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*. The Commission has made no final decision on the issues presented in this rulemaking.

**DATES:** Comments must be received on or before Monday, February 8, 2010. Reply comments must be limited to the issues raised in the initial comments and must be received on or before Monday, February 22, 2010. The Commission will hold a hearing on these proposed rules on Wednesday, March 10, 2010 at 10 a.m. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

**ADDRESSES:** All comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, facsimile or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to [SolicitationShays3@fec.gov](mailto:SolicitationShays3@fec.gov). If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the

commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC, 20463.

**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<sup>1</sup> ("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 regarding Federal candidate and officeholder solicitations at State, district, and local party committee fundraising events at 11 CFR 300.64. The Court of Appeals for the District of Columbia Circuit found aspects of these rules invalid in *Shays v. FEC*, 528 F.3d 914 (DC Cir. 2008) ("*Shays III*"). The Commission seeks comment on proposed changes to the 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, any such candidates or Federal officeholders. *See* BCRA at sec. 323(e); 2 U.S.C. 441i(e). For both Federal and non-Federal elections, these persons may not "solicit, receive, direct, transfer or spend" funds unless the funds comply with the amount limitations and source prohibitions of the Act.<sup>2</sup> *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 those 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 prohibiting from raising Levin funds.<sup>3</sup> *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. Mar. 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 limitation and 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 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 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 justified its interpretation by citing to statutory structure, legislative intent, general First Amendment concerns, and the special relationships that Federal candidates and officeholders share with State, district, and local party committees. *See* 2002 Final Rule at 49108.

The Commission did not, however, interpret 2 U.S.C. 441i(e)(3) to allow unrestricted participation in pre-event 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.

<sup>1</sup> Public Law 107-155, 116 Stat. 81 (2002).

<sup>2</sup> The amount limits on contributions depend on the type of contributor and the recipient. *See* 2 U.S.C. 441a(a)(1), (2), and (3). For example, individuals and non-multicandidate PACs may 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 (combined) to State, district, and local party committees. A multicandidate PAC, by contrast, may give up to \$5,000 per election to a candidate, up to \$5,000 per calendar year to a PAC, and up to \$5,000 (combined) to State, district, and local party committees. Sources prohibited 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).

<sup>3</sup> "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).

### 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 so 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. *Id.* 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 for Final Rules on 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 were permitted, as before, to 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. Advisory Opinions

The Commission has previously been asked for advisory opinions regarding the participation of Federal candidates and officeholders in non-Federal fundraising events for State, district, and local party committees, as well as for non-Federal candidates, State political organizations, and other non-Federal entities.

In Advisory Opinions 2003–03 (Cantor) and 2003–36 (Republican Governor's Association), the Commission stated that a Federal candidate or officeholder may attend and speak at non-Federal fundraisers for non-Federal 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 Governor's Association), and 2007–11 (California State Party Committees). The Commission reasoned that if pre-event publicity does not contain a solicitation, then it is not subject to BCRA's solicitation restrictions. See *id.* If the pre-event 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 source prohibitions and amount limitations of the Act. See *id.* The Commission made clear, however, that Federal candidates and officeholders may not solicit funds in excess of the amount limitations and source prohibitions of the Act and then qualify that impermissible solicitation with a limiting disclaimer. See Advisory Opinion 2003–36 (Republican Governor's Association).

As of 2007, Commission regulations and advisory opinions created two sets

of procedures governing activities by Federal candidates and officeholders at fundraising events at which funds outside the Act's limitations and prohibitions are raised. Commission regulations provided that Federal candidates and officeholders could attend fundraising events for State, district, and local party committee events, whether as a featured guest or not, and could speak at such events "without restriction or regulation." As a result, Federal candidates and officeholders were permitted to solicit directly non-Federal funds at such events. Further, through its advisory opinions the Commission had clarified that Federal candidates and officeholders could also attend, speak, or be a featured guest at non-party fundraising events at which funds outside the Act's limitations and prohibitions are raised. Solicitations at these events, however, were subject to the Act's fundraising restrictions; Federal candidates and officeholders were required to issue disclaimers—oral or written—that any solicitation made by them was only for funds that complied with the limitations and restrictions of the Act.

The guidance relating to pre-event publicity for non-Federal fundraisers—both for State, district, and local party committees as well as other non-Federal fundraising events, did not evolve as clearly, however. 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 Governor's 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 pre-event 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).

### F. *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 “clarify[ing] 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.* at 933. 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).” *Id.* at 934.

## II. Proposed Revisions to 11 CFR 300.64

To comply with the *Shays III* decision, the Commission proposes revising the exemption for attending, speaking and being a featured guest at non-Federal fundraising events at 11 CFR 300.64. The Commission seeks comment on three alternative proposals. Alternative 1 addresses only non-Federal fundraising events for State, district, and local party committees, while Alternatives 2 and 3 address participation by Federal candidates and officeholders at all non-Federal fundraising events, including fundraisers for State and local candidates.

The Commission has not made any determination as to which of the alternative provisions to adopt in the final rule. The final rule may contain only aspects of one alternative or elements from some or all of the alternatives. The Commission invites comment on which, if any, of the three alternatives would be best and why. The Commission is particularly interested in whether the proposed alternatives would satisfy the court of appeals decision in *Shays III*.

### A. Alternative 1

Alternative 1 proposes an amendment to current 11 CFR 300.64 in order to remedy the deficiencies identified by the court of appeals in *Shays III*. It would make fewer changes to the existing rule than either Alternative 2 or

Alternative 3. Alternative 1 would not address non-Federal fundraising events for entities other than State, district, and local committees of political parties. Accordingly, Alternative 1 does not attempt to extend or limit the advice given in Advisory Opinions 2003–03 (Cantor) and 2003–36 (Republican Governor’s Association).

First and foremost, Alternative 1 would delete paragraph (b) of 11 CFR 300.64, which allows Federal candidates and officeholders to speak at State, district, and local party committee fundraising events without restriction or regulation. This change is meant to address the *Shays III* court’s concerns that the provision “allows what BCRA directly prohibits”: the raising of funds outside the limitations and prohibitions of the Act by Federal candidates and officeholders. *See Shays III* at 933. The Commission seeks comment on this proposed deletion. In particular, would it be sufficiently responsive to the *Shays III* court’s opinion? By deleting this paragraph, would the rule properly interpret and give effect to the language of 2 U.S.C. 441i(e)(3)?

In addition, Alternative 1 would designate the introductory paragraph of 11 CFR 300.64 as paragraph (a) and amend it to provide that: (1) Federal candidates and officeholders may attend, speak, or be featured guests at State, district, and local party committee fundraising events at which funds outside the limitations and prohibitions of the Act or Levin funds are raised, and (2) Federal candidates and officeholders who solicit, receive, direct, transfer, or spend funds at such events must do so in accordance with Commission regulations. In general, Federal candidates and officeholders may not solicit funds in connection with any election outside the limitations and prohibitions of the Act. 2 U.S.C. 441i(e)(1).<sup>4</sup> The exceptions to this general rule are set forth in subpart D of 11 CFR 300.

Although the statutory limitation contained in 2 U.S.C. 441i(e)(1) applies at *any time* and *in any context* that a Federal candidate or officeholder might make a solicitation in connection with any election, 2 U.S.C. 441i(e)(3) provides that Federal candidates and officeholders may “attend, speak, or be a featured guest” at *fundraising events* for State, district and local party committees.

Alternative 1 is intended to implement 2 U.S.C. 441i(e)(3) by permitting certain activities by Federal candidates and officeholders—attending, speaking at, or being a featured guest at a State, district, or local party committee event at which funds outside the limits and prohibitions of the Act are being solicited or directed by the host party committee—that might otherwise be limited by the Act because they could be viewed as soliciting, receiving, directing, transferring, and spending funds outside the limitations and prohibitions of the Act in connection with any election.

The Commission seeks public comment on proposed paragraph (a). Does the proposal provide sufficient guidance to Federal candidates and officeholders regarding their conduct at fundraising events for State, district, and local committees of political parties, including how they may solicit at such events?

Proposed paragraph (a) would also effect a technical correction in the rule. The proposal would delete the reference to 11 CFR 100.24 in the current rule and replace it with a reference to 11 CFR 300.31(e)(2). This change would track more closely with cross-references in the Act. *See* 2 U.S.C. 441i(e)(3). Section 441i(e)(3) of the Act includes a cross reference to Section 441i(b)(2)(C), which in effect prohibits Federal candidates and officeholders from soliciting, receiving, directing, transferring or spending Levin funds. *See* 2 U.S.C. 441i(b)(2)(C). However, 11 CFR 300.64, the rule implementing Section 441i(e)(3) of the Act, does not include a parallel cross-reference to 11 CFR 300.31(e), the rule implementing Section 441i(b)(2)(C). Instead, 11 CFR 300.64 cross-references 11 CFR 100.24, which defines Federal election activity and thus is not directly related to the issue of attending, speaking, or being a featured guest at a State, district or local party committee fundraising event.

Alternative 1 would also redesignate paragraph (a) of the current rule, which addresses advertising, announcing, or otherwise publicizing a Federal candidate or officeholder’s appearance at a State, district, or local party committee fundraising event, as paragraph (b). Because publicity for a fundraising event for a State, district, or local committee of a political party was not at issue in the *Shays* litigation, Alternative 1 does not propose any substantive changes to the current rule regarding publicity. As the Commission has stated previously, the purpose of this paragraph is to clarify that State parties are free to advertise, announce or

<sup>4</sup> 2 U.S.C. 441i(e)(1)(A) applies to a candidate or officeholder soliciting funds “in connection with an election for Federal office” and 2 U.S.C. 441i(e)(1)(B) applies to a candidate or officeholder soliciting funds “in connection with any election other than an election for Federal office.”

otherwise publicize, including in pre-event invitations, a Federal candidate or officeholder's attendance, speaking, being a featured guest at a State, district, or local party committee fundraising event as long as that publicity does not constitute a solicitation of funds outside the limits and prohibitions of the Act by the Federal candidate or officeholder. See 2002 Final Rules at 49108; 2005 Revised E&J at 37651. In light of the *Shays III* court's ruling that Federal candidates and officeholders may not solicit funds outside the prohibitions and limitations of the Act at such events, should the rule explicitly state that they also may not solicit such funds in pre-event publicity materials? Alternatively, should paragraph (b) be deleted altogether?

The proposed rule text in Alternative 1 addresses only Federal officeholders' and candidates' attendance, speaking, or being a featured guest at State, local, and district party fundraising events. Alternative 1 also provides that State, district, and local party committees may publicize Federal candidates' and officeholders' participation at such events, but does not specifically address the parameters of such publicity, such as whether the publicity may include solicitations of funds outside the limits and prohibitions of the Act by the event sponsor if the Federal candidate or officeholder appears on the publicity, and what would constitute a solicitation by the Federal candidate or officeholder in this context. Alternative 1 also would continue to leave unaddressed whether, and under what conditions, Federal officeholders and candidates may participate at non-party fundraising events that are in connection with any election at which funds outside the limits and prohibitions of the Act are raised.

Although the text of the rule would not address whether Federal candidates and officeholders may serve on "host committees" for a party fundraising event at which funds outside the prohibitions and limitations of the Act are raised or may sign or otherwise make a solicitation in connection with a party fundraising event at which such funds are raised, such activities would continue to be prohibited. See 2002 Final Rules at 49108; 2005 Revised E&J at 37651.

#### B. Scope of Alternatives 2 and 3

Under proposed Alternatives 2 and 3, 11 CFR 300.64 would be more extensively revised to comply with the court of appeals' decision, as well as to provide additional guidance on participation by Federal candidates and officeholders in all fundraising events at

which funds outside the limits and prohibitions of the Act are raised ("non-Federal fundraising events"). The scope of activities covered by Alternatives 2 and 3 is the same, although the two proposals diverge in how they would regulate those activities.

Paragraph (a), which is the same in both of these alternatives, establishes that the scope of the proposed rule is more comprehensive than current 11 CFR 300.64. In addition, paragraph (a) provides that the proposed rule would address a fuller spectrum of Federal candidate and officeholder activity—specifically, Federal candidate and officeholder participation at non-Federal fundraising events, as well as Federal candidates and officeholder participation in the pre-event publicity for such events.

However, proposed paragraph (a) limits the scope of Alternatives 2 and 3 in three important respects. First, it provides that the rule would cover only participation by Federal candidates and officeholders in *non-Federal fundraising events*—those fundraising events at which funds outside the limits and prohibitions of the Act, or Levin funds, are raised, even if Federal funds are also raised at the event. The proposed rule would not cover fundraising events at which *only* Federal funds are raised, nor would it apply to fundraising events in connection with any non-Federal election at which only funds within the limitations and prohibitions of the Act are raised (e.g., a small-dollar, non-corporate, non-union fundraiser for a State candidate).

Second, proposed paragraph (a) provides that Alternatives 2 and 3 would cover only those non-Federal fundraising events that are "in connection with any election for Federal office or any non-Federal election." In other words, the Commission does not intend these alternatives to affect Federal candidate and officeholder participation in fundraising events that are in no way election related. The purpose of this provision is two-fold: first, it applies the Act's prohibition on Federal candidates and officeholders soliciting, receiving, directing, transferring, spending, or disbursing funds in connection with any election for Federal office or any non-Federal elections, see 2 U.S.C. 441i(e)(1)(B); second, it ensures that the proposed rule does not reach activity that is outside the Commission's jurisdiction.

Third, proposed paragraph (a) states explicitly that nothing in proposed 11 CFR 300.64 shall 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). To the extent that Alternative 2 or 3 could be read to limit in any way these pre-existing statutory exceptions, the Commission wishes to make clear that they do not.

The Commission seeks comment on the scope of Alternatives 2 and 3 as set forth in proposed paragraph (a) of each. Does it correctly establish the scope of the proposed rule? Is it appropriate for the rule to address the full range of Federal candidate and officeholder participation in non-Federal fundraising events? Do Alternatives 2 and 3 set forth proposed rules that clearly state the manner in which Federal candidates and officeholders may participate in such events? Are there other forms of participation in these types of events which the rules neglect to cover? The Commission intends for the scope to cover activities at all fundraising events at which funds outside the limitations and prohibitions of the Act are raised, including dual purpose fundraisers (*i.e.*, fundraising events at which Federal funds and non-Federal funds are raised). The Commission seeks comment on whether it is necessary to include an explicit statement in the rule indicating that such dual-purpose events are covered.

Does proposed paragraph (a) appropriately limit the scope of Alternatives 2 and 3? By covering participation by Federal candidates and officeholders only in fundraising events that are in connection with any election for Federal office or any non-Federal election and at which funds outside the limits and prohibitions of the Act are raised, has the rule been crafted too narrowly? Are there other types of fundraising events that should be addressed by the proposed rule that are not under the current construction? Is the scope of Alternatives 2 and 3 correctly limited to only participation in those events at which funds outside the limitations and prohibitions of the Act and Levin funds are raised, regardless of whether Federal funds are also raised at the event?

Importantly, the Commission seeks comment on whether proposed paragraph (a)—and its use of the "in connection with any election for Federal office or any non-Federal election" standard—establishes a clear and administrable standard. Does this standard provide clear guidance to Federal candidates and officeholders as to which types of events will—and will not—be affected under the proposed rule? Do prior Commission advisory opinions already provide sufficient

guidance for the meaning of this term? *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), 2004–14 (Davis) (solicitation of donations by a Federal officeholder to a charity was not in connection with any election), and 2003–20 (Hispanic College Fund) (solicitation of donations by a Federal officeholder to a scholarship fund was not in connection with any election). *Cf.* Advisory Opinion 2003–12 (Flake) (solicitation of donations by Federal officeholders for a political organization supporting a State referendum was in connection with an election if the measure had qualified for the ballot). Alternatively, should the Commission define what constitutes “in connection with any election for Federal office or any non-Federal election” for purposes of Alternatives 2 and 3? If so, how should the Commission define this standard?

As proposed, Alternatives 2 and 3 cover participation in *fundraising events* that are “in connection with any election for Federal office or any non-Federal election.” Does this establish the correct standard? Should the rule instead look to the *organization or entity* that is the beneficiary of the fundraiser for purposes of determining whether the “in connection with any election for Federal office or any non-Federal election” standard is met? *See, e.g.*, Advisory Opinion 2003–36 (Republican Governor’s Association).

Finally, the Commission seeks comment on whether proposed paragraph (a) sufficiently preserves the statutory exclusions at 2 U.S.C. 441i(e)(2) and (3). Are the cross-references to 11 CFR 300.63 and 300.65 clear and helpful? Are they necessary?

### C. Alternative 2

Under Alternative 2, Federal candidates and officeholders would be permitted to: (1) Attend, speak, and be featured guests at non-Federal fundraising events; (2) solicit funds in compliance with the limitations and prohibitions of the Act at such events; and (3) be featured, with certain limitations, in pre-event publicity for such events. Alternative 2 is based on the statement in the *Shays III* decision that 2 U.S.C. 441i(e)(3) “merely clarifies” that Federal candidates may attend, speak, or appear as featured guests at State, district, or local party committee events without such activities constituting an unlawful “solicitation.” *Shays III* at 933. The court explained that if Congress had intended for 2 U.S.C. 441i(e)(3) to create

an exception to the general solicitation ban, it would have done so explicitly, as it did in other provisions of Section 441i(e). *Id.* at 933–34.

To that end, Alternative 2 does not distinguish between State, district, and local party events and other non-Federal fundraising events. Under proposed paragraph (b)(1) of Alternative 2, Federal candidates and officeholders may attend, speak, and be featured guests at all non-Federal fundraising events. This provision reflects that, under Alternative 2, attending, speaking at, or being a featured guest at non-Federal fundraising events does not constitute a solicitation and, therefore, these activities are not subject to the Act’s restrictions on Federal candidates and officeholders.

The proposed rule in Alternative 2 is in part informed by, and adopts, some of the Commission’s conclusions reached in Advisory Opinions 2003–03 (Cantor) and 2003–36 (Republican Governors Association). Although Alternative 2 is consistent with certain conclusions contained in previous Commission advisory opinions, Alternative 2 is based entirely on the reasoning set forth in this notice.

The Commission seeks comment on this approach. Does it correctly interpret and implement the court’s decision in *Shays III*? Is it appropriate to allow Federal candidates and officeholders to attend, speak at, and be featured guests at all non-Federal fundraising events—whether for State, district, or local party committees or for other entities? Does such an approach give appropriate meaning to 2 U.S.C. 441i(e)? If it is correct to interpret the *Shays III* decision to mean that merely being a featured guest at a State, district, or local party committee fundraiser is not in and of itself an unlawful solicitation according to the Act (2 U.S.C. 441i(e)(3)), how could being a featured guest at a non-party, non-Federal fundraiser transform such activity into an unlawful solicitation? So long as a Federal candidate or officeholder does not solicit funds outside the limitations and prohibitions of the Act, what statutory authority does the Commission have to limit Federal candidates and officeholders from attending, speaking at, or appearing as featured guests at non-party, non-Federal fundraising events? And if such statutory authority exists, how can it be harmonized with the court’s reasoning in *Shays III*?

Proposed paragraph (b)(2) allows Federal candidates and officeholders to solicit funds at non-Federal fundraising events so long as the solicitations are in amounts and from sources that are consistent with State law and do not

violate the Act’s contribution limits or source prohibitions. Proposed paragraphs (b)(2)(i) and (ii) clarify the manner in which Federal candidates and officeholders may so limit their solicitations at non-Federal fundraising events. Specifically, proposed paragraph (b)(2)(i) states that a Federal candidate or officeholder may properly limit such a solicitation either by displaying a written notice or by making an oral statement that the solicitation is limited to funds permitted under the Act. Paragraph (b)(2)(ii) provides that, whether done orally or in writing, the notice would have to be clear and conspicuous.

The Commission seeks comment on proposed paragraph (b)(2). Does it faithfully implement the restrictions imposed by the Act on Federal candidates and officeholders in their solicitation of funds in connection with non-Federal elections? *See* 2 U.S.C. 441i(e)(1)(B); *see also* 11 CFR 300.62. Should the Commission be more explicit regarding notices limiting solicitations at non-Federal fundraising events? For example, should the final rule include examples of notices that satisfy the rule? Further, should the Commission articulate more clearly how a notice will be considered clear and conspicuous? What factors should the Commission consider in making this determination? Are such notices effective?

Finally, paragraph (c) of Alternative 2 addresses publicity associated with non-Federal fundraising events, including advertisements, announcements, and pre-event invitations, regardless of form (*e.g.*, phone calls, mail, e-mail, facsimile), and the extent to which Federal candidates and officeholders may participate in such publicity. The proposal distinguishes between publicity that solicits funds outside the limitations and prohibitions of the Act and publicity that does not. Proposed paragraph (c) is intended to be consistent with the conclusions that were reached in Advisory Opinions 2003–36 (Republican Governor’s Association) and 2007–11 (California State Party Committees) and also answer the questions raised in those advisory opinions that the Commission was unable to resolve.

Proposed paragraph (c)(1) provides that Federal candidates and officeholders may without limitation approve, authorize, agree, or consent to the use of their names or likenesses in publicity for non-Federal fundraising events, if the publicity does not contain a solicitation. Such publicity may 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.

If pre-event publicity solicits funds outside the limitations or prohibitions of the Act or Levin funds, though, proposed paragraph (c)(2) establishes two different standards for participation by Federal candidates and officeholders that are contingent upon whether the solicitation is made by the Federal candidate or officeholder or by another person or entity associated with the event.

Specifically, under proposed paragraph (c)(2)(i), Federal candidates and officeholders would be prohibited from authorizing the use of their names or likenesses in publicity that would constitute a solicitation by them of funds outside the limitations and prohibitions of the Act. Proposed paragraph (c)(2)(i)(A) states that this prohibition covers publicity in which a Federal candidate or officeholder solicits funds outside the limitations and prohibitions of the Act, such as by signing a solicitation letter. Publicity that identifies a Federal candidate or officeholder as serving in a role tied to fundraising, such as serving on the event's "host committee," is a solicitation of funds outside the limitations and prohibitions of the Act by that individual and also would be prohibited. By contrast, proposed paragraph (c)(2)(i)(B) provides that being identified on pre-event publicity as merely serving as a "featured speaker" or "honorary chairperson" would not be in and of itself a solicitation because this Alternative presumes that those are not roles tied to fundraising and therefore would be permitted.

Proposed paragraph (c)(2)(ii) permits a Federal candidate or officeholder to approve, authorize, agree, or consent to the use of his or her name or likeness on publicity that contains a solicitation of funds outside the limitations and prohibitions of the Act *if* the solicitation is made by—and clearly attributable to—a person or entity other than the Federal candidate or officeholder. Such publicity must include a clear and conspicuous statement noting that the solicitation of funds outside the limitations and prohibitions of the Act is not being made by the Federal candidate or officeholder whose name or likeness is featured. Such a statement would be required to meet the requirements of 11 CFR 110.11(c)(2) in order to be considered "clear and conspicuous."

The Commission seeks comments on how pre-event publicity for non-Federal fundraising events is treated in proposed paragraph (c). Given the

court's statement in *Shays III* that 2 U.S.C. 441i(e)(3) provides that "Federal candidates may \* \* \* be a featured guest at a State party event where soft money is raised," *Shays III* at 933, is there any reason why pre-event publicity regarding that activity should not be allowed? Should such publicity be limited in any way, or do such limitations infringe upon a Federal candidate's or officeholder's ability to be a *featured* guest?

As above, the Commission also requests comments on whether the discussion in *Shays III* regarding this issue was limited to State party events, or whether the court's reasoning applies more broadly to all non-Federal fundraising events. If the latter, does its reasoning apply also to how Federal candidates and officeholders may be "featured" in pre-event publicity? Is proposed paragraph (c) of Alternative 2 consistent with the *Shays III* decision on this issue? Is it consistent with 2 U.S.C. 441i(e)?

Additionally, does proposed Alternative 2 establish a generally workable standard that provides clear guidance to Federal candidates and officeholders? Does the proposal adequately address all types of publicity associated with these events? Does the proposal correctly implement the prohibition in the Act and in Commission regulations regarding the solicitation, receipt, direction, transfer, spending, and disbursement of funds outside the limitations and prohibitions of the Act by Federal candidates and officeholders? Is the identification of a Federal candidate or officeholder as member of a "host committee" appropriately treated under the proposal as being a solicitation by the Federal candidate or officeholder, or is it common for such an individual to be identified as a "host" in a capacity not related to solicitation or fundraising? Is it appropriate for the proposal to exclude titles on pre-event publicity such as featured guest, featured speaker, or honorary chairperson, or should such titles similarly be considered to be a solicitation by the individual?

Is the distinction between publicity that includes a solicitation by Federal candidates and officeholders and publicity that includes a solicitation by another person associated with the non-Federal fundraising event a reasonable one? Could a Federal candidate or officeholder be featured in publicity that solicits funds outside the limitations and prohibitions of the Act without having that solicitation attributed, at least in part, to that candidate or officeholder? Is proposed paragraph (c) of Alternative 2 consistent with

proposed paragraph (b), governing participation by Federal candidates and officeholders at non-Federal fundraising events?

In conclusion, the Commission seeks comment on proposed Alternative 2 in all respects. Does it appropriately resolve the *Shays III* court's criticisms of the Commission's previous implementation of 2 U.S.C. 441i(e)(3) and does it appropriately implement that Section, as well as Section 441i(e) generally?

#### D. Alternative 3

As noted above, the proposed scope of Alternative 3 is the same as that proposed in Alternative 2. As with Alternative 2, Alternative 3 does not cover participation by Federal candidates or officeholders in fundraising events at which *only* Federal funds are raised, nor would it apply to fundraising events in connection with any non-Federal election at which only funds subject to the limitations and prohibitions of the Act are raised (e.g., a small-dollar, non-corporate, non-union fundraiser for a State candidate). Though Alternatives 2 and 3 would cover the same universe of activity, they diverge in the manner in which that activity would be addressed. Specifically, Alternative 3 would treat participation by Federal candidates and officeholders at non-Federal fundraising events for State, district, and local party committees differently from participation by Federal candidates and officeholders at all other non-Federal fundraising events (e.g., for a local candidate, a State PAC, or an organization making independent expenditures). This approach is informed both by the court's decision that found invalid the Commission's previous rule allowing Federal candidates and officeholders to speak at certain non-Federal fundraising events without "restriction or regulation," and by the plain language of the Act, specifically, by the focus in 2 U.S.C. 441i(e)(3) on State, district, and local party committee fundraisers only.

As the court noted in *Shays III*, 2 U.S.C. 441i(e)(3) permits Federal candidates to attend, speak or be a featured guest at State, district, and local party committee fundraisers—activities which the Act and, specifically, its fundraising restrictions, "might otherwise be read as forbidding." *Shays III* at 933. This language could be read as an acknowledgement by the court that Section 441i(e)(1) may permissibly and plausibly be construed to limit attending, speaking, and being a featured guest as fundraising activities.



If such a construction of Section 441i(e)(1) had not been possible, Section 441(i)(e)(3) would not have been necessary.

Whether the statute would affect such activities is largely a function of the Commission's definition of "solicit," which was promulgated subsequent to the passage of BCRA and 2 U.S.C. 441i(e)(3). The Commission initially defined "to solicit" as "to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." 11 CFR 300.2(m) (2003). The Court of Appeals stuck down this definition for failing to enact a restriction equal in breadth to that intended by Congress. *Shays v. FEC*, 414 F.3d 76, 103–05 (DC Cir. 2005). Specifically, the Court held that the Commission's prior definition failed to cover indirect requests. *Id.* In order to comply with the court's ruling, the Commission revised its definition of "to solicit" to mean "to ask, request or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." 11 CFR 300.2(m).

Federal candidates and officeholders are often included at fundraising events for the specific purpose of drawing more donors (and more donations) to the events. The fundraiser's motivation to include Federal candidates and officeholders at the event is, as one commenter in the 2005 rulemaking explained, "to increase attendance and the [fundraiser's] yield from that event." 2005 Revised E&J at 37654. When a Federal candidate or officeholder allows his or her name to be used to increase the number of donors and amount of donations, that helps to raise funds—potentially funds outside the limitations and prohibitions of the Act. Participating in non-Federal fundraisers in this way would constitute an implicit ask, request, or recommendation that individuals attend and donate funds as part of the fundraising event, and thus would be prohibited for Federal candidates and officeholders to the extent the event seeks to raise funds outside the limitations and prohibitions of the Act.

Under this reading, 2 U.S.C. 441i(e)(3) does, indeed, provide a limited exception to the Act's fundraising restrictions—specifically, for Federal candidates and officeholders who appear as featured guests at non-Federal fundraising events for State, district, or local party committees. Importantly, given 2 U.S.C. 441i(e)(3)'s specific focus on only State, district, and local party committee events, this exception would not extend to other election-related non-

Federal fundraising events. As such, proposed paragraph (b)(1)(i) of Alternative 3 provides that a Federal candidate or officeholder may attend, speak, or be a featured guest at a State, district or local party fundraiser. By contrast, proposed paragraph (c) provides that a Federal candidate or officeholder may attend a non-party, non-Federal fundraising event and speak at such an event (so long as the speech does not itself constitute a solicitation), but may not consent to the use of his or her name or likeness in publicity for non-party, non-Federal events. This aspect of the proposal is intended to prohibit activities by Federal candidates and officeholders in connection with non-Federal fundraising events that constitute the solicitation of funds outside the limits and prohibitions of the Act, which would violate the Act.

The Commission seeks comment on this approach. As a threshold matter, does the proposed bifurcated structure of the rule appropriately recognize the Act's unique treatment of participation by Federal candidates and officeholders at State, district, and local party committee fundraisers? If the Commission were to adopt a rule that treats Federal candidate and officeholder participation at all non-Federal fundraising events the same, would it, in effect, render Section 441i(e)(3) of the Act meaningless? Would it be responsive to the *Shays III* court's concern that the Commission's initial regulation was too permissive? Is the approach proposed in Alternative 3 consistent with the court's opinion in *Shays III*? Does the court's opinion provide guidance on whether the rule should treat State, district, and local party committee fundraisers differently from other election-related non-Federal fundraising events, given that these other events were not at issue in the prior regulation?

The Commission invites comments on whether the Commission should provide additional guidance by promulgating a regulatory definition of "featured guest," and if so, what should that definition be? Are there different ways in which a guest might be featured and would some of those ways constitute a solicitation while others would not? What does it mean to be a featured guest? Is being featured as a guest limited to appearing on written materials or can a guest be featured in some other manner? Is there a difference between simply appearing on a list of attendees and being featured on such a list? If pre-event publicity for a fundraising event indicates that a Federal candidate or officeholder will

be attending, or will be speaking, is that alone enough to make the Federal candidate or officeholder a featured guest?

What factors should the Commission consider in determining when a person should be considered to be a featured guest? If a person is listed in pre-event publicity as "invited" (but for which there is no confirmation the person will attend), should the person still be considered a featured guest? Should a person be considered a featured guest even though the word "featured" is not used? Can a person be a "guest" if the person is a usual attendee or a member of the group hosting the event?

Similarly, because the exemption for participating as a featured guest only applies when a Federal candidate does so at a State, district, or local party committee's fundraising event, should the Commission promulgate a regulatory definition of what qualifies as a "fundraising event"? For instance, is there a minimum number of attendees required to constitute a fundraising event? Or is the term "fundraising event" generally understood by those who participate in them, such that no definition is required?

Regarding the specifics of Alternative 3, proposed paragraph (b)(1)(i) of Alternative 3 provides that a Federal candidate or officeholder may attend, speak, or be a featured guest at a State, district or local party fundraiser.

Proposed paragraph (b)(1)(ii) provides that Federal candidates and officeholders may solicit funds at such non-Federal fundraising events if the solicitation is not for Levin funds and is limited to funds that do not exceed the Act's contribution limits or come from prohibited sources under the Act. Each proposed paragraph implements, almost verbatim, a provision of the Act. Proposed paragraph (b)(1)(i) addresses 2 U.S.C. 441i(e)(3) of the Act, which provides that a Federal candidate or officeholder may attend, speak, or be a featured guest at a State, district or local party fundraiser. Proposed paragraph (b)(1)(ii) states that Federal candidates and officeholders may solicit funds for State, district and local party committees so long as the solicitation is consistent with 2 U.S.C. 441i(e)(1)(B). Proposed paragraph (b)(1)(ii) is intended to require all solicitations made by Federal candidates and officeholders at such events to be limited to funds that comply with the Act's amount limitations and source prohibitions. This proposal would neither preserve nor extend the disclaimer regime of Advisory Opinions 2003–36 (Republican Governor's Association) and 2003–03 (Cantor).



The Commission seeks comment on the proposed distinctions between party committee non-Federal events and other non-Federal fundraising events. Does the proposal faithfully implement the Act? Does it appropriately recognize Congress's different statutory treatment of Federal candidates' and officeholders' participation in non-Federal party committee events and other non-Federal fundraising events? Or, consistent with Alternative 2, does the statute merely clarify that Federal candidates and officeholders may participate in non-Federal party committee events, without necessarily differentiating between party versus non-party events? Does proposed paragraph (b)(1)(ii) establish clear guidance for Federal candidates and officeholders who wish to solicit funds at fundraising events for a State, district, or local committee of a political party?

Proposed paragraph (b)(2) of Alternative 3 would address publicity associated with non-Federal fundraising events for State, district, and local committees of political parties. It would provide that a Federal candidate or officeholder may approve, authorize, agree, or consent to the use of his or her name or likeness in publicity for a non-Federal fundraising event for a State, district, or local party committee for the purpose of indicating that he or she will be attending, speaking, or will be a featured guest at the event *only if* the publicity does not solicit funds outside the limitations and prohibitions of the Act or Levin funds. Publicity covered by proposed paragraph (b)(2) would include, but not be limited to, pre-event invitation materials. Like proposed paragraph (b)(1)(ii), proposed paragraph (b)(2) is intended to ensure that Federal candidate and officeholder participation in publicity for State, district and local party committee fundraisers is consistent with the Act's prohibition on raising funds outside the limitations and prohibitions of the Act. *See* 2 U.S.C. 441i(e)(1)(B).

The Commission seeks comments on paragraph (b)(2)'s treatment of publicity in connection with non-Federal fundraising events for State, district, and local party committees. Does the proposal properly implement 2 U.S.C. 441i(e)(3)? Does it preserve the Act's restrictions on the raising of Levin funds and funds outside the limitations and prohibitions of the Act? Does proposed paragraph (b)(2) establish clear guidance as to how Federal candidates and officeholders may and may not be featured in such publicity? Would it clearly establish the types of publicity that would solicit Levin funds or funds

outside the limitations and prohibitions of the Act?

Proposed paragraph (c) of Alternative 3 in turn would establish rules governing participation by Federal candidates and officeholders at all other non-Federal fundraising events. Given the absence of a statutory provision addressing specifically non-party, non-Federal fundraisers, it follows that no special exceptions exist for Federal candidates and officeholders at such events. Accordingly, rules governing participation by Federal candidates and officeholders at such events would be guided only by to the Act's general fundraising restrictions. *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. Accordingly, a Federal candidate or officeholder could participate in non-party, non-Federal fundraisers only if his or her participation did not constitute a solicitation otherwise prohibited by the Act.

To that end, proposed paragraph (c)(2) provides that a Federal candidate or officeholder may attend a non-party, non-Federal fundraising event and speak at such an event so long as the speech does not, itself, constitute a solicitation. Although this type of participation at non-party, non-Federal fundraisers is not explicitly exempted by the Act, it is also not specifically prohibited by the Act or Commission regulations. *See, e.g.,* 11 CFR 300.2(m). So long as a Federal candidate or officeholder can attend or speak at a non-party, non-Federal fundraising event without soliciting funds outside the limitations and prohibitions of the Act, the Commission is not proposing to prohibit such attendance and speech.

Proposed paragraph (c)(1) of Alternative 3, however, prohibits Federal candidates and officeholders from consenting to the use of their names or likenesses in publicity for non-party, non-Federal fundraisers. This aspect of Alternative 3 is based upon the premise that Federal candidates and officeholders lend their names to publicity for fundraising events for one reason: to help raise funds. Therefore, it follows that appearing in publicity as a featured guest at an event where funds outside the limitations and prohibitions of the Act will be raised amounts to an implicit request that someone make a contribution beyond the limits of the Act and Commission regulations. *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62, 11 CFR 300.2(m) (stating that a solicitation may be made "explicitly or implicitly" and is any activity that "in context" contains a clear message asking for a contribution or donation). To the extent that the purpose of a Federal candidate or officeholder's participation is to

attract contributors and contributions to an event that solicits funds outside the limitations and prohibitions of the Act, such participation is prohibited under proposed paragraph (c)(1). A Federal candidate or officeholder may not participate in those efforts.

The Commission seeks comment on this approach. Would allowing Federal candidates and officeholders to attend or speak at such non-Federal fundraisers undermine the Act's restrictions on soliciting Levin funds and funds outside the limitations and prohibitions of the Act? Does the Commission have statutory authority to restrict Federal candidates and officeholders from attending or speaking at non-party, non-Federal fundraisers, if they do not ask for funds outside the limitations and prohibitions of the Act?

In conclusion, the Commission seeks comment on proposed Alternative 3 in all respects. Does it appropriately resolve the *Shays III* court's criticisms of the Commission's previous implementation of 2 U.S.C. 441i(e)(3) and does it appropriately implement that section? Does Alternative 3 provide a generally workable standard that provides clear guidance to Federal candidates and officeholders?

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

##### *Regulatory Flexibility Act*

The Commission certifies that the attached proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the entities affected by this proposed rulemaking 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 proposed rulemaking would affect 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 proposal 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 would be amended to read as follows:

#### PART 300—NON-FEDERAL FUNDS

1. The authority citation for part 300 would continue to read as follows:

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

2. Section 300.64 would be revised to read as follows:

#### Alternative 1

##### **§ 300.64 Attending, speaking, or appearing as a featured guest at State, district, or local party committee fundraising events (2 U.S.C. 441i(e)(3)).**

(a) A Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, including, but not limited to, a fundraising event at which funds outside the limits and prohibitions of the Act or Levin funds are raised. Federal candidates and individuals holding Federal office who solicit, receive, direct, transfer, or spend funds at any such fundraising event shall only do so in accordance with 11 CFR 300.31(e)(2), 300.61, and 300.62.

(b) State, district, or local committees of a political party may advertise, announce or otherwise publicize that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, publicizing such appearance in pre-event invitation materials and in other party committee communications.

#### Alternative 2

##### **§ 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 any election for Federal office or any non-Federal election at which funds outside the limitations and prohibitions of the Act or Levin funds are raised, and in publicity related to such non-Federal fundraising events. This section applies even if funds that comply with the limitations and prohibitions of the Act are also raised 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, 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 limitations and prohibitions of the Act and is 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, does not seek funds that exceed the Act's contribution limits, and does not seek funds from prohibited sources under the Act.

(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.

(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 or officeholder may approve, authorize, agree, or consent to the use of his or her name or likeness in publicity for a non-Federal fundraising event that does not contain a solicitation.

(2) *Publicity containing a solicitation.*

(i) *Solicitation by the Federal candidate or officeholder.* A Federal candidate or officeholder may not solicit

funds outside the limitations or prohibitions of the Act or Levin funds in any publicity for a non-Federal fundraising event.

(A) A solicitation by the Federal candidate or officeholder occurs if the Federal candidate or officeholder approves, authorizes, agrees, or consents to being identified as serving in a position specifically related to fundraising, such as on a host committee, or signs the communication, even if the communication contains a written statement as described in paragraph (c)(2)(ii) of this section.

(B) Titles such as featured guest, featured speaker, or honorary chairperson are not positions specifically related to fundraising for purposes of this paragraph.

(ii) *Solicitations by someone other than the Federal candidate or officeholder.* A Federal candidate or officeholder may approve, authorize, agree, or consent to the use of his or her name or likeness in publicity for a non-Federal fundraising event that contains a solicitation of funds outside the limitations and prohibitions of the Act or Levin funds only if the solicitation is made by someone other than the Federal candidate or officeholder. Any such publicity must include a clear and conspicuous written statement that the solicitation is not being made by the Federal candidate or officeholder. The written statement must meet the requirements in 11 CFR 110.11(c)(2).

#### Alternative 3

##### **§ 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 any election for Federal office or any non-Federal election at which funds outside the limitations and prohibitions of the Act or Levin funds are raised, and in publicity related to such non-Federal fundraising events. This section applies even if funds that comply with the limitations and prohibitions of the Act are also raised 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) Non-Federal fundraising event for a State, district, or local committee of a political party.

(1) Participation by a Federal candidate or officeholder. A Federal candidate or officeholder may:

(i) Attend, speak, or be a featured guest at a non-Federal fundraising event for a State, district, or local committee of a political party; and

(ii) Solicit funds at such non-Federal fundraising events, provided that the solicitation is limited to funds in amounts that do not exceed the Act's contribution limits and do not come from prohibited sources under the Act.

(2) Publicity for a non-Federal fundraising event for a State, district, or local committee of a political party. A Federal candidate or officeholder may approve, authorize, agree, or consent to the use of his or her name or likeness in an advertisement, announcement, or other publicity for a fundraising event for a State, district, or local committee of a political party for the purpose of indicating that the Federal candidate or officeholder will attend, speak, or be a featured guest at the fundraising event, provided that the advertisement, announcement, or other publicity does not solicit funds outside the limitations and prohibitions of the Act or Levin funds. Such advertisements, announcements, or other publicity may include but are not limited to pre-event invitation materials.

(c) Other non-Federal fundraising events.

(1) For non-Federal fundraising events that are not described in paragraph (b) of this section, a Federal candidate or officeholder may not approve, authorize, agree, or consent to the use of his or her name or likeness in an advertisement, announcement or other publicity for the event, including but not limited to pre-event invitation materials.

(2) Nothing in paragraph (c)(1) would prohibit a Federal candidate or officeholder from attending or speaking at such a non-Federal fundraising event as long as he or she does not solicit funds outside the limitations and prohibitions of the Act.

Dated: November 24, 2009.

On behalf of the Commission.

**Steven T. Walther,**

*Chairman, Federal Election Commission.*

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**BILLING CODE 6715-01-P**

## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Parts 121 and 124**

**RIN 3245-AF53**

#### **Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Tribal Consultation**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule; notice of tribal consultation meeting; request for comments.

**SUMMARY:** The U.S. Small Business Administration (SBA) announces that it is holding tribal consultation meetings in Seattle, Washington and Albuquerque, New Mexico on the topic of the proposed 8(a) Business Development (BD) program regulations. Testimony presented at this tribal consultation meeting will become part of the administrative record for SBA's consideration when the Agency deliberates on approaches to changes in the regulations pertaining to the 8(a) BD program.

**DATES:** The tribal consultation meetings will be held on Wednesday, December 16, 2009 from 9 a.m. to 4 p.m. in Seattle, Washington, and on Thursday, January 14, 2010 from 9 a.m. to 4 p.m. in Albuquerque, New Mexico.

The tribal consultation meeting pre-registration deadline dates are: December 10, 2009 at 5 p.m. Eastern Standard Time (EST) for the Seattle location; and January 8, 2010 at 5 p.m. EST for the Albuquerque location.

**ADDRESSES:** 1. The Seattle Tribal Consultation meeting address is South Seattle Community College's Georgetown Campus, Building C—Gene J. Colin Ed. Bldg., 6737 Corson Avenue South, Seattle, WA 98108.

2. The Albuquerque Tribal Consultation meeting address is American Indian Cultural Center, 2401 12 Street, NW., Albuquerque, NM 87104.

3. Send pre-registration requests to attend and/or testify to Ms. Carol Walker, Office of Native American Affairs, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; by e-mail to [carol.y.walker@sba.gov](mailto:carol.y.walker@sba.gov); or by facsimile to (202) 481-0614.

4. Send all written comments to Mr. Joseph Loddo, Associate Administrator for Business Development, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416; [Joseph.Loddo@SBA.gov](mailto:Joseph.Loddo@SBA.gov); or by facsimile to (202) 481-2740.

**FOR FURTHER INFORMATION CONTACT:** If you have any questions on this proposed rulemaking, call or e-mail LeAnn Delaney, Deputy Associate Administrator, Office of Business Development, at (202) 205-5852, or [leann.delaney@sba.gov](mailto:leann.delaney@sba.gov). If you have any questions about registering or attending the tribal consultation please contact Ms. Carol Walker at 202-205-7094, or [carol.y.walker@sba.gov](mailto:carol.y.walker@sba.gov); or by facsimile to (202) 481-0614.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On October 28, 2009 (74 FR 55694-01), SBA issued a Notice of Proposed Rulemaking (NPRM), publicly available at <http://edocket.access.gpo.gov/2009/E9-25416.htm>. In that document, SBA proposed to make a number of changes to the regulations governing the 8(a) BD Program Regulations and several changes to its Small Business Size Regulations. Some of the changes involve technical issues. Other changes are more substantive and result from SBA's experience in implementing the current regulations. In addition to written comments, SBA is requesting oral comments on the various approaches for the proposed changes.

##### **II. Tribal Consultation Meetings**

The purpose of these tribal consultation meetings is to conform to the requirements of Executive Order 13175, Tribal Consultations; to provide interested parties with an opportunity to discuss their views on the issues; and for SBA to obtain the views of these SBA's stakeholders on approaches to the 8(a) BD program regulations. SBA considers tribal consultation meetings a valuable component of its deliberations and believes that this tribal consultation meeting will allow for constructive dialogue with the tribal community, Tribal Leaders, Elders and elected members of Alaska Native Villages or their appointed representatives.

The format of these tribal consultation meetings will consist of a panel of SBA representatives who will preside over the session. The oral and written testimony will become part of the administrative record for SBA's consideration. Written testimony may be submitted in lieu of oral testimony.

SBA will analyze the testimony, both oral and written, along with any written comments received. SBA officials may ask questions of a presenter to clarify or further explain the testimony. The purpose of the tribal consultation is to allow the tribal community, Tribal Leaders, Elders and elected members of Alaska Native Villages or their appointed representatives to comment