

## Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule consists of an administrative change to the company name and does not affect any small entities.

## Backfit Analysis

The NRC has determined that the backfit rule (10 CFR 50.109 or 10 CFR 72.62) does not apply to this direct final rule because this amendment does not involve any provisions that would impose backfits as defined. Therefore, a backfit analysis is not required.

## Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

## List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

■ For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR Part 72.

## PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for Part 72 continues to read as follows:

**Authority:** Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec.

10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

■ 2. In § 72.214, Certificate of Compliance 1007 is revised to read as follows:

### § 72.214 List of approved spent fuel storage casks.

\* \* \* \* \*

Certificate Number: 1007.

Initial Certificate Effective Date: May 7, 1993.

Amendment Number 1 Effective Date: May 30, 2000.

Amendment Number 2 Effective Date: September 5, 2000.

Amendment Number 3 Effective Date: May 21, 2001.

Amendment Number 4 Effective Date: February 3, 2003.

Amendment Number 5 Effective Date: September 13, 2005.

SAR Submitted by: BNG Fuel Solutions Corporation.

SAR Title: Final Safety Analysis Report for the Ventilated Storage Cask System.

Docket Number: 72–1007.

Certificate Expiration Date: May 7, 2013.

Model Number: VSC–24.

Dated at Rockville, Maryland, this 14th day of June, 2005.

For the Nuclear Regulatory Commission.

**Luis A. Reyes,**

*Executive Director for Operations.*

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**BILLING CODE 7590–01–P**

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 300

[Notice 2005–17]

### Candidate Solicitation at State, District, and Local Party Fundraising Events

**AGENCY:** Federal Election Commission.

**ACTION:** Revised Explanation and Justification.

**SUMMARY:** The Federal Election Commission is publishing a revised Explanation and Justification for its rule regarding appearances by Federal officeholders and candidates at State, district, and local party fundraising events under the Federal Election Campaign Act of 1971, as amended (“FECA”). The rule, which is not being amended, contains an exemption permitting Federal officeholders and candidates to speak at State, district, and local party fundraising events “without restriction or regulation.” These revisions to the Explanation and Justification conform to the decision of the U.S. District Court for the District of Columbia in *Shays v. FEC*. Further information is provided in the supplementary information that follows.

**DATES:** Effective June 30, 2005.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Assistant General Counsel, Mr. Robert M. Knop, Attorney, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107–155, 116 Stat. 81 (2002), limits the amounts and types of funds that can be raised in connection with Federal and non-Federal elections by Federal officeholders and candidates, their agents, and entities directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of Federal officeholders or candidates (“covered persons”). See 2 U.S.C. 441i(e). Covered persons may not “solicit, receive, direct, transfer or spend” non-Federal funds in connection with an election for Federal, State, or local office except under limited circumstances. See 2 U.S.C. 441i(e); 11 CFR part 300, subpart D.

Section 441i(e)(3) of FECA states that “notwithstanding” the prohibition on raising non-Federal funds, including Levin funds, in connection with a Federal or non-Federal election in section 441i(b)(2)(C) and (e)(1), “a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.” *Id.* During its 2002 rulemaking to implement this provision, the Commission considered competing interpretations of this provision. The Commission decided to promulgate rules at 11 CFR 300.64(b) construing the statutory provision to permit Federal officeholders and candidates to attend, speak, and appear as featured guests at fundraising events for a State, district, and local committee of a political party

("State party") "without restriction or regulation." See Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49108 (July 29, 2002).

In *Shays v. FEC*, the district court held that the Commission's Explanation and Justification for the fundraising provision in 11 CFR 300.64(b) did not satisfy the reasoned analysis requirement of the Administrative Procedure Act, 5 U.S.C. 553 (2000) ("APA"). See 337 F. Supp. 2d 28, 93 (D.D.C. 2004), *appeal pending* No. 04-5352 (D.C. Cir.). The court held, however, that the regulation did not necessarily run contrary to Congress's intent in creating the fundraising exemption, was based on a permissible construction of the statute, and did not "unduly compromise[] the Act's purposes." *Id.* at 90-92 (finding the regulation survived *Chevron* review).<sup>1</sup> The Commission did not appeal this portion of the district court decision.

To comply with the district court's order, the Commission issued a Notice of Proposed Rulemaking to provide proposed revisions to the Explanation and Justification for the current rule in section 300.64. See Notice of Proposed Rulemaking on Candidate Solicitation at State, District and Local Party Fundraising Events, 70 FR 9013, 9015 (Feb. 24, 2005) ("NPRM"). As an alternative to providing a new Explanation and Justification for the current rule, the NPRM also proposed revisions to current section 300.64 that would prohibit Federal officeholders and candidates from soliciting or directing non-Federal funds when attending or speaking at State party fundraising events. See *id.* at 9015-16. The NPRM sought public comment on both options.

The public comment period closed on March 28, 2005. The Commission received eleven comments from sixteen commenters in response to the NPRM, including a letter from the Internal Revenue Service stating "the proposed explanation and the proposed rules do not pose a conflict with the Internal

Revenue Code or the regulations thereunder." The Commission held a public hearing on May 17, 2005 at which six witnesses testified. The comments and a transcript of the public hearing are available at [http://www.fec.gov/law/law\\_rulemakings.shtml](http://www.fec.gov/law/law_rulemakings.shtml) under "Candidate Solicitation at State, District and Local Party Fundraising Events." For the purposes of this document, the terms "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

The commenters were divided between those supporting the current exemption in section 300.64 and those supporting the alternative proposed rule. Several commenters urged the Commission to retain the current exemption as a proper interpretation of 2 U.S.C. 441i(e)(3). One commenter argued that section 441i(e)(3) created a total exemption because Congress knew that State and local parties requested Federal officeholders and candidates to speak at these fundraisers to increase attendance, but that these appearances do not create any *quid pro quo* contributions for the speaker. Some commenters stressed the importance of the relationship between Federal and State candidates and stated that the current exemption properly recognizes the need for Federal officeholders and candidates to participate in State party fundraising events.

Some commenters viewed the alternative proposed rule requiring a candidate to avoid "words of solicitation" as problematic because it would necessitate Commission review of speech at such events. These commenters asserted that the alternative rule would cause Federal officeholders and candidates to refuse to participate in State party fundraising events for fear that political rivals will attempt to seize on something in a speech as an impermissible solicitation. One commenter noted that Federal officeholders and candidates, who are attending State party fundraisers, are expected to thank attendees for their past and continued support for the State party, and without a complete exemption, such a courtesy could be treated as a solicitation.

Another commenter noted that party committees and campaign staff have worked hard over the past two years doing training, following Commission meetings and advisory opinions, and absorbing enforcement cases as they have developed. Another commenter noted that State parties have already had to adjust their fundraising practices during the 2004 election cycle to comply with BCRA. Two commenters

argued that further regulatory changes at this point would only increase the costs of compliance and fundraising for State parties that already operate on a small budget.

In contrast, some commenters supported the alternative proposed rule that would bar Federal candidates and officeholders from soliciting non-Federal funds when appearing and speaking at State party fundraising events. Some commenters argued that the *Shays* opinion, while upholding section 300.64 under *Chevron*, criticized the Commission's interpretation as "likely contraven[ing] what Congress intended \* \* \* as well as \* \* \* the more natural reading of the statute \* \* \*." (Quoting *Shays*, 337 F. Supp. 2d at 91.) Thus, these commenters argued that the structure of section 441i(e) as a whole, as well as the specific wording of section 441i(e)(3), when compared to the exceptions for candidates for State and local office and certain tax-exempt organizations (sections 441i(e)(2) and (e)(4), respectively), demonstrate that section 441i(e)(3) should not be construed as a total exemption from the soft money solicitation prohibitions. Accordingly, these commenters argued that the legislative history of BCRA better supports the interpretation in the alternative proposed rule. These commenters also argued that the Commission's proposed Explanation and Justification did not sufficiently address the district court's concern as to why the Commission believed that monitoring speech at State party fundraising events is more difficult or intrusive than in other contexts where solicitations of non-Federal funds are almost completely barred. *Shays*, 337 F. Supp. 2d at 93. Finally, these commenters noted that Federal officeholders and candidates should be able to distinguish speaking from "soliciting," as they are required to do in other situations such as charitable activity governed by the Senate Ethics Rules or political activity regulated by the Federal Hatch Act, 5 U.S.C. 7323, and could properly tailor their speeches to comply with the alternative proposed rule.

The Commission has decided, after carefully weighing the relevant factors, to retain the current exemption in section 300.64 permitting Federal officeholders and candidates to attend, speak, or be featured guests at State party fundraising events without restriction or regulation. The reasons for this decision are set forth below in the revised Explanation and Justification for current section 300.64.

<sup>1</sup> The district court described the first step of the *Chevron* analysis, which courts use to review an agency's regulations: "a court first asks 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" See *Shays*, at 51 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43(1984)). In the second step of the *Chevron* analysis, the court determines if the agency interpretation is a permissible construction of the statute which does not "unduly compromise" FECA's purposes by "creat[ing] the potential for gross abuse." See *Shays* at 91, citing *Orloski v. FEC*, 795 F.2d 156, 164-65 (D.C. Cir. 1986) (internal citations omitted).

**Explanation and Justification****11 CFR 300.64—Exemption for Attending, Speaking, or Appearing as a Featured Guest at Fundraising Events****11 CFR 300.64(a)**

The introductory paragraph in 11 CFR 300.64 restates the general rule from the statutory provision in section 441i(e)(3): “[n]otwithstanding the provisions of 11 CFR 100.24, 300.61 and 300.62, a Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, including but not limited to a fundraising event at which Levin funds are raised, or at which non-Federal funds are raised.”

The Commission clarifies in section 300.64(a) that State parties are free within the rule to publicize featured appearances of Federal officeholders and candidates at these events, including references to these individuals in invitations. However, Federal officeholders and candidates are prohibited from serving on “host committees” for a party fundraising event at which non-Federal funds are raised or from signing a solicitation in connection with a party fundraising event at which non-Federal funds are raised, on the basis that these pre-event activities are outside the statutory exemption in section 441i(e)(3) permitting Federal candidates and officeholders to “attend, speak, or be a featured guest” at fundraising events for State, district, or local party committees.

**11 CFR 300.64(b)**

In promulgating 11 CFR 300.64(b), the Commission construes 2 U.S.C. 441i(e)(3) to exempt Federal officeholders and candidates from the general solicitation ban, so that they may attend and speak “without restriction or regulation” at State party fundraising events. The Commission bases this interpretation on Congress’s inclusion of the “notwithstanding paragraph (1)” phrase in section 441i(e)(3), which suggests Congress intended the provision to be a complete exemption. *See Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (“[T]he Courts of Appeals generally have ‘interpreted similar ‘notwithstanding’ language \* \* \* to supercede all other laws, stating that a clearer statement is difficult to imagine.’”) (internal citation omitted).

Although some commenters argue that section 441i(e)(3) of FECA does not permit solicitation because Congress did not include the word “solicit” in that exception, the *Shays* court stated:

“[w]hile it is true that Congress created carve-outs for its general ban in other provisions of BCRA utilizing the term ‘solicit’ or ‘solicitation,’ *see* 2 U.S.C. 441i(e)(2), (4), these provisions do not conflict with the FEC’s reading of Section (e)(3).” *See Shays*, 337 F. Supp. 2d at 90; *see also Shays* at 89 (“However, as Defendant observes, ‘if Congress had wanted to adopt a provision allowing Federal officeholders and candidates to attend, speak, and be featured guests at state party fundraisers but denying them permission to speak about soliciting funds, Congress could have easily done so.’”).

Furthermore, construing section 441i(e)(3) to be a complete exemption from the solicitation restrictions in section 441i(e)(1) gives the exception content and meaning beyond what section 441i(e)(1)(B) already permits. Section 441i(e)(1)(A) establishes a general rule against soliciting non-Federal funds in connection with a Federal election. Section 441i(e)(1)(B) permits the solicitation of non-Federal funds for State and local elections as long as those funds comply with the amount limitations and source prohibitions of the Act. In contrast to assertions by commenters that without section 441i(e)(3) candidates would not be able to attend, appear, or speak at State party events where soft money is raised, the Commission has determined that under section 441i(e)(1)(B) alone, Federal officeholders and candidates would be permitted to speak and solicit funds at a State party fundraiser for the non-Federal account of the State party in amounts permitted by FECA and not from prohibited sources. *See* Advisory Opinions 2003–03, 2003–05 and 2003–36. Section 441i(e)(3) carves out a further exemption within the context of State party fundraising events for Federal officeholders and candidates to attend and speak at these functions “notwithstanding” the solicitation restrictions otherwise imposed by 441i(e)(1). Interpreting section 441i(e)(3) merely to allow candidates and officeholders to attend or speak at a State party fundraiser, but not to solicit funds without restriction, would render it largely superfluous because Federal candidates and officeholders may already solicit up to \$10,000 per year in non-Federal funds from non-prohibited sources for State parties under section 441i(e)(1)(B).

The Commission agrees with one commenter who stated that the “more natural” interpretation of 2 U.S.C. 441i(e)(3) is that found in current section 300.64. The Commission also believes that such an interpretation is more consistent with legislative intent.

Section 300.64(b) effectuates the careful balance Congress struck between the appearance of corruption engendered by soliciting sizable amounts of soft money, and preserving the legitimate and appropriate role Federal officeholders and candidates play in raising funds for their political parties. Just as Congress expressly permitted these individuals to raise and spend non-Federal funds when they themselves run for non-Federal office (*see* 2 U.S.C. 441i(e)(2)), and to solicit limited amounts of non-Federal funds for certain 501(c) organizations (*see* 2 U.S.C. 441i(e)(4)), Congress also enacted 2 U.S.C. 441i(e)(3) to make clear that Federal officeholders and candidates could continue to play a role at State party fundraising events at which non-Federal funds are raised. The limited nature of this statutory exemption embodied in 11 CFR 300.64 is evident in that it does not permit Federal officeholders and candidates to solicit non-Federal funds for State parties in written solicitations, pre-event publicity or through other fundraising appeals. *See* 11 CFR 300.64(a).

The commenters also stressed the importance of the unique relationship between Federal officeholders and candidates and their State parties. They emphasized that these party fundraising events mainly serve to energize grass roots volunteers vital to the political process.

By definition, the primary activity in which persons attending or speaking at State party fundraising events engage is raising funds for the State parties. It would be contrary to BCRA’s goals of increasing integrity and public faith in the campaign process to read the statute as permitting Federal officeholders and candidates to speak at fundraising events, but to treat only some of what they say as being in furtherance of the goals of the entire event. As one commenter noted regarding Federal candidate appearances at State party fundraising events, “the very purpose of the candidate’s invited involvement—or at least a principal one—is to aid in the successful raising of money. So there is little logic, and undeniably the invitation to confusion, in allowing candidates to speak and appear in aid of fundraising purposes, while insisting that the candidate’s speech be free of apparent fundraising appeals.” Determining what specific words would be merely “speaking” at such an event without crossing the line into “soliciting” or “directing” non-Federal funds raises practical enforcement concerns. *See* 11 CFR 300.2(m) (definition of “to solicit”) and 300.2(n) (definition of “to direct”). A regulation

that permitted speaking at a party event, the central purpose of which is fundraising, but prohibited soliciting, would require candidates to perform the difficult task of teasing out words of general support for the political party and its causes from words of solicitation for non-Federal funds for that political party. As the U.S. Supreme Court stated in *Buckley v. Valeo*:

[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

424 U.S. 1, 43 (1976); see also *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (noting that “solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views”); *Thomas v. Collins*, 323 U.S. 516, 534–35 (1945) (stating that “[g]eneral words create different and often particular impressions on different minds. No speaker, however careful, can convey exactly his meaning, or the same meaning, to the different members of an audience \* \* \* [I]t blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim”); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (holding that “[t]he nature of a place, ‘the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.’ \* \* \* The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”).

A complete exemption in section 300.64(b) that allows Federal officeholders and candidates to attend and speak at State party fundraising events without restriction or regulation avoids these significant concerns. A number of commenters noted the potential impact of these concerns if the Commission did not retain current 11 CFR 300.64(b). For example, one commenter “strongly urge[d] the Commission not to adopt a ‘speak but don’t solicit’ rule. As noted in the NPRM itself, such a rule would ‘require candidates to tease out’ appropriate words from inappropriate ones.” This commenter further stated that he “also

fear[s] the outcome if a ‘middle ground’ is adopted, wherein federal officeholders and candidates could attend fundraisers but not use words that might be deemed solicitation for money. This would, first and foremost, open up a whole new battleground in politics, as every statement made by a Congressman at his party’s Jefferson/Jackson day (or Lincoln Day) dinner will be scrutinized to see if it complies with requirements.” Another commenter noted that current 11 CFR 300.64 “applies only to the speeches that a Federal officeholder or candidate may give at a State or local party event. It reflects the practical realities of these events. As a featured speaker, an officeholder is expected to thank the attendees for their past and continued support of the party. Without the current exemption, this common courtesy might well be treated as a violation of the ban on the solicitation of non-Federal funds. The Commission would then be placed in the position of determining whether a normal and expected expression of gratitude or request for support crosses some indeterminate line and violates the law.” Another commenter urged the Commission to retain the current regulation so that Federal officeholders and candidates would not be exposed to “legal jeopardy” because the proposed alternative rule would leave “too much opportunity for someone to second guess and misinterpret a speech made at this type of event.” The same commenter stated that the Commission is faced with the question of whether or not to adopt a rule “that allows candidates and officeholders to be placed at the mercy of those who would misinterpret or mischaracterize the speech they give.”

At the hearing, the Commission explored a number of scenarios involving a Federal officeholder or candidate speaking at a party fundraising event. The discussion illustrates the difficulty for not only the Commission, but also Federal officeholders and candidates, in parsing speech under the alternative proposed rule. For example, when asked whether statements like “I’m glad you’re here to support the party,” and “thank you for your continuing support of the party,” constitute solicitation, the commenters who favor the alternative proposed rule could not give definitive answers. They acknowledged that the word “support” may be construed as a solicitation when spoken at a fundraising event but not when spoken at other types of events. Likewise, commenters who favored the current rule expressed uncertainty as to

whether these phrases would be construed as solicitations when spoken at a fundraising event.

The commenters disagreed as to whether a Federal officeholder or candidate delivering a speech under a banner hung by the State party reading “Support the 2005 State Democratic ticket tonight” would be construed as impermissible solicitation unless explicit disclaimers were included in the speech. Some commenters noted that even a “pure policy” speech, otherwise permissible at a non-fundraising event, could constitute an impermissible solicitation in the context of a State party fundraising event. Finally, many commenters could not provide a clear answer as to whether a policy speech that included a statement of support for the “important work” of the State party chairman on a particular issue (such as military base closures in the state) could be construed as an impermissible solicitation. In each of these examples the commenters stated that an analysis of the particular facts and circumstances surrounding the speech would be required in order to determine whether a speech would be solicitation. However, the commenters analyzed the facts and circumstances differently, and when presented with the same facts and circumstances, they could not come to agreement on whether the speech was a solicitation.

The inability of the commenters to provide clear answers to these scenarios demonstrates how parsing speech at a State party fundraising event is more difficult than in other contexts and why it would be especially intrusive for the Commission to enforce the alternative proposed rule. As illustrated during the discussion at the hearing and observed by one of the commenters, whether a particular message is a solicitation may depend on the person hearing the message—what one person interprets as polite words of acknowledgement may be construed as a solicitation by another person. The likelihood of this misinterpretation occurring increases at a State party fundraising event because of the Federal officeholders’ and candidates’ unique relationship to, and special identification with, their State parties.

The Commission believes that the alternative rule would, as a practical matter, make the statutory exception at 2 U.S.C. 441i(e)(3) for appearances at State and local party fundraising events a hollow one. Given that the Federal officeholder’s appearance would be, by definition, at a fundraising event, it would be exceedingly easy for opposing partisans to file a facially plausible complaint that the candidate or Federal

officeholder's words or actions at the event constituted a "solicitation." In such circumstances, the Commission believes that Federal officeholders and candidates would be reluctant to appear at State party fundraising events, as doing so would risk complaints, intrusive investigations, and possible violations based on general words of support for the party.

Some commenters argued that Federal officeholders and candidates should be able to distinguish between permissible speech and an impermissible solicitation under the alternative rule because Federal employees are already required to make such judgments when involved in political activity pursuant to the Hatch Act. See 5 U.S.C. 7323; 5 CFR 734.208(b). Under the Hatch Act and its implementing regulations, a Federal employee "may give a speech or keynote address at a political fundraiser \* \* \* as long as the employee does not solicit political contributions." See 5 CFR 734.208, Example 2. However, there are significant differences between the requirements of the Hatch Act and the Commission's regulations which make it much easier for Federal employees to know which words are words of solicitation under the Hatch Act scheme, than under the alternative proposed rule.

Although the Hatch Act restriction appears similar to the proposed alternative rule banning Federal officeholders and candidates from soliciting money when speaking at State party fundraising events, the Hatch Act is a narrower standard that provides clear guidance to speakers to distinguish permissible speech. First, the implementing regulations for the Hatch Act contain a narrow definition of "solicit" meaning "to request expressly" that another person contribute something. See 5 CFR 734.101. Thus, for example, the Hatch Act regulations explain that an employee may serve as an officer or chairperson of a political fundraising organization so long as they do not personally solicit contributions, see 5 CFR 734.208, Example 7, while Federal officeholders and candidates may not serve in such capacity under 2 U.S.C. 441i(e) and 11 CFR 300.64. Moreover, in order to violate the Hatch Act, a Federal employee must "knowingly" solicit contributions—a higher standard than that employed in FECA and Commission regulations. Thus, a Federal employee would not be penalized for unintentionally crossing the line into "solicitation" under the Hatch Act, whereas the alternative proposed rule would reach situations where the Federal officeholder or candidate speech could be construed as

an impermissible solicitation, regardless of the speaker's knowledge or intent.

A commenter cited the Senate Ethics Manual explaining Rule 35 of the Senate Code of Official Conduct, arguing that Federal officeholders and candidates know how to ask for money and avoid asking for money. The Senate rule targets solicitation of gifts from registered lobbyists and foreign agents and applies to situations not analogous to State party fundraising events. Rule 35 prohibits Senators and their staff from soliciting charitable donations from registered lobbyists and foreign agents but makes an exception, among others, for a fundraising event attended by fifty or more people. Thus, at a fundraising event attended by fifty or more people, including registered lobbyists and foreign agents, senators do not need to be concerned that their speech soliciting charitable donations is an impermissible solicitation of a gift under Rule 35.

Many commenters stressed the need for Federal officeholders and candidates to have clear notice regarding what speech would be allowable at these State party fundraising events, as the unwary could unintentionally run afoul of a more restrictive rule. A complete exemption in section 300.64(b) that allows Federal officeholders and candidates, in these limited circumstances, to attend and speak at State party committee fundraising events without restriction or regulation, including solicitation of non-Federal or Levin funds, avoids these concerns and the practical enforcement problems they entail. The exemption provides a straightforward, clear rule that Federal officeholders and candidates may easily comprehend and that the Commission may practically administer. It also fully complies with the plain meaning of BCRA.

Furthermore, as noted above, current 11 CFR 300.64 is carefully circumscribed and only extends to what Federal candidates and officeholders say at the State party fundraising events themselves. The regulation tracks the statutory language by explicitly allowing Federal candidates and officeholders to attend *fundraising* events and in no way applies to what Federal candidates and officeholders do outside of State party fundraising events. Specifically, the regulation does not affect the prohibition on Federal candidates and officeholders from soliciting non-Federal funds for State parties in fundraising letters, telephone calls, or any other fundraising appeal made before or after the fundraising event. Unlike oral remarks that a Federal candidate or officeholder may

deliver at a State party fundraising event, when a Federal candidate or officeholder signs a fundraising letter or makes any other written appeal for non-Federal funds, there is no question that a solicitation has taken place that is restricted by 2 U.S.C. 441i(e)(1). Moreover, it is equally clear that such a solicitation is not within the statutory safe harbor at 2 U.S.C. 441i(e)(3) that Congress established for Federal candidates and officeholders to attend and speak at State party fundraising events.

Finally, there does not appear to be evidence of corruption or abuse under the current rule that dictates a change in Commission regulations. Commenters both favoring and opposed to the regulation in its current form agreed that there is no evidence that the operation of this exemption in the past election cycle in any way undermined the success of BCRA cited by its Congressional sponsors. Congress specifically allowed Federal candidates and officeholders to attend and speak at State party *fundraising* events. The statute permits attendance where non-Federal funds are being raised, and policing what may be said in both private and public conversations with donors at such events does little to alleviate actual or apparent corruption. One commenter pointed out that most of these fundraising events require a contribution to the State party as the cost of admission, and do not present a significant danger of corruption from solicitation at the event itself by speakers. As one commenter noted, "it is difficult to identify any regulatory benefit to be derived by additional restrictions on what a candidate might say to an audience that already has chosen to attend and contribute [when] without any overt solicitation, the candidate's appearance at the event already makes clear the importance that she attaches to the party's overall campaign efforts." The Commission agrees with the commenters that additional restrictions on what a candidate may say once at the fundraising event provides little, if any, anti-circumvention protection since, as one commenter noted in oral testimony, "the ask has already been made \* \* \*. The people are already there. They are motivated to be there" and the funds have already been received by the party committee before the Federal candidate and officeholder speaks at the fundraising event. A commenter observed, "most political events I am familiar with involve the raising of funds as a condition of admission as opposed to a solicitation at an event."

Another commenter stated that “in most instances the money for the event has already been raised. Therefore, the candidate or officeholder’s appearance and speech [are] not a solicitation.”

Another commenter noted that most of these fundraising events are small-dollar events targeted at grass roots volunteers where donations are usually less than \$100, and do not include corporations or single-interest groups. An additional commenter stated that “Congress knew that state and local party committees request officeholders speak at party events to increase attendance and the party’s yield from the event. It was also aware that speeches at these events are unlikely of themselves to foster the quid pro quo contributions that the law seeks to curb.” Thus, many of these events already comply with amount limitations and source prohibitions for solicitation under section 441i(e)(1)(B). In contrast, other commenters asserted that there was a potential for abuse if Federal candidates and officeholders make phone calls from the event asking donors for non-Federal funds, or gather together a group of wealthy donors and label it a “State party fundraising event” in order to benefit from the exemption in section 300.64. However, in response to Commission questioning at the hearing, no commenter could point to any reports of such activity in the past election cycle. If the Commission detects evidence of abuse in the future, the Commission has the authority to revisit the regulation and take action as appropriate, including an approach targeted to the specific types of problems that are actually found to occur.

#### Additional Issues

##### 1. Other Fundraising Events

In the NPRM, the Commission sought public comment regarding certain advisory opinions issued by the Commission permitting attendance and participation by Federal officeholders and candidates at events where non-Federal funds would be raised for State and local candidates or organizations, subject to various restrictions and disclaimer requirements. *See NPRM* at 9015; Advisory Opinions 2003–03, 2003–05, and 2003–36. Some commenters stated that the analysis in those advisory opinions was correct and consistent with BCRA’s exceptions permitting Federal officeholders and candidates to raise money for State and local elections within Federal limits and prohibitions under section 441i(e)(1)(B). One commenter noted that these advisory opinions were based on the

Commission’s regulation at 11 CFR 300.62, which was not challenged in the *Shays* litigation and need not be reexamined here. Another commenter urged the Commission to incorporate the holdings of these advisory opinions into its regulations so that Federal officeholders and candidates could continue to rely on them. One commenter also suggested that any additional restrictions beyond the disclaimers required in these advisory opinions would raise constitutional concerns. In contrast, other commenters asserted that these advisory opinions were incorrect and that the Commission should supersede them with a regulation that completely bars attendance at soft money fundraising events that are not hosted by a State party. The Commission does not believe it is necessary to initiate a rulemaking to address the issues in Advisory Opinions 2003–03, 2003–05, and 2003–36 at this time.

##### 2. Levin Funds

The Commission also sought comment on how it should interpret 2 U.S.C. 441i(b)(2), (e)(1), and (e)(3) in light of language from *Shays* stating that Levin funds are “funds ‘subject to [FECA’s] limitations, prohibitions, and reporting requirements.’” *See NPRM* at 9016. Most comments regarding this inquiry opposed any interpretation of these provisions that would allow Federal officeholders and candidates to solicit Levin funds without restriction, with some commenters noting that the Commission has consistently referred to Levin funds as non-Federal funds, including in recent final rules published in 2005. However, one commenter stated that Federal officeholders and candidates should be allowed to raise Levin funds. This issue of interpretation was relevant only to the alternative approach proposed in the NPRM. Because the Commission has decided to retain its rule in section 300.64 with a revised Explanation and Justification, the Commission need not further address this question of statutory interpretation.

Dated: June 23, 2005.

**Scott E. Thomas,**

*Chairman, Federal Election Commission.*

[FR Doc. 05–12863 Filed 6–29–05; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 23

[Docket No. CE230, Special Condition 23–170–SC]

#### Special Conditions; Raytheon Model King Air H–90 (T–44A) Protection of Systems for High Intensity Radiated Fields (HIRF)

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued to ARINC Inc., 1632 S. Murray Blvd., Colorado Springs, CO 80916 for a Supplemental Type Certificate for the Raytheon Model King Air H–90 (T–44A) airplane. These airplanes will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. The novel and unusual design features include the installation of the Rockwell Collins Pro Line 21 Avionics System. This system includes Electronic Flight Instrument Systems (EFIS), electronic displays, digital Air Data Computers (ADC), and supporting equipment. The applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

**DATES:** The effective date of these special conditions is June 22, 2005.

Comments must be received on or before August 1, 2005.

**ADDRESSES:** Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket Clerk, Docket No. CE230, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE230. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** Wes Ryan, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4127.