

Rules and Regulations

Federal Register

Vol. 70, No. 243

Tuesday, December 20, 2005

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FEDERAL ELECTION COMMISSION

11 CFR Parts 106 and 300

[Notice 2005–27]

State, District, and Local Party Committee Payment of Certain Salaries and Wages

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission is amending its rules to revise the method by which State, district and local party committees (collectively “State party committees”) may pay salaries and wages of employees who spend 25 percent or less of their compensated time in a month on Federal election activity or activity in connection with Federal elections (“Federal-related activity” or “Federal-related activities”). These final rules implement the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, which held that the Commission had not provided an adequate explanation for its former rules under the Administrative Procedure Act. The Commission is also changing its requirements regarding the method State party committees use to pay for employees’ fringe benefits and clarifying its rules regarding the use of funds raised in joint Federal and non-Federal fundraising events. Further information is provided in the Supplementary Information that follows.

DATES: Effective Date: These rules are effective on January 19, 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Assistant General Counsel, or Mr. Anthony T. Buckley, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of

2002, Public Law 107–155, 116 Stat. 81 (2002) (“BCRA”), amended the Federal Election Campaign Act of 1971, as amended (the “Act”), 2 U.S.C. 431 *et seq.*, in various respects. Under BCRA, State party committees must pay the salaries and wages of employees who spend more than 25 percent of their compensated time per month on Federal-related activities entirely with Federal funds.¹ 2 U.S.C. 431(20)(A)(iv) and 441i(b)(1). However, BCRA does not address what type of funds State party committees must use to pay the salaries and wages of employees who spend some, but not more than 25 percent, of their compensated time per month on Federal-related activities (“covered employees”). In 2002, the Commission promulgated 11 CFR 106.7(c)(1), (c)(5) and (d)(1), and 300.33(c)(2). Under these rules, State party committees were permitted to pay the salaries or wages of covered employees entirely with funds that comply with State law. *Id.*

In *Shays v. Federal Election Commission*, 337 F. Supp. 2d 28 (D.D.C. 2004) (“*Shays District*”), *aff’d*, 414 F.3d 76 (DC Cir. 2005) (“*Shays Appeal*”), *reh’g en banc denied* (Oct. 21, 2005) (No. 04–5352), the District Court considered a challenge to the regulations that permitted State party committees to use all non-Federal funds to pay the salaries and wages of covered employees. The District Court recognized that the Commission’s interpretation of 2 U.S.C. 431(20)(A)(iv) and 441i(b)(1), did not violate the first step of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”), because Congress had not directly spoken on this issue. However, the District Court held that the Commission’s interpretation was not a permissible reading of the statute under step two of *Chevron*.² *Shays District* at 113–114.

On July 15, 2005, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court’s ruling on this regulation, but on different grounds. The Court of Appeals

held that the regulations addressing the salaries and wages of covered employees survived both steps of the *Chevron* analysis, but that the regulation failed for lack of a sufficient explanation under the Administrative Procedure Act. *See Shays Appeal*, 414 F.3d at 112.

Before the Court of Appeals decision, the Commission issued a Notice of Proposed Rulemaking to determine the appropriate mix of Federal and non-Federal funds that State party committees must use to pay the salaries and wages of covered employees. *Notice of Proposed Rulemaking on State, District and Local Party Committee Payment of Certain Salaries and Wages*, 70 FR 23072 (May 4, 2005) (“NPRM”). The comment period closed on June 3, 2005. The Commission received comments from nine commenters in response to this NPRM. The Commission held a hearing on this rulemaking on August 4, 2005, at which four commenters testified.

After the hearing, the Commission reopened the comment period until September 29, 2005. In reopening the comment period, the Commission noted that it was doing so “to allow all interested persons to submit information or comments that may be useful in this rulemaking in light of the Court of Appeals opinion.” *Notice to Reopen Comment Period for Rulemaking on State, District, and Local Party Committee Payment of Certain Salaries and Wages*, 70 FR 51302 (Aug. 30, 2005). Five additional commenters submitted comments during this period. The names of all commenters and their written comments, as well as a transcript of the public hearing are available at http://www.fec.gov/law/law_rulemakings.shtml#party_salaries under “State Party Payment of Salaries and Wages.”

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 rules that follow were transmitted to Congress on December 14, 2005.

Explanation and Justification

The Court of Appeals’ decision allows the Commission to attempt to justify the

¹ “Federal funds” are funds that are subject to the contribution limitations, source prohibitions, and reporting requirements of the Act. 11 CFR 300.2(g).

² The first step of the *Chevron* analysis, which courts use to review agency regulations, is whether Congress has directly spoken to the precise questions at issue. The second step is whether the agency’s resolution of an issue not addressed in the statute is based on a permissible construction of the statute. *See Shays District* at 51–52 (citing *Chevron*).

rules allowing State party committees to use wholly non-Federal funds for the salaries and wages of covered employees. However, the decision also indicates that a far more substantial record would be necessary to support these regulations. *Shays Appeal* at 112. Here, the Court found it “quite plausible that wealthy donors would swallow costs for increased state and local campaigning * * * [for] an army of workers devoting more than a day a week to federal elections.” *Id.*

Several commenters urged the Commission to retain the rules allowing State party committees to pay the salaries and wages of covered employees with 100% non-Federal funds. They argued that there is no evidence of abuse or circumvention of BCRA by dividing Federal-related activities among many employees who each devote no more than 25% of their time to Federal races. In fact, one commenter testified that wealthy donors interested in Federal elections would not give a penny if apprised that no more than 25% of their donation would be used for these purposes. This commenter also urged the Commission to retain these rules for party committees that have under seven employees because it would be difficult for such small committees to engage in the kind of evasion that concerned the District Court.

Thus, the record developed during this rulemaking, including the comments submitted by the State and local party committees or their representatives, suggests that, in general, State party committees may face practical obstacles in trying to use the rule to circumvent BCRA in the way the court feared. However, as explained below, the Commission has an alternative to the former rules that addresses the Court of Appeals’ concerns about circumvention and has the virtues of familiarity, relative ease of administration, and a reasonable relationship to the State party committees’ level of Federal-related activities. Consequently, the Commission is not retaining the former rules. Instead, it is amending 11 CFR 106.7 and 300.33 to require State party committees to allocate the salaries and wages of covered employees between their Federal and non-Federal accounts as administrative costs.

I. Allocation of State Party Wages

A. Introduction

The NPRM presented three options for allocating the salaries and wages of covered employees. The first proposal would adopt an allocation method that

would establish a fixed minimum of 25 percent that a State party committee would be required to allocate to its Federal account. The NPRM contained proposed rules only for this approach. The second proposal in the NPRM would adopt an allocation percentage directly proportional to the amount of compensated time an employee spent on Federal-related activities in a given month in relation to all compensated time in that same month. This proposal would have resulted in different ratios for different employees.

The third proposal would follow the pre-BCRA rules by treating salaries and wages of covered employees as administrative costs. This proposal would subject the salaries and wages at issue to the allocation ratios at 11 CFR 106.7(d)(2) that were developed as part of the BCRA soft money rulemaking. For the reasons stated below, the Commission is adopting this allocation method for the salaries and wages of covered employees.

B. 11 CFR 106.7(c)(1) and 300.33(c)(2) Allocation of Salaries and Wages as Administrative Costs

The Commission is amending 11 CFR 106.7(c)(1) and adding new 11 CFR 300.33(d)(1)–(3),³ to require that State party committees either: (1) Allocate the salaries and wages of covered employees as administrative expenses, or (2) pay these salaries and wages entirely from a Federal account. Revised paragraph (c)(1) of section 106.7 sets forth these two options. New section 300.33(d) addresses how State party committees must pay the salaries, wages, and fringe benefits of their employees. Revised section 300.33(d)(1) mirrors the language in revised 11 CFR 106.7(c)(1). Revised section 300.33(d)(2) requires that State party committees pay the salaries, wages, and fringe benefits of employees who spend more than 25% of their compensated time in a given month on Federal-related activities with only Federal funds. New section 300.33(d)(3) states that State party committees may pay the salaries, wages, and fringe benefits of employees who spend no time in a given month on Federal-related activities entirely with funds that comply with State law.⁴

Allocation ratios for administrative costs in 11 CFR 106.7(d)(2)(i) through (iv) were modified during the BCRA soft money rulemaking. *Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67

FR 49064, 49079 (July 29, 2002) (“Soft Money E&J”). As explained in the 2002 Soft Money E&J, the Commission derived the four allocation ratios that range from 15% to 36% by taking the averages of the previous ballot composition-based allocation percentages reported by State party committees in four representative groupings of State party committees representing states of varying sizes and geographic locations. *Id.* This approach was designed “to assure that activities deemed allocable are not paid for with a disproportionate amount of non-Federal funds.” *Id.* This approach reflects the variability of State party committee Federal spending from election cycle to election cycle, depending on the types of Federal offices that are on the ballot in one election cycle versus another. For example, State party committees are required to use 15% Federal funds for administrative expenses in election cycles where only Members of the U.S. House of Representatives are on the ballot in those states, versus 36% when the offices of the President and U.S. Senate are also on the ballot.

The Commission has concluded that the use of these ratios will prevent circumvention of the soft money rules, even though the ratios do not track precisely the number of hours worked by employees. In addition, State party committees already use these allocation ratios for a variety of administrative costs and they allocated their employees’ salaries and wages as administrative costs prior to BCRA’s effective date. Thus, their familiarity and experience with the administrative costs allocation method will ease the transition and implementation of the new rules regarding the salaries and wages of covered employees.

The Commission received comments supporting partial application of the administrative cost allocation method. These commenters favored using the administrative costs ratios in election cycles other than Presidential election cycles. They argued that it would be inappropriate to apply Presidential election cycle allocation ratios of 28% and 36% because they would apply to employees who spend no more than 25% of their compensated time in a given month on Federal-related activities. The Commission disagrees that such an application would be inappropriate.

Requiring a Federal allocation percentage that is higher than the corresponding percentage of Federal-related activity is not inconsistent with BCRA. Under 2 U.S.C. 431(20)(A)(iv), Congress mandated that a person who

³ The Commission is redesignating current 11 CFR 300.33(d) as 11 CFR 300.33(e).

⁴ Section 300.33(c) is amended so that it addresses only public communications.

spends as little as 26% of his or her compensated time in a month on Federal-related activities must be paid entirely with Federal funds. Congress was silent on how State party committees should pay the salaries and wages of covered employees. Congress was aware, however, that at the time it enacted BCRA, State party committees were required to allocate salaries and wages of their employees as administrative costs. It is reasonable to conclude that Congress could have expected that the Commission might continue to treat the salaries and wages of covered employees as allocable administrative costs.

Another commenter objected to requiring allocation of covered employees' salaries as administrative costs, maintaining that there is no rational relationship between the time actually spent by employees on Federal-election activities and the amount of Federal money required to be used to fund those employees. Neither FECA nor BCRA requires that the allocation ratios be precisely proportional to the amount of time spent on Federal-related activities. It is sufficient that the administrative costs allocation ratios generally reflect the overall level of State party committees' Federal activity based on the percentage of Federal candidates on the ballot.

Other commenters who opposed the administrative costs allocation method were concerned that not enough Federal funds would be used to pay employees who spend 25% of their compensated time per month on Federal-related activities during any year in which no Presidential or Senatorial candidate is on the ballot. They argued that the 15% administrative costs allocation ratio for those years would allow State party committees to pay the remaining 10% of the employees' compensated time spent on Federal-related activities with non-Federal funds. According to these commenters, this approach is inconsistent with Congress' overall scheme of requiring Federal-related activities to be paid for with Federal funds.

The Commission disagrees that using the administrative costs allocation ratios is inconsistent with Congressional intent. The average of the allocation ratios of 15%, 21%, 28% and 36% is 25%, and the weighted average based on the frequency that State party committees would use the various ratios over a number of election cycles is over 26%. Moreover, when there is a Presidential candidate on the ballot, State party committees must pay the salaries and wages of covered employees with at least 28% or 36%

Federal funds, depending on whether there is a Senatorial candidate on the ballot. Because the administrative costs allocation ratios for State party committees will average at least 25% over time, the allocation ratios will achieve one of the goals of the fixed minimum 25% allocation ratio—ensuring that over time, State party committees will use sufficient Federal funds to pay for employee time that is spent on Federal-related activities—without imposing a new allocation regime on State party committees.

Furthermore, the Court of Appeals suggested its approval of this approach when it noted that “the salary rule appears particularly irrational given the FEC’s recognition that costs for voter registration, get-out-the-vote drives, and generic party advertising—all matters, like salaries, that the FEA definition specifically addresses—may require allocation even when the activities ‘do not qualify’ as FEA. See 11 CFR 106.7(c)(5).” *Shays Appeal* at 112.

In addition to the changes to 11 CFR 106.7(c)(1) and 300.33(d), corresponding changes are being made to two other regulations. Section 106.7(d)(1)(i) is being revised to state that these salaries and wages must be paid wholly from the Federal account, or allocated as administrative costs. Similarly, section 106.7(c)(5) is being amended to make clear that the salaries and wages of covered employees are not exempt from allocation but rather are subject to allocation as administrative expenses. Conforming changes are also being made to 11 CFR 100.57(b), 106.7(e)(2) and 300.36(b)(2)(ii).

C. Alternative Allocation Methods

1. Minimum Allocation of 25 Percent

An alternative in the NPRM’s proposed rule text would have required State party committees either (1) to allocate at least 25% of salaries and wages of covered employees to a Federal account, or (2) to pay those salaries and wages entirely with funds from a Federal account. See proposed 11 CFR 106.7(c)(1)(i) and (ii), 70 FR at 23074. As stated in the NPRM, a minimum allocation percentage of 25% would ensure that State party committees use Federal funds to pay for all the compensated time covered employees spend on Federal-related activity. 70 FR at 23073. In this way, this proposal was one way to prevent circumvention of the Act, which, according to the District Court and the Court of Appeals, the challenged rules failed to ensure. See *Shays District* at 114; *Shays Appeal* at 112.

Some commenters supported this proposal. They asserted that setting a fixed allocation ratio has the advantage of providing a clear and readily administered rule that would minimize the burdens of compliance on State party committees and simplify enforcement for the Commission. Other commenters supported this proposal only for election cycles when a Presidential candidate appears on the ballot. For election cycles in which there is no Presidential race, these commenters believed that it was more appropriate to use the same allocation ratio as is used for administrative costs.

In contrast, some commenters objected to this proposal in its entirety. One commenter argued that a fixed 25% allocation would introduce another step into an already complex process and required additional rules for determining how to manage payroll operations over and above what is already required for administrative expense allocation. Another commenter stated that the proposed 25% allocation sweeps too broadly and unjustifiably interferes with the type of money State and local committees may use to compensate their employees who work substantially on non-Federal issues.

Although a fixed minimum 25% allocation ratio on its face appears to be the simplest, most straightforward method for allocating salaries and wages of covered employees, it is not, given the other regulations that govern how State party committees pay for their disbursements and experience with past allocation methods. State party committees are already required to apply an allocation scheme to their administrative costs if they do not use 100% Federal funds. Moreover, before BCRA’s enactment, State party committees were required to allocate their employees’ salaries and wages as administrative costs if they did not use entirely Federal funds. By including the salaries and wages of covered employees as administrative costs, State party committees will use an allocation scheme with which they are familiar and have experience applying. The fixed minimum 25% allocation method would subject State party committees to an additional and different allocation ratio that would apply to only one category of their disbursements for which they would have to monitor, maintain records and report on a different form. To avoid creating yet another allocation method for State party committees to apply, the Commission is not adopting a fixed allocation ratio of 25% for salaries and wages of covered employees.

2. Allocation Directly Proportional to Amount of Time Worked

This proposal would adopt an allocation percentage for salaries and wages of covered employees directly proportional to the amount of compensated time these employees spend on Federal-related activities in a given month in relation to all compensated time in that same month. This proposal would probably have required State parties to use different percentages for different employees in a given month. The percentages would also be expected to vary for each employee from month to month.

Most commenters agreed that a direct proportionality allocation scheme would be complicated, would require additional recordkeeping that could be burdensome, and would be difficult to track, report, and enforce. The commenters who supported this method only did so to the extent that this method would be an optional method available to State party committees in lieu of another allocation method adopted by the Commission.

State party committees must maintain logs of employee time spent on Federal-related activities under current 11 CFR 106.7(d)(1). These same logs could serve as the basis for allocating these employees salaries and wages between Federal and non-Federal funds. While in most cases such a method could be expected to produce an allocation that most closely matches the proportion of employees' time spent on Federal-related activities, it suffers from a number of practical deficiencies. Under the current system, the logs only serve to distinguish covered employees from those over the 25% threshold. This division has legal consequences, while the particular percentage does not.

It would also introduce into the allocation scheme for State party committees the problems with computing complicated allocation ratios that the Commission sought to eliminate for SSFs and nonconnected committees when it amended the allocation regulations in 11 CFR 106.6. See *Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 FR 68056, 68059 (Nov. 23, 2004). When the Commission examined the allocation scheme for SSFs and nonconnected committees, it found that it was difficult for these committees to calculate a precise ratio because the calculation was based on predicting accurately the amount of time spent on certain activities. The calculation was further complicated when these

committees predicted incorrectly the amount they spent on certain activities.

Based on the comments and Commission experience with allocation methods, an allocation method directly proportional to the amount of time worked would be complex and likely to engender confusion, and would be unduly burdensome to State party committees. For these reasons, the Commission is not adopting this allocation method.

D. Employees Who Spend No Compensated Time on Federal-Related Activities

In the NPRM, the Commission stated that it is continuing to interpret BCRA as allowing committees to pay the salaries and wages of employees who spend no time in a given month on Federal-related activities entirely with non-Federal funds. All commenters who addressed this issue supported this interpretation. Some of these commenters recommended that the Commission incorporate this interpretation into its regulations, as some committees might otherwise interpret the Commission's regulations as requiring them to allocate such salaries and wages. Consequently, the Commission is adding new 11 CFR 106.7(d)(1)(iii), which states that, notwithstanding section 106.7(d)(1)(i), salaries and wages paid for employees who spend none of their compensated time in a given month on Federal election activities or activities in connection with a Federal election may be paid entirely with non-Federal funds.

II. Allocation of Fringe Benefits of Employees

The NPRM also sought comment on whether the methods for allocating salaries and wages should be applied to fringe benefits of employees. Specifically, the NPRM sought comment on whether the rules should be amended to permit, but not require, State party committees to use the same allocation rules for fringe benefits as are used for salaries and wages, instead of allocating fringe benefits as administrative costs. In Advisory Opinion ("AO") 2003-11, the Commission advised a State party committee that it may pay the costs of fringe benefits for covered employees with non-Federal funds. Fringe benefits were described by the State party committee as medical, dental, and prescription drug insurance coverage; coverage for short-term disability (wage loss) and long-term disability insurance benefits; coverage for life insurance benefits; and employer matching contributions to the 401(k) retirement

plan. The Commission determined in AO 2003-11 that amounts spent on fringe benefits fell into the category of compensated time, and thus concluded that the State party committee could use entirely non-Federal funds to pay for the fringe benefits under the rules for payment of salaries and wages that were in effect at that time.

Some commenters urged the Commission to give State party committees the option of treating fringe benefits as administrative costs, while other commenters urged the Commission to treat fringe benefits as compensated time.

Because the salaries and wages of covered employees are treated as administrative costs under the revised rules at 11 CFR 106.7(c)(1) and (d)(1)(i), and fringe benefits are a form of compensation, it is appropriate for State party committees to treat fringe benefits for covered employees as administrative costs. Accordingly, State party committees must now treat fringe benefits as they would salaries and wages, depending on the time spent per month on Federal-related activities: Either by paying for them entirely from the Federal account, or by allocating the costs of the fringe benefits as administrative costs. Consistent with the new rules' approach to salaries and wages, the fringe benefits of employees who spend no time in a month on Federal-related activity may be paid with funds that comply with State law. Revised 11 CFR 106.7(c)(1) and 106.7(d)(1), and new 11 CFR 300.33(d) reflect that salaries, wages, and fringe benefits are treated the same. AO 2003-11 is hereby superseded to the extent it stated that State party committees may pay for fringe benefits of covered employees entirely with non-Federal funds.

III. Use of Funds Raised Through Joint Federal and Non-Federal Fundraising Events

The NPRM sought comment on whether to amend 11 CFR 106.7(c)(4) to clarify that Federal funds raised through a joint fundraising activity or a joint fundraiser (collectively "joint fundraiser") may be used for Federal election activity.⁵ The statutory basis for section 106.7(c)(4) is 2 U.S.C. 441i(c), which reads: "An amount spent by a [national committee of a political party or a State party committee] to raise funds that are used, in whole or in part, for expenditures and disbursements for

⁵ Joint fundraisers include events where a State party committee raises both Federal and non-Federal funds on its own, or together with another organization under 11 CFR 102.17.

a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." In AO 2004-12, the Commission determined that a State party committee could pay for Federal election activity with Federal funds raised at events where the costs of such events had been paid for with a combination of Federal and non-Federal funds, allocated through the use of the funds received method. See 11 CFR 106.6(d).

Some commenters supported amending the rule to reflect the interpretation in AO 2004-12. These commenters argued that the current regulation, strictly interpreted, would have required State party committees to pay all of their fundraising expenses with Federal dollars in order to use the Federal funds raised at a fundraiser to pay for Federal election activities. These commenters asserted that such a result was unduly burdensome for, and unfair to, State party committees. Other commenters who opposed any revision argued that the regulation "captures one of the essential elements of BCRA: to provide for clear separation between hard money and soft money for the funds to be used by state parties for Federal election activities." They asserted that 2 U.S.C. 441i(c) mandates such a rule and interpretation.

The Commission disagrees that 2 U.S.C. 441i(c) requires this construction. The Commission interprets the statute to require only that the costs of raising Federal funds to pay for Federal election activities must be paid for with Federal funds. Allocation and the use of the funds received method accomplish this because they ensure that Federal funds are used to raise Federal funds. Indeed, with respect to the funds received method, the Commission has previously noted that it "provides the most accurate basis for division of [fundraising] costs." *Explanation and Justification on Methods of Allocation Between Federal and Nonfederal Accounts; Payments; Reporting*, 55 FR 26058, 26065 (June 26, 1990).

Further, interpreting 2 U.S.C. 441i(c) to mandate special fundraising rules when raising Federal funds for Federal election activity would result in an anomalous treatment of Federal funds raised at joint fundraisers. Under this interpretation, State party committees could not use Federal funds raised at a joint fundraiser to pay for Federal election activities directly, but they could transfer the Federal funds to the national party committee to pay for Federal election activities in their own states; they could also transfer Federal

funds to other State party committees to pay for their Federal election activities.

Furthermore, this interpretation of 2 U.S.C. 441i(c) would create a new class of Federal funds that must be used to pay for Federal election activity. This new class of Federal funds would be subject to fundraising restrictions that would not be applicable to other Federal funds including those used to make direct contributions to Federal candidates. The Commission does not believe that Congress intended these anomalous results.

In order to avoid any confusion concerning fundraising costs, the Commission is amending 11 CFR 106.7(c)(4) to state specifically that State party committees may allocate the direct costs of joint fundraising between their Federal and non-Federal accounts according to the funds received method described in 11 CFR 106.7(d)(4). All other statements in section 106.7(c)(4) suggesting otherwise are being deleted.

Corresponding changes are being made to other Commission regulations. Section 106.7(e)(4) and the contents of section 300.33(c)(3) are being removed, because neither indicates that direct costs of fundraising may be allocated. Also, section 300.32(a)(3) is being amended to state that State party committees that raise Federal and non-Federal funds at a joint fundraiser, where the Federal funds raised are to be used for Federal election activity, must either pay the direct costs of the fundraiser entirely with Federal funds, or must allocate the costs according to the funds received method. That rule is also being revised to state explicitly that if a State party committee raises only Federal funds at a fundraising activity it must pay the entire direct costs of the fundraising activity with Federal funds. The language in amended section 300.32(a)(3) closely tracks the new language at section 106.7(c)(4).

The Commission is also amending the description in 11 CFR 106.7(c)(4) of what is included in the direct costs of fundraising to conform to the descriptions at 11 CFR 106.6(b)(1)(ii) and 300.32(a)(3). This amendment is not a substantive change; rather, the Commission seeks to avoid any potential confusion by having two different descriptions of "direct costs of fundraising" in its regulations.

IV. Additional Issues

A commenter urged the Commission to address three issues not discussed in the NPRM. These issues are: (1) Establishing a payroll holding account into which both Federal and non-Federal funds are deposited for the sole purpose of transmitting payroll through

a payroll company; (2) permitting allocation of fundraising costs among Federal, non-Federal and Levin accounts; and (3) providing guidance on how State party committees should remedy a situation in which they make a mistake in estimating the amount of time an employee spends on Federal-related activities. The first two issues are beyond the scope of this rulemaking.

Regarding the third issue, the commenters noted that some State party committees are required to pay their salaries, wages, and fringe benefits in advance because of their vendor contracts or payroll systems. Thus, these State party committees must estimate whether particular employees will spend more or less than 25 percent of their compensated time on Federal-related activity, and that these estimates are sometimes wrong. As a result, salaries, wages, and fringe benefits for employees may sometimes be prepaid with an allocable mix of Federal and non-Federal funds (under the new rule), when they should be prepaid entirely with Federal funds. Conversely, the salaries, wages, and fringe benefits for other employees might be prepaid entirely with Federal funds when they could have been paid with an allocable mix of Federal and non-Federal funds. The commenter sought guidance on how a State party committee could remedy these situations after the fact.

Commission regulations at 11 CFR 106.7(f) govern transfers from a non-Federal to a Federal account, or from Federal and non-Federal accounts to an allocation account, to cover allocable expenses. When a State party committee uses a Federal or allocation account to prepay salaries, wages, and fringe benefits and later determines that these amounts could have been paid from a non-Federal account, *i.e.* the salaries, wages, and fringe benefits for covered employees, the non-Federal account may reimburse the Federal account or the allocation account within the 70-day time window in that rule. In contrast, the salaries, wages, and fringe benefits of employees who spend more than 25 percent of their compensated time per month on Federal-related activity are not allocable expenses and must be paid for entirely out of the Federal account. When a State party committee uses a non-Federal or allocation account to prepay salaries, wages, and fringe benefits and later determines that these amounts must have been paid for from a Federal account, current regulations do not contemplate that the Federal account can reimburse the non-Federal account or allocation account within the 70-day time window. While the Commission may consider such a

transfer a mitigating factor, the use of non-Federal funds to prepay salaries, wages, and fringe benefits that are required to be paid for with Federal funds is impermissible under Commission regulations.

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

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the organizations affected by these final rules are State, district, and local party committees, 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 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 party committees of 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 party 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 these final rules is not substantial.

List of Subjects

11 CFR Part 106

Campaign funds, political committees and parties, reporting and recordkeeping requirements.

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, Subchapters A and C of Chapter 1 of title 11 of the *Code of Federal Regulations* are amended as follows:

PART 100—SCOPE AND DEFINITIONS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

§ 100.57 [Amended]

■ 2. In § 100.57, amend paragraph (b) introductory text by removing "(consistent with 11 CFR 300.33(c)(3))".

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

■ 3. The authority citation for part 106 continues to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

■ 4. Section 106.7 is amended by:

- a. Revising paragraphs (c)(1), (c)(4), (c)(5), (d)(1)(i), and (d)(1)(ii);
 - b. Adding paragraph (d)(1)(iii);
 - c. Removing "300.33(c)(2)" in paragraph (e)(2) and adding in its place "300.33(d)(2)"; and
 - d. Removing paragraph (e)(4).
- Revisions and additions read as follows:

§ 106.7 Allocation of expenses between Federal and non-Federal accounts by party committees, other than for Federal election activities.

* * * * *

(c) *Costs allocable by State, district, and local party committees between Federal and non-Federal accounts.*

(1) *Salaries, wages, and fringe benefits.* State, district, and local party committees must either pay salaries, wages, and fringe benefits for employees who spend 25% or less of their time in a given month on Federal election activity or activity in connection with a Federal election with funds from their Federal account, or with a combination of funds from their Federal and non-Federal accounts, in accordance with paragraph (d)(2) of this section. *See* 11 CFR 300.33(d)(1).

* * * * *

(4) *Certain fundraising costs.* State, district, and local party committees may allocate the direct costs of joint fundraising programs or events between their Federal and non-Federal accounts according to the funds received method described in paragraph (d)(4) of this section. The direct costs of a fundraising program or event include expenses for the solicitation of funds and for the planning and administration of actual fundraising programs and events.

(5) *Voter-drive activities that do not qualify as Federal election activities and that are not party exempt activities.* Expenses for voter identification, voter registration, and get-out-the-vote drives, and any other activities that urge the general public to register or vote, or that promote or oppose a political party, without promoting or opposing a candidate or non-Federal candidate, that do not qualify as Federal election

activities and that are not exempt party activities, must be paid with Federal funds or may be allocated between the committee's Federal and non-Federal accounts.

(d) *Allocation percentages, ratios, and record-keeping.*

(1) * * *

(i) Except as provided in paragraph (d)(1)(iii) of this section, salaries, wages, and fringe benefits paid for employees who spend 25% or less of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must either be paid only from the Federal account or be allocated as administrative costs under paragraph (d)(2) of this section.

(ii) Salaries, wages, and fringe benefits paid for employees who spend more than 25% of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must be paid only from a Federal account. *See* 11 CFR 300.33(d)(1), and paragraph (e)(2) of this section.

(iii) Salaries, wages, and fringe benefits paid for employees who spend none of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election may be paid entirely with funds that comply with State law.

* * * * *

PART 300—NON-FEDERAL FUNDS

■ 5. 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.

■ 6. Section 300.32 is amended by revising paragraph (a)(3) to read as follows:

§ 300.32 Expenditures and disbursements.

(a) *Federal funds.* * * *

(3) State, district, and local party committees that raise Federal funds through an activity where only Federal funds are raised, must pay the direct costs of such fundraising only with Federal funds. State, district, and local party committees that raise Federal funds and non-Federal funds through a joint fundraising activity under 11 CFR 106.7(d)(4) or a joint fundraiser under 11 CFR 102.17, where the Federal funds are to be used, in whole or in part, for Federal election activities, must either pay the direct costs of such fundraising only with Federal funds or allocate the direct costs in accordance with the funds received method described in 11 CFR 106.7(d)(4). The direct costs of a

fundraising program or event include expenses for the solicitation of funds and for the planning and administration of actual fundraising programs and events.

* * * * *

■ 7. Section 300.33 is amended by:

■ a. Revising paragraph (c);

■ b. Redesignating paragraph (d) as paragraph (e) and removing “(d)(2)(i)” and adding “(e)(2)(i)” in its place in newly designated paragraph (e)(2)(ii); and

■ c. Adding new paragraph (d).

Revisions and additions read as follows:

§ 300.33 Allocation of costs of Federal election activity.

* * * * *

(c) *Costs of public communications.* Expenditures for public communications as defined in 11 CFR 100.26 by State, district, and local party committees and organizations that refer to a clearly identified candidate for Federal office and that promote, support, attack, or oppose any such candidate for Federal office must not be allocated between or among Federal, non-Federal, and Levin accounts. Only Federal funds may be used.

(d) *Costs of salaries, wages, and fringe benefits.*

(1) Except as provided in paragraph (d)(3) of this section, salaries, wages, and fringe benefits paid for employees who spend 25% or less of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must either be paid only from the Federal account or be allocated as administrative costs under 11 CFR 106.7(d)(2).

(2) Salaries, wages, and fringe benefits paid for employees who spend more than 25% of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must be paid only from a Federal account.

(3) Salaries, wages, and fringe benefits paid for employees who spend none of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election may be paid entirely with funds that comply with State law. See 11 CFR 106.7(c)(1) and (d)(1).

* * * * *

§ 300.36 [Amended]

■ 8. In § 300.36, amend paragraph (b)(2)(ii) by removing “(d)” and adding in its place “(e)”.

Dated: December 14, 2005.

Scott E. Thomas,

Chairman, Federal Election Commission.

[FR Doc. 05-24249 Filed 12-19-05; 8:45 am]

BILLING CODE 6715-01-P

FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A]

Extensions of Credit by Federal Reserve Banks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has adopted final amendments to its Regulation A to reflect the Board's approval of an increase in the primary credit rate at each Federal Reserve Bank. The secondary credit rate at each Reserve Bank automatically increased by formula as a result of the Board's primary credit rate action.

DATES: The amendments to part 201 (Regulation A) are effective December 20, 2005. The rate changes for primary and secondary credit were effective on the dates specified in 12 CFR 201.51, as amended.

FOR FURTHER INFORMATION CONTACT: Jennifer J. Johnson, Secretary of the Board (202/452-3259); for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263-4869.

SUPPLEMENTARY INFORMATION: The Federal Reserve Banks make primary and secondary credit available to depository institutions as a backup source of funding on a short-term basis, usually overnight. The primary and secondary credit rates are the interest rates that the twelve Federal Reserve Banks charge for extensions of credit under these programs. In accordance with the Federal Reserve Act, the primary and secondary credit rates are established by the boards of directors of the Federal Reserve Banks, subject to the review and determination of the Board.

The Board approved requests by the Reserve Banks to increase by 25 basis points the primary credit rate in effect at each of the twelve Federal Reserve Banks, thereby increasing from 5.00 percent to 5.25 percent the rate that each Reserve Bank charges for extensions of primary credit. As a result of the Board's action on the primary credit rate, the rate that each Reserve Bank charges for extensions of secondary credit automatically

increased from 5.50 percent to 5.75 percent under the secondary credit rate formula. The final amendments to Regulation A reflect these rate changes.

The 25-basis-point increase in the primary credit rate was associated with a similar increase in the target for the Federal funds rate (from 4.00 percent to 4.25 percent) approved by the Federal Open Market Committee (Committee) and announced at the same time. A press release announcing these actions indicated that:

Despite elevated energy prices and hurricane-related disruptions, the expansion in economic activity appears solid. Core inflation has stayed relatively low in recent months and longer-term inflation expectations remain contained. Nevertheless, possible increases in resource utilization as well as elevated energy prices have the potential to add to inflation pressures.

The Committee judges that some further measured policy firming is likely to be needed to keep the risks to the attainment of both sustainable economic growth and price stability roughly in balance. In any event, the Committee will respond to changes in economic prospects as needed to foster these objectives.

Regulatory Flexibility Act Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the new primary and secondary credit rates will not have a significantly adverse economic impact on a substantial number of small entities because the final rule does not impose any additional requirements on entities affected by the regulation.

Administrative Procedure Act

The Board did not follow the provisions of 5 U.S.C. 553(b) relating to notice and public participation in connection with the adoption of these amendments because the Board for good cause determined that delaying implementation of the new primary and secondary credit rates in order to allow notice and public comment would be unnecessary and contrary to the public interest in fostering price stability and sustainable economic growth. For these same reasons, the Board also has not provided 30 days prior notice of the effective date of the rule under section 553(d).

List of Subjects in 12 CFR Part 201

Banks, Banking, Federal Reserve System, Reporting and recordkeeping.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR Chapter II to read as follows: