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. Joseph E. Sandler and Neil P. Reiff regarding the above-captioned matter.

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

Attachment

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July 31, 2007

Via Facsimile

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

Re: Draft Advisory Opinion 2007-11

Dear Madame Secretary:

We are submitting these comments on the above-referenced Draft Advisory Opinion which is scheduled to be taken up by the Commission at its public meeting on Wednesday, August 1, 2007. We are submitting these comments on our own behalf, based on our experience and in our capacity as current campaign finance counsel for 37 of the state Democratic Parties in the U.S., and for numerous local committees.

In summary, in the draft AO, the Office of General Counsel ("OGC") takes the position that, even though the Bipartisan Campaign Reform Act of 2002 ("BCRA") clearly and unequivocally provides that a federal candidate or officeholder can attend, speak at and be a featured guest at a state or local party fundraising event at which non-federal funds are being raised, *such a candidate or officeholder cannot be mentioned in a normal invitation* to the event. Specifically, the draft AO indicates--in addressing "Proposed Communications" 1 and 2-- that an invitation to such an event *cannot indicate how much it costs to attend the event*, even on a separate reply card, and that a state or local party holding an event with a federal candidate/officeholder as featured speaker must go to the trouble and expense of sending a *second, separate mailing* to everyone invited informing them of the ticket price and providing the form to respond or order tickets.

That position is arbitrary, capricious and contrary to law for three reasons. *First*, it contravenes the clear intent of Congress. *Second*, OGC's position is entirely inconsistent with the Commission's own Revised Explanation and Justification for the applicable

regulation, 11 C.F.R. §300.64. *Third*, OGC's position flatly ignores the Commission's own definition, specific to this regulation, of what constitutes a "solicitation" and instead improperly applies the holdings of advisory opinions dealing with an entirely different provision of the statute.

Background

The Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. §441i(e)(1)(B), prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring or spending funds in connection with non-federal elections unless such funds comply with the limits and prohibitions of the Federal Election Campaign Act of 1971, as amended ("FECA").

Section 441i(e)(3), however, then provides that, "Notwithstanding paragraph 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."

The Commission's regulation implementing this provision, 11 C.F.R. §300.64, provides clearly that a state or local 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...." *Id.* §300.64(a). The regulation further provides that federal candidates and officeholders "may speak at such events without restriction or regulation."

No one has ever challenged subsection (a) of the regulation, clearly permitting references to federal candidates/officeholders in "pre-event invitation materials." Subsection (b), of course, was challenged in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d (D.C. Cir. 2005). The District Court held that the regulation survived *Chevron* review but that the original Explanation and Justification did not sufficiently explain the basis for subsection (b) of the rule. 337 F. Supp. 2d at 92-93.

The Commission left the regulation intact, but issued a new Explanation and Justification fully explaining the basis for its regulation. *Candidate Solicitation at State, District and Local Party Fundraising Events, Revised Explanation and Justification*, 70 *Fed. Reg.* 37649 (June 30, 2005)(hereinafter "Revised E&J").

Discussion

OGC's position in the draft AO, as to Proposed Communications 1 & 2, is arbitrary, capricious and contrary to law for three reasons.

First, OGC's position clearly contravenes the intent of Congress. One of the principal concerns of Members of Congress when BCRA was being debated was that

they would continue to be allowed to attend state and local party Jefferson-Jackson and Lincoln Day events even though non-federal funds would be raised at such events. The result was section 441i(e)(3). As the Commission itself has correctly concluded, "Congress intended the provision to be a *complete exemption*" from the ban on federal candidates/officeholders soliciting non-federal funds. Revised E&J, 70 *Fed. Reg.* at 37651 (emphasis added).

As a matter of common sense, an invitation to a fundraising event necessarily must the person being invited that the event is a fundraiser and how much it costs to attend the event. A communication that does not tell the person how much they have to pay, does not inform the invitee of what the applicable legal limits and prohibitions are under state law, and does not provide any means for the invitee to respond by sending in a check for a ticket (or to be put on the list to be admitted to the event), is functionally useless as an invitation to a fundraising event. And if federal candidates/officeholders cannot be listed on invitations to state party fundraisers, there would be no point in allowing them to attend such events. No Member of Congress who voted for this bill would ever have conceived that his or her state party would have to send *two, separate sets of invitations to the same list*—one noting the federal officeholder's attendance and a second, separate invitation telling the invitee how much it costs to attend and affording an opportunity to respond.

Second, OGC's position is completely contrary to the construction of the statute advanced by the Commission itself in the Revised E&J. As noted, the Commission interpreted the statutory provision "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." Revised E&J, 70 *Fed. Reg.* at 37651. The Commission noted that "it based 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.*" *Id.* (emphasis added).

The Commission went on to explain that, since federal candidates/officeholders are already allowed, under section 441i(e)(1) of BCRA, to solicit contributions within the Act's limits and prohibitions, section 441i(e)(3) "carves out a further exemption within the context of State party fundraising events for Federal officeholders and candidates...." *Id.* The Commission explained that "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....." *Id.*

It makes absolutely no sense for the Commission to interpret the statute as allowing federal officeholders/candidates to solicit *without restriction* at a state party fundraiser, but not even to allow their names to be included on a normal invitation to the event. Even more so than restricting the candidate/officeholder's speech at the event, OGC's position renders the statutory provision not only superfluous but utterly useless. Under OGC's position, a state party could announce that a federal candidate/officeholder

is a featured speaker at a fundraising event but could not—in the same mailing, even in a separate reply card--tell the person invited how to attend the event, how much it would cost and what the applicable non-federal contribution limits are. There would be no way to use the candidate/officeholder's appearance to raise the funds in connection with the event and thus no point in even trying to hold the event. As the Commission itself emphasized, "By definition, the primary activity in which persons attending or speaking at State party fundraising events engage is raising funds for the State parties." *Id.*

To support its position, OGC quotes, completely out of context, one line from the Revised E&J stating that the statutory exemption "does not permit Federal officeholder and candidates to solicit non-Federal funds for State parties in written solicitations, pre-event publicity or through other fundraising appeals." Draft AO at 4, lines 8-10. But the rest of the Revised E&J makes it clear that this reference is to a written solicitation by the federal candidate/officeholder in a *separate* communication, *outside* the context of the actual invitation to the event. The Commission explained that the regulation, like the exemption, "in no way applies to what Federal candidates and officeholders do *outside of* State party fundraising events." Revised E&J, 70 *Fed. Reg.* at 37653 (emphasis added). The Commission observed that the regulation "does not affect the prohibition on Federal candidates and officeholder 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.*" *Id.* (emphasis added).

Nowhere in the E&J does the Commission remotely suggest that the actual invitation for the event—which normally and necessarily would carry the ticket price and a reply card—cannot mention that the federal officeholder/candidate will appear. Indeed, such a suggestion would be contrary to the plain language of the very regulation the Commission was trying to justify, which explicitly *allows* the appearance of the federal candidate/officeholder to be publicized in "pre-event invitation materials." 11 C.F.R. §300.64(a).

Third, OGC's reliance on Advisory Opinions 2003-3 and 2003-36 to determine what constitutes a "solicitation" by a federal officeholder/candidate in an invitation to a state or local party event is entirely misplaced. Those AO's were defining when publicity for an event constitutes a "solicitation" under the main statutory prohibition—441i(e)(1)—and its implementing regulation, section 300.62. The entire point of section 441i(e)(3)—as the Commission went to great pains to explain in the Revised E&J—is to create a "*complete exemption*" to that blanket prohibition, Revised E&J, 70 *Fed. Reg.* at 37651 (emphasis added), so as to *allow* a federal candidate/officeholder to be the featured guest—the draw, the attraction—at a state or local party fundraising event at which non-federal funds are being raised.

OGC ignores the Commission's own definition of what constitutes a "solicitation," for the specific purposes of section 300.64. In the original E&J of section 300.64(a)—which as noted has never been challenged by anyone—the Commission

stated expressly that state and local parties "are free within the rule to publicize featured appearances of Federal candidates and officeholders at these events, including references to these individuals in invitations." *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, Final Rules,* 67 *Fed. Reg.* 49064, 49108 (July 29, 2002). The only actions that would constitute a "solicitation," the Commission made clear, would be (i) serving on a host committee for the event or (ii) "personally signing a solicitation" in connection with the event. *Id.* Insofar as they attempt to define "solicitation" in a context in which the exemption of 441i(e)(3) does not apply, AO's 2003-03 and 2003-36 are completely irrelevant and inapplicable.

For these reasons, the position taken by OGC in the draft AO, as to Proposed Communications 1 and 2, is arbitrary, capricious and contrary to law. State and local parties should be able to include, in an invitation to a party fundraising event featuring a federal candidate/officeholder, information about non-federal contributions as long as the invitation does not constitute a "solicitation" as described in the original E&J—i.e., the federal candidate/officeholder is not a host committee and has not personally signed a solicitation. The Commission should instruct OGC to prepare a revised AO that concludes that all three communications are permissible as proposed.

Respectfully submitted,

Joseph E. Sandler
Neil P. Reiff

cc: Rosemary C. Smith, Esq. (via facsimile)
Office of General Counsel