

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

#### 7 CFR Parts 1700 and 1709

RIN 0572-AB91

#### Assistance to High Energy Cost Rural Communities

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Rural Utilities Service (RUS) is proposing regulations implementing its financial assistance programs for rural communities with extremely high energy costs. These programs are authorized under section 19 of the Rural Electrification Act of 1936, as amended (7 U.S.C. 918a). This proposed rule is intended to establish and clarify eligibility and application requirements, the review and approval process, and grant administration procedures for RUS grants to rural communities with extremely high energy costs and for grants to State entities for bulk fuel revolving loan funds. This publication of these rules will assure timely and effective distribution of grant funds to eligible rural communities and state entities. In the final rule section of this **Federal Register**, RUS is publishing this action as a direct final rule without prior proposal because RUS views this as a non-controversial action and anticipates no adverse comments. If no adverse comments are received in response to the direct final rule, no further action will be taken on this proposed rule and the action will become effective at the time specified in the direct final rule. If RUS receives adverse comments, RUS will publish a timely notice withdrawing the direct final rule based on this action. Any parties interested in commenting on this proposed action should do so at this time.

**DATES:** Comments on this proposed action must be received on or before March 4, 2005.

**ADDRESSES:** Submit your adverse comments or notice of intent to submit adverse comments by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instruction for submitting comments.
- Agency Web site: <http://www.usda.gov/rus/index2.Comments.htm>. Follow the instructions for submitting comments.
- E-mail: [RUSComments@usda.gov](mailto:RUSComments@usda.gov).

Include in the subject line of the message "7 CFR 1700 and 1709."

- Mail: Addressed to Richard Annan, Acting Director, Program Development and Regulatory Analysis, Rural Utilities Service, United States Department of Agriculture, 1400 Independence Avenue, STOP 1522, Washington, DC 20250-1522.

- Hand Delivery/Courier: Addressed to Richard Annan, Acting Director, Program Development and Regulatory Analysis, Rural Utilities Service, United States Department of Agriculture, 1400 Independence Avenue, SW., Room 5168-S, Washington, DC 20250-1522.

**Instructions:** RUS requests a signed original and three copies of all written comments (7 CFR 1700.4). Comments may also be submitted by e-mail at [RUSComments@usda.gov](mailto:RUSComments@usda.gov) and must contain the phrase "High Cost Energy Grants" in the subject line. All comments received must identify the name of the individual (and the name of the entity, if applicable) who is submitting the comment. All comments received will be posted without changes to <http://www.usda.gov.rus.index2.Comments.htm>, including any personal information provided. All comments will also be available for public inspection during regular business hours (7 CFR 1.27(b)).

**FOR FURTHER INFORMATION CONTACT:** Karen Larsen, Management Analyst, U.S. Department of Agriculture, Rural Utilities Service, Electric Program, 1400 Independence Ave., SW., Stop 1560, Room 5165-S, Washington, DC 20250-1560. Telephone (202) 720-9545, Fax (202) 690-0717, e-mail address: [Karen.Larsen@usda.gov](mailto:Karen.Larsen@usda.gov).

**SUPPLEMENTARY INFORMATION:** See the Supplementary Information provided in the direct final rule located in the final rule section of this **Federal Register** for the applicable supplementary information on this section.

Dated: January 13, 2005.

**Hilda Gay Legg,**

*Administrator, Rural Utilities Service.*

[FR Doc. 05-1879 Filed 2-1-05; 8:45 am]

**BILLING CODE 3410-15-P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 109 and 300

[Notice 2005-3]

#### Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Election Commission requests comments on the proposed revision of the definition of "agent" for its regulations on coordinated and independent expenditures, and non-Federal funds, which are commonly referred to as "soft money." Current Commission regulations define agent as "any person who has actual authority, either express or implied" to perform certain actions. This definition does not include persons acting only with apparent authority. The Commission's regulations defining agent were challenged in *Shays v. FEC*. The District Court held that the Commission's definitions of agent did not necessarily run contrary to Congress's intent and were based on a permissible construction of the statute. However, the court also held that the Commission had not provided adequate explanation of its decision to exclude from the definition of agent persons acting only with apparent authority and therefore had not satisfied the reasoned analysis requirement of the Administrative Procedures Act. The court remanded the regulations to the Commission for further action consistent with the court's opinion. Accordingly, in order to comply with the court's decision, the Commission now revisits the definition of agent by issuing this Notice of Proposed Rulemaking. No final decision has been made by the Commission on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

**DATES:** Comments must be received on or before March 4, 2005. If the

Commission receives sufficient requests to testify, it may hold a hearing on these proposed rules. Commenters wishing to testify at the hearing must so indicate in their written or electronic comments.

**ADDRESSES:** All comments should be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and must be submitted in either electronic or written form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic mail comments should be sent to [agentnprm@fec.gov](mailto:agentnprm@fec.gov) and may also be submitted through the Federal eRegulations Portal at <http://www.regulations.gov>. All electronic comments must include the full name, electronic mail address, and postal service address of the commenter. Electronic comments that do not contain the full name, electronic mail address, and postal service address of the commenter will not be considered. If the electronic comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with printed copy follow-up. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. The Commission will post public comments on its Web site. If the Commission decides that a hearing is necessary, the hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brad C. Deutsch, Assistant General Counsel, or Mr. Ron B. Katwan, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (March 27, 2002) ("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"). On July 29, 2002, the Commission promulgated regulations in order to implement BCRA's new limitations on party, candidate, and officeholder solicitation and use of non-Federal funds. *Final Rules and Explanation and Justification for Regulations on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money*, 67 FR 49064 (July 29, 2002) ("Soft Money E&J"). On January 3, 2003, the Commission promulgated regulations implementing BCRA's provisions regarding payments by

political committees and other persons for communications that are coordinated with a candidate, a candidate's authorized committee, or a political party committee and regarding expenditures by political party committees that are made either in coordination with, or independently from, candidates. *Final Rules and Explanation and Justification for Regulations on Coordinated and Independent Expenditures*, 68 FR 421 (Jan. 3, 2003) ("Coordination E&J").

Many of the regulations promulgated in these two rulemakings apply not only to principals, such as a candidate or party committee, but also to their agents. 67 FR at 49081-82; 68 FR at 421-22. Accordingly, in each rulemaking the Commission adopted a definition of the term "agent." 67 FR at 49081-83; 68 FR at 423-25. The two identical definitions provide that an agent is "any person who has actual authority, either express or implied" to perform certain actions. See 11 CFR 109.3 and 300.2(b). The definitions do not include persons acting only with apparent authority.

Subsequently, in *Shays v. FEC*, 337 F.Supp.2d 28 (D.D.C. 2004), *appeal filed*, No. 04-5352 (D.C. Cir. Sept. 28, 2004) ("*Shays*"), the district court held that the Commission had not satisfied the reasoned analysis requirement of the Administrative Procedures Act ("APA") because the Commission had not provided adequate explanation of its decision to exclude from the definition of agent persons acting only with apparent authority.<sup>1</sup> The court based its conclusion that the Explanations and Justifications for the Commission's definitions of agent did not satisfy APA requirements on three grounds. First, the court found that the Commission had not explained why its former definition of agent, which pre-dated BCRA and which had included a definition that covered certain aspects of apparent authority, should be changed. *Shays* at 87. Second, the court found that the Commission had not addressed the impact that its construction of the term agent might have on preventing circumvention of

<sup>1</sup> Although the court held that, with respect to the definition of agent, the Soft Money E&J and the Coordination E&J both failed to satisfy APA requirements, it found that the definitions of agent at 11 CFR 109.3 and 300.2(b) did not necessarily run contrary to Congress's intent and were based on a permissible construction of the statute. *Id.* at 71-72, 81-86 (finding that both definitions "survive[] *Chevron* review"). The court concluded that "the FEC's definition of the term 'agent' is, at least on its face, a 'permissible construction of the statute'" and that "the Commission's construction of the term 'agent' is faithful to the literal terms of the statute." *Id.* at 84.

the Act's limitations and prohibitions and preventing the appearance of corruption, two policies that Congress sought to advance in passing BCRA. *Id.* at 72, 87. Third, the court found that the Commission's main concern in excluding apparent authority from the definitions—namely to prevent a candidate or party committee from being held liable for the actions of a rogue or misguided volunteer who purports to act on behalf of the candidate or committee—was "not supported by the law of agency. \* \* \*" *Id.* at 87.

The court remanded both definitions to the Commission for further action consistent with its opinion. *Id.* at 130. Accordingly, in order to comply with the court's decision in *Shays*, the Commission is now issuing this Notice of Proposed Rulemaking ("NPRM") on the definition of agent. For reasons explained in more detail below, the Commission proposes to revise its regulations to include persons acting with apparent authority in its definitions of agent at 11 CFR 109.3 and 300.2(b). The Commission may nonetheless determine after the comment period to retain the current definitions of agent, which exclude apparent authority. Accordingly, this NPRM seeks comment both on whether apparent authority should be added to the Commission's definitions of agent and on whether there are reasons for continuing to exclude apparent authority from the definitions.

#### **Proposed 11 CFR 109.3 and 300.2(b)—Definitions**

According to the common law definition of actual and apparent authority as codified in the Restatement (Second) of Agency (1958) ("Restatement"),<sup>2</sup> an agent's actual authority is created by manifestations of consent (express or implied) made by the principal *to the agent*. Restatement, § 7. Apparent authority, by contrast, is the result of manifestations the principal makes *to a third party* about a person's authority to act on the principal's behalf. Restatement, § 8. It is important to emphasize that apparent authority is created only where the principal's word or conduct "reasonably interpreted, causes the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 266 (D.C. Cir. 1998) (quoting

<sup>2</sup> See *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 542 (1999) ("The common law as codified in the Restatement (Second) of Agency (1957), provides a useful starting point for defining [the] general common law [of agency].")

Restatement, § 27). Moreover, to have apparent authority “the third party must not only believe that the individual acts on behalf of the principal but, in addition, ‘either the *principal* must intend to cause the third party to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.’” *Id.* (quoting Restatement, § 27, cmt. a) (emphasis added). Finally, “apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, that carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position, regardless of unknown limitations which are imposed upon the particular agent.” Restatement, § 27, cmt. a.

At the time the Commission decided to exclude apparent authority from its definitions of agent, its primary goal was to ensure that a principal would be able to control whether a would-be agent had authority to act on the principal’s behalf. Accordingly, the Commission sought to limit a principal’s liability for the actions of an agent to situations where the principal had engaged in specific conduct to create an agent’s authority. Particularly, the Commission was concerned that by including apparent authority in the definition of agent it would, first, expose principals to liability based solely on the actions of a rogue or misguided volunteer and, second, “place the definition of ‘agent’ in the hands of a third party”. See *Soft Money E&J*, 67 FR at 49083; *Coordination E&J*, 68 FR at 425. The Commission seeks comment on rationales for excluding apparent authority from the definition of agent.

According to the *Shays* court, the scope of the common law concept of apparent authority appears to exclude from the definition of agent precisely the types of conduct that the Commission sought to exclude when it decided to limit its definitions of agent to persons acting with actual authority. Just as the Commission intended when it adopted its current definitions of agent, the common law definition of agent, including apparent authority, limits a principal’s liability for a would-be agent’s actions to situations where the principal has taken specific action to create authority, either actual or apparent, in a person.

Given the *Shays* court’s interpretation of the narrow scope of apparent authority, the Commission now proposes to revise 11 CFR 109.3 and 300.2(b) by defining agent as any person

acting with either actual authority, express or implied, or apparent authority, but also seeks comments on whether or not there remain reasons to exclude apparent authority from the Commission’s definitions of agent.

By including persons acting with apparent authority in the definition of agent, the proposed revision would ensure that when a candidate or party committee conveys through words or actions that another person has authority to act on that candidate’s or committee’s behalf, then the actions of that person are imputed to the candidate or party committee for purposes of determining liability under the Commission’s soft money and coordination provisions. The Commission solicits comments on whether persons acting with apparent authority should be included in the definitions of agent at 11 CFR 109.3 and 300.2(b). Is the proposed revision required by BCRA? Would the proposed revision reduce the opportunities for circumvention of the Act and the appearance of corruption? Furthermore, would including apparent authority in the definition of agent affect the exercise of political activity, and if so, how? Would including apparent authority in the definition of agent make it more difficult for a campaign or party organization to predict potential liability?

The Commission also seeks comment on whether it should specify the appropriate conclusions to be drawn from a principal’s silence. Should a principal be held liable for the actions of another person based solely on the principal’s failure to disavow that person’s actions, or must there be some other facts present to indicate knowledge and/or complicity? Should the Commission’s rules provide that the failure of a person to disavow the actions of another person shall not, without more, create apparent authority for purposes of the Act?

Alternatively, the Commission solicits comment on whether, instead of including apparent authority, it would be more consistent with the purposes of BCRA to continue to exclude persons acting only with apparent authority from the definitions of agent. The Supreme Court has noted that not every nuance of the law of agency need be incorporated into Federal statutes where full incorporation is not necessary to effect the statute’s underlying purpose. See, e.g., *Farragher v. City of Boca Raton*, 527 U.S. 775, 802 n. 3 (1998) (The “obligation here is not to make a pronouncement of agency law in general or to transplant [the Restatement (Second) of Agency into a Federal

Statute, but] is to adapt agency concepts to the [Statute’s] practical objectives.”) However, would excluding apparent authority from the definitions of agent create opportunities for circumvention of the Act or permit activity that would give the appearance of corruption?

In the *Soft Money E&J*, the Commission reasoned that the exclusion of apparent authority from the definition of agent was appropriate because apparent authority was primarily designed to “protect innocent third parties who had suffered monetary damages as a result of reasonably relying on representations by individuals who purported to have, but did not actually have, authority to act on behalf of principals. Unlike other statutes, such as consumer protection or anti-fraud legislation, BCRA does not affect individuals who have been defrauded or have suffered economic loss due to detrimental reliance on unauthorized representations.” 67 FR at 49082. The Commission solicits comments on whether there are reasons supporting this rationale for excluding apparent authority from the definition of agent. Specifically, do the legislative purposes of BCRA of preventing circumvention of the Act and the appearance of corruption differ from those of other statutes, such as anti-fraud, consumer protection, or antitrust, in ways that support excluding apparent authority from the definition of agent?

Particularly, the Commission notes the following differences between ordinary commercial settings, which are the settings in which the concept of apparent authority has been applied, and political settings, in which the Commission’s regulations operate: (1) Ordinarily, in commercial settings people have no incentive to promote a product with which they are not associated; (2) in commercial settings, those who have not suffered harm generally have no incentive or standing to file complaints, whereas in political settings opposing candidates may be motivated to impede their rivals’ campaigns by filing complaints; (3) in commercial settings, businesses usually have incentives to dissuade people from purporting to act on their behalf, whereas in political settings a candidate’s or party’s goal is often to motivate others to act on their behalf; and finally (4) in political settings, constitutional rights are at stake that are not often at stake in commercial settings. Do these differences between commercial and political settings provide grounds for excluding apparent authority from the Commission’s definitions of agent? Are there additional reasons for excluding

apparent authority from the definition of agent?

Alternatively, rather than either excluding apparent authority altogether from the definitions of agent at 11 CFR 109.3 and 300.2(b) or simply adding the term "apparent authority" to these definitions, should the Commission instead provide a more narrowly tailored definition of agent? Before the Commission adopted the definition of agent in the soft money regulations in 2002, the Commission's former regulations contained a narrowly tailored definition of agent that included certain aspects of apparent authority. Specifically, former 11 CFR 109.1(b)(5) defined agent as including "any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures." Former 11 CFR 109.1(b)(5) appears to be narrower than the revision proposed in this NPRM because it does not include cases where apparent authority exists for persons other than those who hold a position "where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures." Under the proposed revision of the definitions of agent, which would add the term "apparent authority" and rely on the Restatement for the definition of the term, a principal potentially could invest a person with the authority of an agent also by making statements to, or engaging in conduct with respect to, a third party, regardless of the position the putative agent occupies within the principal's organization. Should the Commission re-adopt the definition of agent at former 11 CFR 109.1(b)(5)? Or would that definition be either too narrow or too broad to effectuate the purposes of BCRA's soft money and independent and coordinated expenditures provisions? Would former 11 CFR 109.1(b)(5) be more or less effective than the proposed revision in preventing circumvention of the Act and the appearance of corruption?

Alternatively, the Commission seeks comments on whether it should adopt an entirely new approach towards apparent authority, different from both the definition at former 11 CFR 109.1(b)(5) and the Restatement. Commenters who propose such a new approach should explain how their proposal would be more effective than both the revision proposed in this NPRM and former 11 CFR 109.1(b)(5) in implementing the purposes of BCRA's soft money and independent and coordinated expenditures provisions,

and how a wholly new approach would prevent circumvention of the Act and the appearance of corruption.

Finally, although the Commission proposes to have consistent definitions in both 11 CFR 109.3 and 300.2(b), the Commission also solicits comments on whether effective implementation of BCRA's purposes would be better served by defining agent in the soft money context differently from agent in the coordination context and, specifically, whether apparent authority should be included in one but not in the other definition.

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

The Commission certifies that the attached proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the national, State, and local party committees of the two major political parties, and other political committees are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions. Further, individual citizens operating under these rules are not small entities. To the extent that any political party committees or other political committees may fall within the definition of "small entities," their number is not substantial.

#### **List of Subjects**

##### *11 CFR Part 109*

Elections, Reporting and recordkeeping requirements.

##### *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 proposes to amend subchapters A and C of chapter I of title 11 of the *Code of Federal Regulations* as follows:

#### **PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) AND (d), AND PUB. L. 107-55 SEC. 214(c))**

1. The authority citation for part 109 would continue to read as follows:

**Authority:** 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d.; Sec. 214(c) of Pub. L. 107-55, 116 Stat. 81.

2. Section 109.3 would be amended by revising the introductory text of the section to read as follows:

#### **§ 109.3 Definitions.**

For the purposes of 11 CFR part 109 only, agent means any person who has actual authority, either express or implied, or apparent authority to engage in any of the following activities on behalf of the specified persons:

\* \* \* \* \*

#### **PART 300—NON-FEDERAL FUNDS**

3. 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.

4. Section 300.2 would be amended by revising the introductory text of paragraph (b) to read as follows:

#### **§ 300.2 Definitions.**

\* \* \* \* \*

(b) *Agent.* For the purposes of part 300 of chapter I, agent means any person who has actual authority, either express or implied, or apparent authority to engage in any of the following activities on behalf of the specified persons:

\* \* \* \* \*

Dated: January 27, 2005.

**Scott E. Thomas,**

*Chairman, Federal Election Commission.*

[FR Doc. 05-1892 Filed 2-1-05; 8:45 am]

**BILLING CODE 6715-01-P**

#### **FEDERAL ELECTION COMMISSION**

##### **11 CFR Part 300**

[Notice 2005-2]

#### **De Minimis Exemption for Disbursement of Levin Funds by State, District, and Local Party Committees**

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Federal Election Commission requests comments on proposed revisions to the Commission's regulations that establish a *de minimis* exemption allowing State, district, and local committees of a political party to pay for certain Federal election activity aggregating \$5,000 or less in a calendar year entirely with Levin funds. In *Shays v. FEC*, the District Court held that the Commission's *de minimis* exemption was inconsistent with the statutory intent of the Bipartisan Campaign Reform Act and remanded the regulation to the Commission for further action consistent with the court's opinion. The Commission is appealing