FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: JULY 31, 2007

SUBJECT: COMMENT ON DRAFT AO 2007-11
California Republican Party and
California Democratic Party

Transmitted herewith is a timely submitted comment from Messrs. Chris K. Gober and Jason Torchinsky, on behalf of the National Republican Senatorial Committee, regarding the above-captioned matter.

Proposed Advisory Opinion 2007-11 is on the agenda for Wednesday, August 1, 2007.

Attachment

NRSC

THE·NATIONAL·REPUBLICAN·SENATORIAL·COMMITTEE

Senator John Ensign
Chair

Scott Bensing
Executive Director

July 30, 2007

By Fax

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: The National Republican Senatorial Committee's Comments on Draft Advisory Opinion 2007-11

Dear Ms. Dove:

The National Republican Senatorial Committee ("NRSC") writes to comment on the Federal Election Commission's (the "Commission") Draft Advisory Opinion 2007-11 ("Draft AO"). The Draft AO responds to the California Republican Party's and the California Democratic Party's joint advisory opinion request seeking guidance on the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and the Commission's regulations to three types of proposed communications preceding State party fundraising events that include Federal candidates or officeholders (alternatively "covered person") as featured speakers or honored guests.

The Draft AO should not be adopted without significant revision. The conclusion reached by the Commission – that a Federal candidate or officeholder is prohibited from being listed as a "featured speaker" or "honored guest" on an invitation to a State party fundraiser that includes a request for non-Federal funds – is based upon an incorrect premise that being listed on such a communication as a "featured speaker" or "honored guest" constitutes a solicitation and, as applied, essentially repeals an existing statute and its implementing regulations.

A. BEING LISTED AS A "FEATURED SPEAKER" OR "HONORED GUEST" DOES NOT, IN AND OF ITSELF, CONSTITUTE A SOLICITATION.

The use of a covered person's name as a "featured speaker" or "honored guest" on a fundraising invitation does not, in and of itself, constitute a solicitation. The Draft AO misplaces reliance on Revised Explanation and Justification for Candidate Solicitation at

State, District, and Local Party Fundraising Events, 70 Fed. Reg. 37649, 37651 (June 30, 2005) ("E&J"), to buttress its conclusions. The E&J simply states that Federal candidates and officeholders may not serve on the host committee or sign a solicitation for a State party event; actions that are not at issue here. Using the E&J as support for the Draft AO's conclusions ignores the express text of 11 C.F.R. § 300.64(a) as well as the Commission's previous statements that "section 441(i)(e)(1) and section 300.62 do not apply to publicity for an event where that publicity **does not constitute a solicitation or direction** of non-Federal funds **by a covered person**, nor to a Federal candidate or officeholder merely because he or she is a featured speaker at a non-Federal fundraiser." *See* AO 3003-3 (Cantor)[1] at 5 (emphasis added).

Indeed, the Commission appeared to answer the question of "what does not constitute a solicitation" when it argued that "[t]he mere mention of a covered individual in the text of a written solicitation does not, without more, constitute a solicitation or direction of non-Federal funds by that covered individual."[2] Advisory Opinion 2003-36 (RGA) at 5. The Commission further clarified its argument when it revised the definition of "to solicit" in 2006, stating "[t]he revised definition retains the requirement that a communication must contain some affirmative verbalization, whether oral or in writing, to be a solicitation. Final Rules Defining "Solicit" and "Direct", 71 Fed. Reg. 13926, 13929 (March 20, 2006).

Admittedly, the Court of Appeals for the D.C. Circuit determined that the Commission's original definition of "to solicit" impermissibly required that a candidate or officeholder use certain "magic words" to satisfy the definition. *Shays v. FEC*, 414 F.3d 76, 104-106 (D.C. Cir. 2005). However, the Commission retained the requirement that a communication contain a clear message asking, requesting, or recommending that another person make a contribution. 71 Fed. Reg. at 13926 (emphasis added). Unlike signing a solicitation or serving on a fundraiser's host committee, the positions of "featured speaker" and "honored guest" are not specifically related to fundraising, and merely being listed as such simply does not constitute a clear message asking, requesting,

[1] Although Advisory Opinions 2003-03 (Cantor) and 2003-36 (RGA) are cited to provide guidance as to what constitutes a solicitation, the NRSC would like to note that the Draft AO incorrectly relies on these Advisory Opinions in support of its conclusions as though the statutory and regulatory exemption for State, district, and local party committees does not exist. *See* 2 U.S.C. § 441i(e)(3); 11 C.F.R. § 300.64. In fact, the original requests for these Advisory Opinions make clear that the very reason Commission guidance was sought in these contexts was to determine whether non-Federal candidate and non-profit fundraisers fall within section 441i(e)(3)'s exemption.

[2] To distinguish between "publicity" and a solicitation, the Draft AO cites a two-fold test employed in Advisory Opinions 2003-3 (Cantor) and 2003-36 (RGA): (1) whether the writing or publicity constitutes a solicitation for funds; and (2) whether the covered person approved, authorized, or agreed or consented to be featured, or named in, the writing or publicity (e.g., through the use of his name or likeness). This two-fold test utilizes a circular argument; to determine whether the use of a covered person's name as a "featured speaker" or "honored guest" on a fundraising invitation constitutes a solicitation, the Commission must first consult 11 C.F.R. 300.62(m).

or recommending that another person make a contribution.[3] Yet, the Draft AO relies upon an inapplicable E&J and ignores guidance provided by the Commission as recently as sixteen months ago.

B. STATUTE AND IMPLEMENTING REGULATIONS PERMIT COVERED PERSONS TO BE LISTED AS "FEATURED SPEAKER" AND "HONORED GUEST" ON SOLICITATIONS TO STATE, DISTRICT, AND LOCAL PARTY COMMITTEE FUNDRAISING EVENTS RAISING FUNDS OUTSIDE THE ACT'S LIMITS AND PROHIBITIONS.

The Draft AO rests the crux of its argument on 2 U.S.C. § 441i(e)(1). Yet, paragraph (3) of the same section reads: "Notwithstanding paragraph (1) or subsection (b)(2)(C), 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." Although Congress arguably omitted any reference to the pre-event publicity preceding such an event from this subsection, the Commission's own regulations at 300.64(a) and (b) do not. Specifically, the regulations read:

> (a) State, district or local committees of a political party may advertise, announce or otherwise publicize that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, publicizing such appearance in pre-event invitation materials and in other party committee communications; and
>
> (b) Candidates and individuals holding Federal office may speak at such events without restriction or regulation.

11 C.F.R. § 300.64 (emphasis added).

Put simply, a covered person's name appearing in a State party pre-event communication that includes a request for non-Federal accounts is exempt from section 441(e)(1)(A)'s general prohibition.

If the regulations permit Federal candidates and officeholders to speak at these events freely, as paragraph (b) does, then surely Congress intended to permit these individuals to be announced as the "featured speaker" or "honored guest" for such events. Indeed, the Commission aptly made this very argument in Revised Explanation and

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[3] A typical invitation to a State party fundraiser where a Federal candidate or officeholder is the guest speaker will say something along the lines of "X State Party invites you to ABC event featuring guest speaker John Smith." Although the State party will make "the ask" in another section of the invitation or include a reply device, it is clear the State party is soliciting the funds and John Smith is simply the guest speaker. Although a recipient could conceivably view John Smith's appearance as a "guest speaker" as a solicitation under their own subjective reasoning, revised 11 C.F.R. 300.62(m) sets forth an objective test that does not turn on subjective interpretations. *See* 71 Fed. Reg. at 13928.

Justification for Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 37649, 37651 (June 30, 2005):

> 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 Draft AO, as applied, essentially repeals the exception to the Act's general prohibition that covered person shall not solicit, receive, direct, transfer, or spend funds outside the Act's limits and prohibitions. Moreover, section 300.64's exceptions are not dependent, as the Draft AO seems to suggest, upon the Federal candidate or officeholder's "approval, authorization, or agreement or consent" to be named in a pre-event invitation.

The NRSC also encourages the Commission to construe Congress's intent with respect to section 441i(e)(3) in light of the undesirable practical consequences that would result from the Draft AO's conclusion. First, relying on the second prong of the Commission's two-fold test to distinguish between "publicity" and a solicitation for State, district, and local party committees would create a perverse and untenable incentive for Federal candidates and officeholders to refrain from ensuring pre-event communications

are compliant with the law.[4] Second, State, district, and local party committees would be forced to pay the costs of an additional mailing to publicize the appearance of a Federal candidate or officeholder. The additional expense further diminishes the role of State, district, and local party committees in the electoral process, contrary to the will of Congress.

C. CONCLUSION.

The Draft AO ignores the Commission's own regulatory guidance and existing statute. As a result, the NRSC respectfully requests that the Commission decline to adopt it without significant revision to address the issues raised above.

Respectfully Submitted,

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[4] Such a consequence would, in effect, make 11 C.F.R. § 300.64(a) inoperative because it is likely that few Federal candidates and officeholders would allow their name to be publicized in fundraising materials without due diligence review for legal compliance. Because the FECA holds the covered person personally responsible for violations of the law, covered persons have both a desire and need to ensure that all uses of their name are in compliance with Federal law in order to avoid investigation by the Commission and potential prosecution by the U.S. Department of Justice. Federal candidates and officeholders are aware that most State, district, and local party committees do not employ in-house counsel highly knowledgeable about the Act and its implementing regulations.