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AGENDA ITEM
For Meeting of: 08-01-07

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

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Associate General Counsel

Ron Katwan *RK*
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Margaret Perl *MP*
Attorney

Subject: Draft AO 2007-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 1, 2007.

Attachment

1 ADVISORY OPINION 2007-11

2

3 Charles H. Bell, Jr.

4 General Counsel

DRAFT

5 California Republican Party

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8 Sacramento, CA 95814

9

10 Lance H. Olson

11 General Counsel

12 California Democratic Party

13 Olson, Hagel & Fishburn, LLP

14 555 Capitol Mall, Suite 1425

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16 Dear Messrs. Bell and Olson:

17 We are responding to your joint advisory opinion request on behalf of the
18 California Republican Party and the California Democratic Party (collectively “California
19 State Party Committees”). Your request concerns the application of the Federal Election
20 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to three
21 types of proposed communications preceding State party fundraising events that include
22 Federal candidates or officeholders as featured speakers or honored guests. The
23 Commission concludes that one type of proposed communications is permissible under
24 the Act and Commission regulations, but that the other two types of proposed
25 communications are not permissible.

26 ***Background***

27 The facts presented in this advisory opinion are based on your letter received on
28 June 13, 2007 and your email received on June 26, 2007.

29 The California State Party Committees plan to invite Federal candidates and
30 officeholders to be featured speakers or honored guests at various fundraising events for

1 State, district or local party committees in California. These fundraising events would
2 raise non-Federal funds for State, district or local party committees. The California State
3 Party Committees plan to publicize the Federal candidates' and officeholders'
4 appearances in pre-event communications, including mailings that "reference
5 solicitations for non-Federal funds to be raised at the event." Specifically, the California
6 State Party Committees propose to make the following three types of communications:

7 Proposed Communication 1: An invitation from the State or county party
8 committee stating that a Federal candidate or officeholder will be the featured
9 speaker/honored guest, which also asks for non-Federal funds (either funds exceeding the
10 amount limitations or from prohibited sources). The reply card also references the
11 Federal candidate or officeholder.

12 Proposed Communication 2: A State or county party committee invitation stating
13 that a Federal candidate or officeholder will be the featured speaker/honored guest, but
14 that does not solicit non-Federal funds in itself. However, the reply card sent in the same
15 envelope would request non-Federal funds without referencing any Federal candidate or
16 officeholder.

17 Proposed Communication 3: A State or county party committee "Save the Date"
18 announcement containing the name and date of the non-Federal fundraiser that references
19 a Federal candidate or officeholder as the featured speaker/honored guest but does not
20 ask for any donation. The announcement would also state that more information will
21 follow. The actual solicitation for non-Federal funds would be made in a separate
22 mailing that identifies the fundraising event and the date but does not make any reference
23 to a Federal candidate or officeholder.

1 For each of these proposed communications, the California State Party
2 Committees will consult with the Federal candidate or officeholder before sending the
3 communication to obtain the Federal candidate’s or officeholder’s comments on, and
4 approval of, the communication’s language and form.

5 ***Question Presented***

6 *Are each of the three types of proposed communications publicizing a Federal*
7 *candidate’s or officeholder’s appearance as a speaker or guest at fundraising events for*
8 *California State, district or local party committees permissible under 2 U.S.C. 441i(e)*
9 *and 11 CFR 300.64?*

10 ***Legal Analysis and Conclusions***

11 The first two types of proposed communications are not permissible under the Act
12 and Commission regulations, but the third type of communication is permissible.

13 The Act prohibits Federal candidates and officeholders from soliciting non-
14 Federal funds in connection with an election for Federal office. *See* 2 U.S.C. 441i(e); 11
15 CFR 300.61. Federal candidates and officeholders may “solicit, receive, direct, transfer
16 or spend funds” in connection with a non-Federal election only in amounts and from
17 sources that are consistent with State law, and that do not exceed the Act’s contribution
18 limits or source prohibitions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. In addition, the
19 Act provides that “notwithstanding” the general prohibition on raising non-Federal funds,
20 Federal candidates and officeholders may “attend, speak, or be a featured guest at a

1 fundraising event for a State, district, or local committee of a political party.” 2 U.S.C.
2 441i(e)(3); 11 CFR 300.64.¹

3 Under 11 CFR 300.64(a), State parties may “advertise, announce or otherwise
4 publicize” that a Federal candidate or officeholder will attend, speak or be a featured
5 guest at a fundraising event, including “publicizing such appearance in pre-event
6 invitations materials and in other party committee communications.” While State parties
7 are free to include references to Federal candidates and officeholders in invitations to an
8 event at which non-Federal funds are raised, this exemption “does not permit Federal
9 officeholders and candidates to solicit non-Federal funds for State parties in written
10 solicitations, pre-event publicity or through other fundraising appeals.” Revised
11 Explanation and Justification for Candidate Solicitation at State, District, and Local Party
12 Fundraising Events, 70 Fed. Reg. 37649, 37651 (June 30, 2005). For example, Federal
13 candidates and officeholders are prohibited from serving on “host committees” for a State
14 party event raising non-Federal funds or from signing a solicitation letter asking for non-
15 Federal funds in connection with such an event because “these pre-event activities are
16 outside the statutory exemption in section 441i(e)(3).” *Id.*

17 The Commission has previously examined pre-event publicity for other types of
18 fundraising events in connection with non-Federal elections that are governed by section
19 300.62. *See* Advisory Opinions 2003-03 (Cantor) (non-Federal candidate fundraisers);
20 2003-36 (RGA) (non-profit organization fundraisers). In these advisory opinions, the
21 Commission stated that the restrictions in section 300.62 do not apply to “publicity for an

¹ The Commission notes that 11 CFR 300.64 is the subject of ongoing litigation in *Shays v. FEC*, Civ. No. 1:06CV01247 (D.D.C.). Pending the outcome of this litigation, the Commission’s current rule in 11 CFR 300.64 remains in full force and effect. Accordingly, the guidance in this advisory opinion may be relied upon while the current rule remains in effect.

1 event where that publicity does not constitute a solicitation or direction of non-Federal
2 funds by a covered person, nor to a Federal candidate or officeholder merely because he
3 or she is a featured guest at a non-Federal fundraiser.” Advisory Opinions 2003-03
4 (Cantor); 2003-36 (RGA). To determine whether a pre-event communication complies
5 with the restrictions on Federal candidates and officeholders soliciting non-Federal funds,
6 the Commission has employed a two-step analysis: (1) whether the pre-event
7 communication constitutes a solicitation of funds; and (2) whether the Federal candidate
8 or officeholder approved, authorized, or agreed or consented to be featured, or named in,
9 the pre-event communication. *See* Advisory Opinions 2003-03 (Cantor); 2003-36
10 (RGA).

11 If the pre-event communication is a solicitation and the Federal candidate or
12 officeholder approves, authorizes, or agrees or consents to be named or featured in the
13 solicitation, the solicitation must contain a “clear and conspicuous express statement” that
14 the solicitation itself is limited to funds that comply with the amount limits and source
15 prohibitions of the Act. *See* Advisory Opinion 2003-36 (RGA) (citing Advisory Opinion
16 2003-03 (Cantor)). A disclaimer purporting to limit the Federal candidate’s or
17 officeholder’s personal solicitation to funds within the amount limits and source
18 prohibitions that is placed together with a general solicitation of funds outside the Act’s
19 limitations and prohibitions is not sufficient. Rather, this statement must be applied to
20 the entire solicitation.

21 The Commission emphasizes that the analysis in Advisory Opinions 2003-03
22 (Cantor) and 2003-36 (RGA) also applies to pre-event communications for a State party
23 fundraising event covered by section 300.64(a). For each of the three proposed

1 communications, the Commission must determine whether that communication is simply
2 “publicity” for a State party fundraiser under section 300.64(a), or is a solicitation of non-
3 Federal funds in connection with a non-Federal election governed by section 300.62.

4 Under the facts of your request, Federal candidates or officeholders would approve,
5 authorize, or agree or consent to be named in each of these pre-event communications.

6 Therefore, if any of the proposed communications are solicitations, these
7 communications are only permissible under section 300.62 if the entire solicitation is
8 expressly limited to funds that comply with the amount limitations and source
9 prohibitions of the Act.

10 *Proposed Communication 1 - An invitation from the State or county party committee*
11 *stating that a Federal candidate or officeholder will be the featured speaker/honored*
12 *guest, which also asks for non-Federal funds (either funds exceeding the amount*
13 *limitations or from prohibited sources). The reply card also references the Federal*
14 *candidate or officeholder.*

15
16 The Commission concludes that Proposed Communication 1 would not be
17 permissible because it would constitute a solicitation by a Federal candidate or
18 officeholder of non-Federal funds that are not in compliance with the amount limitations
19 and source prohibitions of the Act.

20 Proposed Communication 1 is a solicitation under the Act because it expressly
21 includes a request for non-Federal funds over and above the limitations and prohibitions
22 of Federal law. A Federal candidate’s or officeholder’s agreement to be featured in a pre-
23 event invitation that solicits non-Federal funds is a solicitation by the Federal candidate
24 or officeholder. Thus, because Proposed Communication 1 would solicit non-Federal
25 funds and the Federal candidate or officeholder would approve or authorize the
26 communication, or agree or consent to be featured in it, it would not be permissible under

1 2 U.S.C. 441i(e) and 11 CFR 300.62. As discussed above, the Commission notes that a
2 “disclaimer” would not render the solicitation permissible.

3 *Proposed Communication 2 - A State or county party committee invitation stating that a*
4 *Federal candidate or officeholder will be the featured speaker/honored guest, but that*
5 *does not solicit non-Federal funds in itself. However, the reply card sent in the same*
6 *envelope would request non-Federal funds without referencing any Federal candidate or*
7 *officeholder.*

8
9 The Commission concludes that Proposed Communication 2 would not be
10 permissible because it would be a solicitation by a Federal candidate or officeholder of
11 non-Federal funds that are not in compliance with the amount limitations and source
12 prohibitions of the Act.

13 In the Commission’s recent revision to the definition of “to solicit” in 11 CFR
14 300.2(m), the Commission included examples of communications that constitute
15 solicitations. The example in section 300.2(m)(1)(i) applies to Proposed Communication
16 2:

17 (1) The following types of communications constitute solicitations:

18

19 (i) A communication that provides a method of making a
20 contribution or donation, regardless of the communication. This
21 includes, but is not limited to, *providing a separate card, envelope*
22 *or reply device* that contains an address to which funds may be sent
23 and allows contributors and donors to indicate the dollar amount of
24 their contribution or donation to the candidate, political committee,
25 or other organization.

26

27 (emphasis added).

28 Under section 300.2(m), the invitation referencing the Federal candidate and
29 officeholder in Proposed Communication 2 would be a solicitation because the same
30 mailing contains a reply card requesting non-Federal funds. Because the Federal
31 candidate or officeholder would approve, authorize, or agree or consent to be featured in,

1 this communication, the entire solicitation must be expressly limited to funds that comply
2 with the amount limits and source prohibitions of the Act. The fact that the reference to
3 the Federal candidate and the explicit request for non-Federal funds appear on separate
4 pieces of paper within the same mailing does not change this result. The two pieces must
5 either be in separate mailings or the entire mailing must comply with 2 U.S.C. 441i(e)
6 and 11 CFR 300.62. Because Proposed Communication 2 would solicit non-Federal
7 funds and the Federal candidate or officeholder would approve or authorize the
8 communication, or agree or consent to be featured in it, it would not be permissible under
9 2 U.S.C. 441i(e) and 11 CFR 300.62. As discussed with regard to Proposed
10 Communication 1 above, a “disclaimer” would not render the solicitation permissible.

11 *Proposed Communication 3 - A State or county party committee “Save the Date”*
12 *announcement containing the name and date of the non-Federal fundraiser that*
13 *references a Federal candidate or officeholder as the featured speaker/honored guest but*
14 *does not ask for any donation. The announcement would also state that more*
15 *information will follow. The actual solicitation for non-Federal funds would be made in*
16 *a separate mailing that identifies the fundraising event and the date but does not make*
17 *any reference to a Federal candidate or officeholder.*
18

19 The Commission concludes that Proposed Communication 3 would be
20 permissible under the Act and Commission regulations because the announcement would
21 be merely pre-event publicity for a Federal candidate or officeholder appearance at a
22 State party fundraising event and would not constitute a solicitation of non-Federal funds
23 by a Federal candidate or officeholder.

24 The announcement in proposed Communication 3 would be pre-event publicity
25 permitted by section 300.64(a) because it publicizes the Federal candidate or officeholder
26 as a featured speaker or honored guest at the State party fundraising event, but would not
27 solicit any non-Federal funds. In contrast to Proposed Communication 2, any solicitation

