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FEDERAL ELECTION COMMISSION

11 CFR Part 300

[Notice 2005–26]

$5,000 Exemption for Disbursements of Levin Funds by State, District, and Local Party Committees and Organizations

AGENCY: Federal Election Commission.

ACTION: Final rule.

SUMMARY: The Federal Election Commission is eliminating from its regulations an exemption allowing State, district, and local committees and organizations of a political party to use only Levin funds to pay for certain types of Federal election activity aggregating $5,000 or less in a calendar year. In *Shays* v. *FEC*, the District Court invalidated the exemption and remanded the regulation to the Commission for further action consistent with the court's opinion. The Commission appealed this ruling, and the Court of Appeals for the D.C. Circuit affirmed the District Court's decision. The repeal of this rule means that State, district, and local political party committees and organizations must pay for these specific types of Federal election activity either entirely with Federal funds, or with a mix of Federal funds and Levin funds. Further information is provided in the supplementary information that follows.

DATES: The rules at 11 CFR 300.32(c)(4) are effective on December 19, 2005.

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

SUPPLEMENTARY INFORMATION: The Commission issued a Notice of Proposed Rulemaking (''NPRM'') proposing to eliminate from its regulations at 11 CFR 300.32(c)(4) an exemption that had allowed State, district, and local committees of a political party [1] to pay for certain types of Federal election activity (''FEA'') [2] aggregating $5,000 or less in a calendar year entirely with Levin funds [3] (''$5,000 Exemption''). The NPRM also requested comments on the possibility of creating a new, restructured exemption. The NPRM was published in the **Federal Register** on February 2, 2005. 70 FR 5385 (February 2, 2005). The comment period closed on March 4, 2005. The Commission received five comments from ten commenters on the proposed rules.[4] Eight commenters favored elimination of the $5,000 Exemption and one commenter favored maintaining the $5,000 Exemption. Additionally, the Commission received a comment from the Internal Revenue Service, indicating ''the proposed rules do not pose a conflict with the Internal Revenue Code or the regulations thereunder.'' The Commission is issuing final rules eliminating the $5,000 Exemption and is declining to adopt a restructured exemption.

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rule that follows was transmitted to Congress on November 10, 2005.

Explanation and Justification

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

The Bipartisan Campaign Reform Act of 2002 (''BCRA''), Pub. L. 107–155, 116 Stat. 81 (2002), amended the Federal Election Campaign Act of 1971 (the ''Act''), 2 U.S.C. 431 *et seq.*, in many respects. Section 441i(b)(1) of the Act, as added by BCRA, provides that State, district, and local political party committees generally must use Federal funds [5] to pay for FEA. However, the Levin Amendment (2 U.S.C. 441i(b)(2)) provides an exception for two types of FEA, for which State, district, and local political party committees may allocate disbursements between Federal funds and Levin funds in accordance with allocation ratios determined by the Commission. 2 U.S.C. 441i(b)(2); *see also* 11 CFR 300.2(i), 300.32, and 300.33. Types 1 and 2 FEA, which involve certain voter registration, get-out-the-vote, voter identification, and generic campaign activity, are allocable between Federal and Levin funds, so long as the activities do not refer to a clearly identified Federal candidate (''allocable Type 1&2 FEA''). *See* 2 U.S.C. 441i(b)(2)(B)(i) and 11 CFR 300.32(c).

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

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

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

[3] Levin funds are funds that are raised by State, district, or local party committees and organizations pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. *See* 11 CFR 300.2(i).

[4] All comments on the NPRM are available at *http://www.fec.gov/law/law_rulemakings.shtml#levin.*

[5] ''Federal funds'' are funds that comply with the limits, prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g).

calendar year, thereby permitting such party committees and organizations to pay for these expenses entirely with Levin funds.

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

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

The NPRM proposed to eliminate entirely the $5,000 Exemption in 11 CFR 300.32(c)(4). In response to the NPRM, eight commenters urged the Commission to eliminate the $5,000 Exemption altogether. These commenters stated that BCRA was clear on its face and argued that the Levin Amendment itself reflected Congress's narrowly-drawn exception allowing State, district, and local party committees to use only Federal funds or to allocate between Federal and Levin funds for allocable Type 1&2 FEA. Four of the commenters noted that the Levin Amendment was, itself, a compromise reached during Congressional deliberation. These commenters asserted that Congress had contemplated that Levin funds always would be used in combination with Federal funds for allocable Type 1&2 FEA, recognizing that FEA activities influence Federal elections.

On the other hand, one commenter favored retaining the $5,000 Exemption, stating that the exemption did not undermine Congressional intent. Specifically, this commenter asserted that absent the $5,000 Exemption, a strict application of the Levin Amendment would lead to suppression of ''local grassroots activity in favor of non-party or large institutional party activity'' and that this was ''an unlikely objective'' for Congress.

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

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

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

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

The Commission certifies that the attached final rule does not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the organizations affected by this final rule are State, district, and local party committees and organizations, which are not ''small entities'' under 5 U.S.C. 601. These not-for-profit committees do not meet the definition of ''small organization,'' which requires that the enterprise be independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately. To the extent that any State party committees representing minor political parties might be considered ''small organizations,'' the number affected by this final rule is not substantial.

List of Subjects in 11 CFR Part 300

Campaign funds, Nonprofit organizations, Political candidates, Political committees and parties, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, the Federal Election Commission is amending Subchapter C of Chapter I of Title 11 of the *Code of Federal Regulations* as follows:

PART 300—NON-FEDERAL FUNDS

■ 1. The authority citation for Part 300 continues to read as follows:

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

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

§ 300.32 Expenditures and disbursements.

* * * * *

(c) *Conditions and restrictions on spending Levin funds.* * * *

(4) The disbursements for allocable Federal election activity must be paid for either entirely with Federal funds or by allocating between Federal funds and Levin funds according to 11 CFR 300.33.

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Dated: November 10, 2005.

Scott E. Thomas,

Chairman, Federal Election Commission.

[FR Doc. 05–22778 Filed 11–16–05; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 4 and 19

[Docket No. 05–19]

RIN 1557–AC94

FEDERAL RESERVE SYSTEM

12 CFR Parts 263 and 264a

[Docket No. R–1230]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 336

RIN 3064–AC92

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 507 and 509

[No. 2005–48]

RIN 1550–AB99

One-Year Post-Employment Restrictions for Senior Examiners

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

ACTION: Final rule.

SUMMARY: The OCC, Board, FDIC and OTS (the Agencies) have jointly adopted final rules to implement section 6303(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Intelligence Reform Act), which imposes post-employment restrictions on senior examiners of depository institutions and depository institution holding companies. Under section 6303(b), and the Agencies' final implementing rules, a senior examiner employed by an Agency or a Federal Reserve Bank (Reserve Bank) may not knowingly accept compensation as an employee, officer, director, or consultant from certain depository institutions or depository institution holding companies he or she examined, or from certain related entities, for one year after the examiner leaves the employment or service of the Agency or Reserve Bank. If an examiner violates the one-year restriction, the statute requires the appropriate Federal banking agency to seek an order of removal and prohibition, a civil money penalty of up to $250,000, or both. Section 10(k) will become effective on December 17, 2005.

DATES: Effective Date: December 17, 2005.

FOR FURTHER INFORMATION CONTACT:

OCC: Mitchell Plave, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090; Stuart Feldstein, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090; or Barrett Aldemeyer, Senior Counsel, Administrative and Internal Law Division, (202) 874–4460, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Cary K. Williams, Assistant General Counsel, (202) 452–3295, Kieran J. Fallon, Assistant General Counsel, (202) 452–5270, Andrea Tokheim, Attorney, (202) 452–2300, Legal Division; William Spaniel, Deputy Associate Director, (202) 452–3469, or Jinai Holmes, Senior Financial Analyst, (202) 452–2834, Division of Banking Supervision and Regulation; for users of Telecommunication Devices for the Deaf (TDD) only, contact (202) 263–4869.

FDIC: Robert J. Fagan, Ethics Program Manager, Legal Division, (202) 898–6808; Stephen P. Gaddie, Special Assistant to the Deputy Director, Division of Supervision and Consumer Protection, (202) 898–6575; Richard Osterman, Senior Counsel, Legal Division, (202) 898–7028; and Kymberly K. Copa, Counsel, Legal Division, (202) 898–8832, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Elizabeth Moore, Special Counsel, Litigation Division, (202) 906–7039; or Karen Osterloh, Special Counsel, Regulations and Legislation Division, (202) 906–6639, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

Under section 6303(b) of the Intelligence Reform Act,[1] which added a new section 10(k) to the Federal Deposit Insurance Act (FDI Act), an officer or employee of an Agency or Reserve Bank who acts as a ''senior examiner'' for a particular depository institution may not, within one year after terminating employment with the relevant Agency or Reserve Bank, knowingly accept compensation as an officer, director, employee or consultant from that depository institution or any company (including a bank holding company or savings and loan holding company) that controls the depository institution.[2] Section 10(k) imposes a similar post-employment restriction on an officer or employee who acts as the ''senior examiner'' of a particular depository institution holding company, but in these circumstances, the post-employment restrictions apply to relationships with the depository institution holding company and any depository institution subsidiary of the holding company.[3] The restrictions in section 10(k) apply only to examiners who served as a senior examiner for a particular depository institution or holding company for two or more months during the final twelve months of their employment at the Agency or Reserve Bank.

If a senior examiner violates the one-year post-employment restrictions in section 10(k), the statute requires the appropriate Federal banking agency to initiate proceedings to impose an order of removal and prohibition or a civil money penalty, or both, on the former senior examiner. Congress directed each Agency to prescribe regulations to administer and carry out section 10(k), including rules, regulations or guidelines to define the scope of persons who are ''senior examiners.'' The post-employment restrictions in section 10(k) are in addition to any other conflict of interest and ethics rules and restrictions that may apply to

[1] Pub. L. 108–458, 118 Stat. 3638, 3751–53 (Dec. 17, 2004).

[2] For purposes of section 10(k), the term ''depository institution'' includes an uninsured branch or agency of a foreign bank, if the branch or agency is located in a state of the United States. *See* 12 U.S.C. 1820(k)(2)(A). The FDIC has made a minor technical change to the definition of ''depository institution'' in its regulation to recognize that the term may include uninsured branches or agencies of foreign banks for these purposes.

[3] For purposes of the post-employment restriction of section 10(k), the term ''depository institution holding company'' means a bank holding company or a savings and loan holding company, and also includes, among other things, a foreign bank that has a branch, agency, or commercial lending company subsidiary in the United States.