



To: Election Law Group Clients
From: Bryan Cave Election Law Group
Re: New FEC Regulations Governing Federal Candidate and Officeholder
Participation in Non-Federal Fundraising Activities
Date: May 4, 2010

The Federal Election Commission (“FEC” or “Commission”) recently amended its regulations that govern the participation of federal candidates and officeholders in non-federal fundraising events and activities. These regulations stem from the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which restricts the fundraising activities of federal candidates and officeholders by prohibiting such persons from soliciting, receiving, directing, transferring, or spending funds in connection with federal and nonfederal elections that are outside of the amount limitations, source prohibitions, and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹

The FEC’s new regulations replace prior regulations that were invalidated by the federal courts. The Commission’s new regulations address federal candidate and officeholder participation in non-federal fundraising events as well as the use of federal candidates and officeholders’ names and likenesses in pre- and post-event publicity. This memorandum provides an overview of the Commission’s new regulations, which become effective in June 2010.

I. SCOPE OF THE NEW RULES

The Commission’s new regulations, found at 11 C.F.R. § 300.64, create a unified approach to federal candidate and officeholder participation in non-federal fundraising events by applying the same set of rules to all fundraising events in connection with elections at which funds outside the amount limitations, source prohibitions, and reporting requirements of the Act are solicited.² The new regulations apply not only to federal candidate and officeholder participation in non-federal fundraising events, but also to all pre- and post-event publicity associated with such events. The new regulations apply only to events at which non-federal funds are solicited, regardless of whether non-federal funds are actually raised at the event. Thus, the new regulations do not apply to events at which non-federal funds are received unless non-federal funds have also been solicited.

¹ These restrictions also apply to entities directly or indirectly established, financed, maintained, or controlled by federal candidates and officeholders as well as their agents.

² Such funds include corporate contributions and individual contributions beyond the applicable federal contribution limits.

The new regulations do not change several other exceptions to the general prohibition against federal officeholders and candidates soliciting non-federal funds in connection with elections. Federal candidates and officeholders who are also state candidates may still raise non-federal funds for their state campaign accounts subject to certain restrictions and requirements. Federal candidates and officeholders may also continue to raise non-federal funds for certain tax-exempt organizations subject to certain restrictions.

II. FEDERAL CANDIDATE AND OFFICEHOLDER ATTENDANCE AT NON-FEDERAL FUNDRAISING EVENTS

Under the FEC's new regulations, federal candidates and officeholders may attend, speak, and be the featured guests at all non-federal fundraising events – both party fundraising events and non-party events, such as events sponsored by Section 527 organizations, state PACs, and other non-federal organizations not registered with the FEC. Unlike under prior Commission regulations, federal candidates and officeholders may no longer speak without restriction at party events at which non-federal funds are raised; rather, federal candidates and officeholders must refrain from making any statements at the events that constitute a solicitation of non-federal funds. While attending non-federal fundraising events, federal candidates and officeholders are permitted to solicit funds, provided that the solicitations are limited to funds that comply with state law and the amount limitations and source prohibitions of the Act. Solicitations may be “limited” through the use of “clear and conspicuous” oral and written disclaimers, as discussed below.

A. Oral Disclaimers

Federal candidates and officeholders soliciting funds at non-federal fundraising events may “limit” their solicitations to only funds that comply with the Act by making a clear and conspicuous oral disclaimer. If the oral disclaimer is delivered to the general audience, such as during the course of a speech, then the oral disclaimer need only be made once and does not have to be repeated during one-on-one discussions at the event. However, federal candidates and officeholders may not recite an oral disclaimer publicly and then encourage attendees to disregard the limitation during one-on-one discussions. Please see Attachment A to this memorandum for a sample oral disclaimer.

B. Written Disclaimers

If a federal candidate or officeholder does not wish to make an oral disclaimer or would prefer to only make general solicitations, then the federal candidate or officeholder may “limit” his solicitations by displaying written disclaimers at the event. The written disclaimer should either be (1) posted prominently at the entrance to the fundraising event so that it cannot be overlooked; or (2) placed in the form of a placard on every table at the event. Please see Attachment A to this memorandum for a sample written disclaimer.

III. PUBLICITY FOR NON-FEDERAL FUNDRAISING EVENTS

For the first time, the Commission's regulations address pre- and post-event publicity for non-federal fundraising events. Federal candidates and officeholders may authorize the use of their names and likenesses in publicity related to non-federal fundraising events, with certain limitations and exceptions. The new regulations concerning publicity for non-federal fundraising events apply

to all types of publicity related to the events and to all methods of publicity, such as advertisements, announcements, invitations, and post-event follow-up contacts. The new regulations also apply to all forms of publicity, including, but not limited to, phone calls, mail, email, facsimile, text messages, and websites.

A. Fundraising Roles and Titles

If the event publicity contains a solicitation for funds outside the Act's amount limitations and source prohibitions, then federal candidates and officeholders may not approve, authorize, agree to, or consent to appear in the publicity in a role or with a title related to fundraising. This includes appearing as the "honorary chairperson" of the event, as a member of the "host committee," or in any other title or position related to extending an invitation to the event, such as signing the invitation or other pre- or post-event publicity material or disseminating such materials. For example, an invitation stating "featured guest Senator Jones invites you to join him at next week's reception" would be prohibited. This prohibition applies even if the publicity contains a written disclaimer, as discussed below.

If the event publicity does not contain a solicitation or contains a solicitation only for funds that comply with the Act's amount limitations and source prohibitions, then federal candidates and officeholders may approve, authorize, agree to, or consent to appear in the publicity in a role or with a title related to fundraising.

B. No Solicitation

If the event publicity does not contain a solicitation whatsoever, then federal candidates and officeholders may approve, authorize, agree to, or consent to the use of their names and/or likenesses in the publicity. The FEC has made clear that merely listing a federal candidate or officeholder on an invitation for a non-federal fundraising event does not constitute a solicitation. The publicity may indicate that the federal candidate or officeholder will attend, speak, or be a featured guest at the event. Federal candidates and officeholders may also appear in the publicity in a role related to fundraising, such as "honorary chairperson" of the event and as a member of the "host committee," as well as sign the publicity materials. No "limiting" disclaimer is required because no solicitations are made.

C. Solicitation for Funds Complying with the Act

If the event publicity contains a solicitation for only funds that comply with the Act's amount limitations and source prohibitions, then federal candidates and officeholders may approve, authorize, agree to, or consent to the use of their names and/or likenesses in the publicity. Federal candidates and officeholders may also appear in the publicity in a role related to fundraising, such as "honorary chairperson" of the event and as a member of the "host committee," as well as sign the publicity materials. No "limiting" disclaimer is required because the solicitations are already limited to funds that comply with the Act's amount limitations and source prohibitions.

D. Solicitation for Funds Outside the Act

If the event publicity contains a solicitation for funds outside the Act's amount limitations and source prohibitions, then federal candidates and officeholders may approve, authorize, agree to, or consent to the use of their names and/or likenesses in the publicity only in a manner that does

not result in the solicitation being attributed to the federal candidate or officeholder. The new regulations specify that the following two requirements must be met for a federal candidate or officeholder to appear in such publicity:

- 1) The federal candidate or officeholder is identified in a manner not specifically related to fundraising, such as a “honored guest” or “featured speaker;” and
- 2) The publicity contains a clear and conspicuous disclaimer that the federal candidate or officeholder is not making the solicitation.

The FEC’s new regulations require that the printed disclaimer follow the same “boxed disclaimer” requirements that currently apply to federal political committees. See 11 C.F.R. § 110.11(c)(2). Section 110.11(c)(2) provides that the disclaimer must be:

- Within a printed box set apart from the rest of the text. The disclaimer does not have to appear on the front or cover page of a communication, unless the communication contains only a front face;
- Printed in a color that reasonably contrasts with the paper or background of the communication. FEC regulations state that disclaimers printed in black text on a white background or disclaimers with color contrast no less than the color contrast between the background and the largest type size used in the communication are sufficient; and
- Printed in a clearly readable type size. FEC regulations indicate that a 12-point font size is sufficient for disclaimers on communications up to 24 inches by 36 inches. Although a smaller font may be considered sufficient on smaller materials, we recommend that all materials smaller than 24 inches by 36 inches contain disclaimers in 12-point font.

The “limiting” disclaimer language should be incorporated into the fundraising event host entity’s standard “boxed disclaimer” if the host entity is federally registered or if the host entity is not federally registered but must use a boxed disclaimer under state law. If the entity sponsoring the fundraising event is not required to use any sort of boxed disclaimer under state law, then the “limiting” disclaimer language should be placed by itself in a box. Please see Attachment A to this memorandum for sample printed disclaimers.

Should the publicity be disseminated through unwritten means, such as by telephone calls, a “limiting” disclaimer only needs to be included if the publicity is recorded, follows a script, or is conducted according to a structured or organized program. A script includes any written text that is used to guide conversations, regardless of whether the script takes the form of complete paragraphs, bullet points notes, or any other written prompts. For example, recorded radio ads and phone calls to donors using a script would both require a “limiting” disclaimer. Please see Attachment A to this memorandum for examples of such disclaimers.

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If you have any questions regarding the FEC’s new regulations governing federal candidate and officeholder participation in non-federal fundraising activities, please do not hesitate to contact the Bryan Cave Election Law Group for assistance.

ATTACHMENT A

Examples of Disclaimers at Fundraising Events

Oral Disclaimer

“I am only asking for donations of up to \$<federally permissible limit> from individuals and for donations of up to \$<federally permissible limit> from multicandidate political committees. I am not asking for donations from corporations, labor organizations, foreign nationals, federal contractors, or national banks.”

Written Disclaimer

“Solicitations made by federal candidates and officeholders at this event are limited by federal law. The federal candidates and officeholders speaking tonight are soliciting only donations of up to \$<federally permissible limit> from individuals and up to \$<federally permissible limit> from multicandidate political committees. They are not soliciting donations in any amount from corporations, labor organizations, national banks, federal contractors, or foreign nationals.”

Examples of Disclaimers in Pre- and Post-Event Publicity

Printed Publicity

<p>Paid for by State Party and not authorized by any candidate or candidate’s committee. www. StateParty.com</p> <p>All funds solicited in connection with this event are by State Party and not by Senator John Doe.</p>

<p>Paid for by State Party and not authorized by any candidate or candidate’s committee. www. StateParty.com</p> <p>Senator John Doe is appearing at this event only as a featured speaker. Senator Doe is not asking for funds or donations.</p>

<p>All funds solicited in connection with this event are by State Party and not by Senator John Doe.</p>
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<p>Senator John Doe is appearing at this event only as a featured speaker. Senator Doe is not asking for funds or donations.</p>
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Oral Publicity

“Senator John Doe is appearing at this event only as a featured speaker. Senator Doe is not asking for funds or donations.”

“All funds solicited in connection with this event are by State Party and not by Senator John Doe.”