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September 20, 2007

29044240098

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MURs 5712 and 5799

Dear Ms. Dove:

Enclosed please find a Brief in response to the Office of General Counsel's Brief in Matters Under Review 5712 and 5799.

Pursuant to the Policy Statement Establishing a Pilot Program for Probable Cause Hearings, 72 Fed. Reg. 7551, February 16, 2007, Respondent requests an oral hearing for counsel before the Commission. Respondent believes a hearing will help resolve the significant or novel legal issues present in these Matters, as well as significant questions about the application of the law to the facts.

The Office of General Counsel has confirmed to Respondent's Counsel that these are matters of first impression before the Commission, in that they represent the first application of the solicitation restriction of BCRA in an enforcement action. The questions of what constitutes a solicitation by a federal candidate or officeholder; what constitutes an authorization by the candidate or officeholder of the use of his name or image in a solicitation by a state party or candidate; when a candidate or officeholder has authorized another to act on his or her behalf in this regard; and whether an impermissible solicitation has occurred when the invitation explicitly states that the federal candidate or officeholder is not making a solicitation of any kind, and/or is not soliciting any federally impermissible funds, all involve significant and/or novel legal issues that would warrant a hearing before the Commission prior to consideration of a probable cause recommendation.

Sincerely yours,

Trevor Potter

BRIEF IN RESPONSE TO THE OFFICE OF GENERAL COUNSEL'S BRIEF IN MATTERS UNDER REVIEW 5712 and 5799

I. BACKGROUND

MUR 5712

Senator McCain appeared as an "honored guest" and "speaker" at a political fundraising event on March 20, 2006 co-sponsored by Californians for Schwarzenegger 2006 (Governor Schwarzenegger's re-election committee) and the California Republican Party. An invitation for this event was mailed to invitees by the California committees, listing Senator McCain as a "Special Guest." The invitation contained the following disclaimer, in shaded boxes designed to stand out on both the invitation itself and the reply card:

> We are honored to have Senator John McCain as our Speaker for this event. However, the solicitation for funds is being made only by Californians for Schwarzenegger and the California Republican Party. In accordance with federal law, Senator McCain is not soliciting individual funds beyond the federal limit, and is not soliciting funds from corporations or labor unions. [Complaint in MUR 5712, Exhibit A]

Senator McCain attended the event and spoke. He solicited no funds of any kind or amount during his remarks. This invitation was created by the California committees. It was reviewed for compliance purposes by Craig Goldman, executive director of Straight Talk America PAC, the leadership PAC which existed to help elect Republican candidates in 2006 and arranged for much of Senator McCain's political travel in that election year. Mr. Goldman conferred with Counsel to the Straight Talk America PAC and relied on the advice of Counsel in approving the disclaimer referring to Senator McCain. *See* Supplemental Declaration of Craig Goldman, attached at Tab 1. Mr. Goldman did not discuss the invitation or disclaimer with Senator McCain, and Senator McCain himself never saw or approved the disclaimer or the use of his name or image on the invitation. *See* Declaration of Senator John S. McCain at Tab 2. Mr. Goldman was not authorized by Senator McCain to act as his agent. *Id.*

After the invitation was made public, the California Democratic Party filed a complaint with the FEC alleging that the invitation was defective. The complaint stated *inter alia* that: "[t]he disclaimer does not advise donors of the precise contribution limitations under federal law, thus leaving the uninformed donor to believe the limits are as high as $100,000." Complaint at ¶18. The FEC mailed a copy of this complaint to Respondent on March 14, 2006.

On August 17, 2006, Senator McCain spoke at a reception for Adjutant General Stan Spears, a state candidate in South Carolina, pursuant to a request from General Spears and his campaign. Neither Senator McCain nor Straight Talk America PAC had any role in planning the event or designing the format of the invitation. Mr. Goldman of Straight Talk America PAC did, however, request that he be shown an advance copy of the invitation and reply card to ensure that it included the type of disclaimer seemingly required by the FEC for invitations to state candidate events mentioning federal officeholders (the "Cantor disclaimer"). Because Mr. Goldman was aware of the MUR 5712 Complaint from the California Democratic Party, he was especially sensitive to the disclaimer issue and wanted to ensure that the disclaimer on the invitation was correct. Accordingly, he consulted Straight Talk America PAC's outside legal counsel and followed the advice of such Counsel in approving the exact language that appeared. *See* Supplemental Declaration of Craig Goldman at Tab 1. The final invitation from the Spears Committee contained the following disclaimer:

> Contributions to Spears for Adjutant General are not tax deductible for federal income tax purposes. The solicitation of funds is being made only by Spears for Adjutant General. We are honored to have Senator McCain as our Special Guest for this event. In accordance with federal law, Senator McCain is not soliciting individual contributions in excess of $2,100 per person, nor is he soliciting corporate, labor union, or foreign national contributions. South Carolina state law allows campaign contributions of up to $3,500 per election cycle. Registered lobbyists please disregard. PAID FOR BY SPEARS FOR ADJUTANT GENERAL. PLEASE RETURN IN THE ENCLOSED ENVELOPE.

Mr. Goldman did not discuss the disclaimer with Senator McCain, and Senator McCain himself never saw or approved the disclaimer or the use of his name on the invitation. Mr. Goldman was not authorized by Senator McCain to act as his agent. *See* Declaration of Senator John S. McCain at Tab 2. Senator McCain attended the event and spoke. He solicited no funds of any kind or amount during his remarks. On the day of the event, a complaint concerning the invitation from the Spears Committee was filed with the FEC by "The Senate Majority Project" alleging that the invitation by the Spears Campaign constituted an impermissible solicitation by Senator McCain.

FEC Procedural History

Following Responses to both of these Complaints, and two additional Declarations by Craig Goldman of the Straight Talk America PAC, the Commission joined the two Matters (MURs 5712 and 5799), due to the similar nature of the subject matter. All of the Pleadings and Declarations filed by Respondent with the Commission to date are incorporated by reference herein. Additionally, correspondence concerning representations by

the Counsel's Office about the Commission's position on certain legal issues was exchanged during this period, and copies of this correspondence are attached at Tab 3.

This Brief accordingly responds to the Office of General Counsel's Probable Cause Brief dated August 14, 2007.

II. ARGUMENT

The Commission should take no further action in these Matters. First, Senator McCain did not personally approve the use of his name or images on these solicitations; nor did he authorize anyone else to do so in his stead. On that basis alone, the Complaints are without merit and warrant no further action. (See Part A, below). However, even if Senator McCain were somehow responsible for the actions of Mr. Goldman (which he clearly is not in light of his status as the Honorary Chairman of the Straight Talk America PAC, and without any conversations on this subject with Mr. Goldman or other PAC staff), the matter should be dismissed on the merits of the disclaimer itself. Indeed, Straight Talk America PAC in good faith advised the soliciting entities on inclusion of disclaimer language that was designed to make crystal clear that Senator McCain was not soliciting any funds of any kind, and that if there was any doubt, he certainly was not soliciting any federally impermissible funds. Further, the guidance issued by the Commission was understood by legal counsel to allow the use of curative disclaimer language in the circumstances at hand, an interpretation widely shared (as comments from party lawyers in AOR 2007-11 signal). (See Part B, below).

A. Senator McCain Had No Role Whatsoever in the Design, Approval or Circulation of the Disclaimer at Issue and Therefore May Not Be Held Responsible for the Actions of Straight Talk America or Its Representatives.

Neither Senator McCain (the officeholder and federal candidate covered by the prohibition) or any authorized agent of his did anything that constitutes a violation of the statutory prohibition on federal candidates and officeholders soliciting non federal funds. Senator McCain did not review and approve the invitations, consent to the use of his name or image in them, or even have any awareness of their existence. He did not discuss them with Craig Goldman of Straight Talk America PAC, who did approve the language based on advice of Counsel, and he did not authorize Mr. Goldman to act on his behalf or as his agent in this regard.[1] Straight Talk America was not a political committee authorized by Sen. McCain, but

[1] By letter of September 7, 2006, the Counsel's Office invited clarification of the efforts referred to by Mr. Goldman of Straight Talk America PAC to ensure compliance with the solicitation restrictions of federal election law in the Response filed in MUR 5712. This letter

rather a non-connected committee of which he was Honorary Chair, a position with no legal significance.[2] Finally, he did not solicit funds in person at either of the two events in question. Accordingly, Senator McCain took no action that would constitute an impermissible solicitation under the statute and regulations, and did not authorize anyone to do so on his behalf.[3] These facts alone should result in the Commission taking no further action.

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arrived in the midst of attempts by Counsel to respond to the complaint in MUR 5799, which was forwarded by OGC on August 28, 2006, with a Response due September 22. In the midst of preparing the Response in 5799, Counsel responded on September 20 to OGC's questions in MUR 5712 by providing a Declaration from Craig Goldman of the Straight Talk America PAC (the person who had actually spoken with the California committees about the invitation and consulted Legal Counsel on the required disclaimer language). In the transmittal letter to that Declaration, Counsel erroneously referred to Mr. Goldman as "Senator McCain's agent", an incorrect characterization which Counsel freely admits may have confused OGC. Mr. Goldman was Straight Talk America's agent, but not Sen. McCain's, as the Senator's dispositive statement at Attachment 2 makes clear. This inadvertent error in Counsel's transmittal letter, under the stress of multiple filings with the Commission in these Matters in the same time frame, should be noted for the record, and does not affect the substance of Sen. McCain's sworn assertions in these Matters, or Mr. Goldman's. Both of their statements make clear that they never conferred concerning these invitations in any way, shape or form, and that Mr. Goldman was not authorized to act as Sen. McCain's agent on solicitation matters.

[2] As the Declarations submitted by Craig Goldman indicate, Straight Talk America PAC "coordinated requests from Republican candidates and party committees across the country for appearances by Senator McCain in th[e] mid-term election year." When Sen. McCain agreed to make such appearances, the Straight Talk America PAC coordinated the logistics for the Senator's travel. As Mr. Goldman explains in one of his Declarations, he took a role in reviewing state party and candidate fundraising invitations mentioning Sen. McCain in an attempt to ensure that they complied with the requirements of federal election law. In this regard he viewed himself as a" representative" of Senator McCain and the Straight Talk America PAC (Goldman Dec. of Sept. 21, 2006, at para 3) for administrative purposes, but that does not mean, as a matter of law, that he was an "agent" of Senator McCain for the purpose of authorizing the language in the disclaimers on the invitations at issue in these Matters which allegedly constitute an impermissible solicitation by Senator McCain himself. *See* n. 3, *infra*. As the Senator's own Declaration makes clear, he never discussed the invitation language with Mr. Goldman or anyone else, and did not authorize Mr. Goldman to act on his behalf. Indeed, although he was "aware" that Mr. Goldman was the executive director of the Straight Talk America PAC, he had "few direct dealings " with him, and primarily dealt with two other senior PAC staff (who also never discussed with him the fundraising invitations at issue in these Matters).

[3] The statutory restriction prohibits soft money solicitations by "[a] candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained, or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office." 2 U.S.C. § 441i(e)(1).

B. Even if Senator McCain Could in Theory Be Held Personally Responsible for the Subject Disclaimer, There Is No Justification to find Probable Cause Under Controlling Legal Standards and Commission Guidance

Even were the Commission to find that Respondent were somehow personally responsible for the actions of Straight Talk America's executive director, a finding of probable cause would still be unmerited. There is a good faith argument that the Commission itself sanctioned the very type of disclaimers that Complainants and the General Counsel's Office now find impermissible. Even if a majority of the Commission now believes these disclaimers were not authorized by the Cantor Advisory opinion[4] and the Republican Governors Association Advisory Opinion,[5] it should recognize that those Advisory Opinions have been widely read as establishing such a result. Accordingly, it would be unjust to hold that a violation of law has occurred when there is such clear evidence of confusion about the applicable legal standard, and where advice of Legal Counsel has been sought and directly relied on to guide the actions at issue here.

In the Matters at issue, the solicitations clearly stated that Senator McCain was not making a solicitation, let alone a solicitation for federally impermissible funds. Though Mr. Goldman of Straight Talk America PAC and Counsel for the PAC reviewed the script for the disclaimer used, there is no basis for treating either as an agent of Senator McCain, as the supplemental declarations show. *See* Tabs 1 and 2. The Commission has carefully tailored the definition of "agent" for purposes of the BCRA soft money provisions. The term only reaches "any person who has *actual authority, either express or implied*, to engage in any of the following activities *on behalf of the specified persons*: . . . In the case of an individual who is a Federal candidate or an individual holding Federal office, *to solicit, receive, direct, transfer, or spend funds in connection with any election*." 11 C.F.R. § 300.2(b)(3) (emphasis added). Senator McCain certainly did not provide express or implied authority to Mr. Goldman or Counsel for Straight Talk America PAC to solicit, receive, direct, transfer, or spend funds in connection with any election. Though Mr. Goldman may have been involved in soliciting or spending funds for Straight Talk America PAC, a group with which Senator McCain was associated as Honorary Chair, he was never given any role *by the Senator* that would imply he could solicit or spend funds *on the Senator's behalf*.

[4] Advisory Opinion 2003-3, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=367.

[5] Advisory Opinion 2003-36, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=412.

1. The Disclaimer at Issue Fully Complied with Commission Statements about Solicitations by Officeholders and Candidates

The Bipartisan Campaign Reform Act ("BCRA," of which Senator McCain was a co-sponsor) provides that federal candidates and officeholders shall not solicit or direct funds in connection with any election unless the funds comply with the Act's contribution limits and prohibitions. 2 U.S.C. § 441i(e)(1)(A) and (B). The Commission issued rules interpreting "solicit" and "direct" in 2002. 11 C.F.R. § 300.2(m) and (n). After those regulations were invalidated in Shays v. FEC, the Commission issued new regulations, published in the Federal Register on March 20, 2006, redefining solicit and direct. 71 Fed. Reg 13926 et seq. Between the date of the first regulations in 2002, and that of the second in 2006, the Commission issued Advisory Opinions that explicitly addressed the question of whether a federal candidate or officeholder may appear at a fundraising event for a candidate for state office or for a state party committee, and what notices or statements must be made in connection with such appearance. *See* FEC Advisory Opinions 2003-03 and 2003-36.[6] As the Commission has summarized these Advisory Opinions, they "permitted Federal candidate or officeholders to attend and participate in a fundraising event for non-Federal funds held by State and local candidates, or by non-Federal political organizations, so long as the solicitations made by the Federal candidate included, or were accompanied by, certain disclaimers." 71 Fed. Reg. at 13930. (emphasis added) In the Notice of Proposed Rulemaking for the 2006 rules, and then in the Explanation and Justification of those rules, the Commission stated that it was not necessary to revisit those Advisory Opinions. They accordingly may be relied upon by persons in the same position as the requestors. 2 U.S.C. § 437f(c) (2).

The first of these Advisory Opinions was AO 2003-03, issued to Congressman Eric Cantor and various Virginia elected officials, who sought advice concerning Congressman Cantor's involvement in fundraising for candidates for state office in Virginia. The Commission analysis begins by noting the restrictions of 2 U.S.C. § 441i (e), and then stating:

> The Commission notes, however, that section 441i (e) does not forbid a covered person from making any solicitation of funds in connection with a non-Federal election. The Commission understands section 441i (e) to provide that a covered person may make solicitations, but may not solicit funds that are outside the amount limitations and source prohibitions of the Act.

Addressing the question whether a federal candidate or officeholder may attend a fundraising event for a state candidate or party, at which non-federal funds are to be raised, the Advisory Opinion is clear:

> Yes, mere attendance at a fundraiser where non-Federal funds are raised cannot in and of itself give rise to a violation of section 441i (e) (4) or section 300.62. A

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[6] *See* ns. 4, 5, *supra*.

covered person may participate in any activities at such a fundraising event provided the covered person does not solicit funds outside the Act's limitations and prohibitions. [Question 3A]

The next issue is whether the federal candidate or officeholder may participate in the event as a "featured guest" or speaker. Here, the Commission concludes that he may, but that such participation may in certain circumstances constitute a solicitation which must be limited as to amount and source:

> Yes, Representative Cantor may speak at such an event, provided that by his own speech and conduct he complies with section 441i(e)(1)(B) and section 300.62 in the course of his participation in a fundraiser. (emphasis added) [Answer 3 D]

> Section 441i(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 guest at a non-Federal fundraiser. In the case of publicity, the test is two-fold: First, whether the publicity for the event constitutes a solicitation for donations in amounts exceeding the Act's limitations or from sources prohibited from contributing under the Act; and, second, whether the covered person approved, authorized, or agreed or consented to be featured or named in, the publicity. If the covered person has approved, authorized, or agreed or consented to the use of his or her name or likeness in publicity, and that publicity contains a solicitation for donations, there must be an express statement in that publicity to limit the solicitation to funds that comply with the amount limitations and source prohibitions of the Act. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. [Answer 3 C]

Thus, if a candidate or officeholder DOES approve the use of his or her name or likeness in a solicitation of funds for a non-federal event, he or she must make clear that the funds he or she is soliciting are only those permitted under federal law. As the Commission states the rule:

> Yes. Representative Cantor may ask for funds in connection with a State election or direct funds in connection with such an election as long as he does not ask for funds that are in excess of the amounts permitted with respect to contributions to candidates under 2 U.S.C. 441a(a), or that are from sources prohibited by the Act from making contributions in connection with an election for Federal office. 2 U.S.C. 441i (e)(1). [Answer 1 A] (emphasis added)

Subsequent to Advisory opinion 2003-03, the Commission further elaborated on some of these same issues in Advisory opinion 2003-36, issued to the Republican Governor's Association. The Commission summarized its advice as follows:

In Advisory Opinion 2003-03, the Commission addressed appearances, speeches, and solicitations by a Federal candidate or officeholder at fundraising events for non-Federal candidates where federally impermissible funds were being raised. The Commission interpreted the Act and regulations to permit oral solicitations, and signatures on written solicitations, by a covered individual, so long as the solicitations included or were accompanied by a message adequately indicating that the covered individual is only asking for Federally permissible funds. See 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The following is considered to be an adequate disclaimer: "I am asking for a donation of up to $5,000 per year. I am not asking for funds from corporations, labor organizations, or other Federally prohibited sources." (emphasis added)

The Commission restated its position, in the converse, as follows:

With respect to the RGA Conference Account, may a covered individual sign or appear on written solicitations, such as signing invitation letters, or appear as a featured guest or speaker at a fundraising event, where the donations solicited exceed the Act's amount limits or are from prohibited sources but the solicitation does NOT include a notice that the covered individual is not raising funds outside the amount limits and source prohibitions of the Act? [emphasis added]

No, the covered individual may not so participate under those circumstances. The requirements described above in response to questions 1.a, 1.b, and 1.c are applicable to the situations described in question 2, including the need for the notice that the covered individual is asking for funds only up to the applicable limits of the Act, and is not asking for funds outside the limitations or prohibitions of the Act. [Answer 2] (emphasis added)

The solicitations at issue in these complaints are consistent with the conduct sanctioned by the Commission in these 2003 Advisory Opinions. The invitations contained a solicitation by the hosts for non-federal funds, and also contained specific statements that Senator McCain was not soliciting those funds. Arguably, the flat disclaimer that Sen. McCain was not making the solicitation for funds should have been sufficient by itself. However, out of caution the invitation went on to state the type of disclaimer recommended by the Commission in Advisory Opinions 2003-03 and 2003-36, in case anyone might think Sen. McCain was soliciting funds despite the clear declaration to the contrary.

The confusion present in this enforcement case, highlighted by the sections of the Advisory Opinions underlined above, is that many persons have interpreted these two Advisory Opinions to differentiate between what the federal candidate/officeholder may do (only solicit federally-permissible funds, state that he/she is not soliciting non-federal funds) and what the state party or candidate itself may do on its own behalf (ask for contributions permitted by state law). This distinction results in what is termed the "Cantor disclaimer" standard, named after the Advisory opinions discussed above. OGC attempts to establish in this case a completely different standard: that federal officeholders will be held responsible for whatever the state

entity solicits, even if the invitation states, as here, that the federal officeholder is not soliciting any funds, or specifically disclaims a solicitation by the officeholder of any non-federal funds. Establishing such a standard in an enforcement action, rather than through rulemaking, is not correct, especially when the record (as here) shows that the federal candidate had no role in planning the events or the amounts to be solicited, and was merely appearing as a featured guest and speaker at the event.

Moreover, the Commission must appreciate that the guidance it has issued in the area of candidate/officeholder involvement in nonfederal election fundraising does not cover all possible situations. In the circumstances presented by this case, the regulations and advisory opinions simply don't present a legal bar to what occurred. The Senator did not directly or through an agent approve the use of his name or image on the solicitation. Legal counsel for Straight Talk America (who was not serving as Senator McCain's own Counsel at that point) attempted, out of an abundance of caution and in compliance with the Regulatory language, to develop disclaimer language that would make clear Senator McCain was not soliciting contributions at all and, if there was any doubt, he certainly was not soliciting any funds contrary to the federal restrictions. These circumstances do not coincide with any of the particular facts covered in the Advisory Opinions issued by the Commission. Thus, the Commission should not find any violation of law and, if it does, there should be a determination to take no further action and close this matter.

The statute and the Commission's regulations prevent a federal candidate or officeholder soliciting funds that are not compliant with federal restrictions. There is nothing in these rules suggesting that the mere use of a candidate/officeholder's name or image in a party committee's or state candidate's solicitation can or should be deemed a solicitation by the candidate/officeholder. The test created in Advisory Opinion 2003-3, hinging on whether a candidate/officeholder "approved, authorized, or agreed or consented to be featured or named in publicity" for an event is, perhaps, a rational way to evaluate whether someone "implicitly" or "indirectly" solicited,[7] but that test is not in the statute or regulations, and those circumstances are not present in this matter.[8] The Senator did not approve the use of his name or image, and the wording of the disclaimer expressly indicated that the Senator was not soliciting any funds whatsoever. These facts suggest, if anything, application of the following language from Advisory Opinion 2003-3: "Section 441i(e)(1) and section 300.62 do *not* apply

[7] 11 C.F.R. § 300.2(m), defining "to solicit."

[8] When enforcing the law, the Commission must recognize that rules of general applicability stem from the statue and duly promulgated regulations, not Advisory Opinions. 2 U.S.C. § 437f(b). While an Advisory Opinion can protect a particular person from a sanction the FEC might otherwise impose where that person relies in good faith on such opinion, 2 U.S.C. § 437f(c)(2), the FEC should not attempt to rely on Advisory Opinions as a sword, for they are not a statutory or regulatory rule of law. The heavy reliance of the OGC Brief on a selective reading of the 2003 Advisory Opinions may therefore be misplaced.

to publicity for an event where that publicity does not constitute a solicitation or direction of non-Federal funds *by a covered person*. . . .[latter emphasis added]"

Advisory Opinion 2003-3 certainly leaves the impression that a covered official can cure any suggestion that he/she is soliciting federally impermissible funds through the use of a disclaimer. For example, even though the event the covered official is attending has been funded by federally impermissible funds, publicity has mentioned the covered official's attendance, others have solicited federally impermissible funds for the event, and the donors of federally impermissible funds will be in attendance at the event, the covered official may attend, give a speech, and solicit further funds, as long as a disclaimer is provided indicating the covered official is only soliciting federally permissible funds.[9] If a disclaimer indicating what the individual IS soliciting is adequate in these circumstances, a disclaimer expressly indicating that a covered official is NOT soliciting AT ALL should carry great weight in the present matters.[10]

Advisory Opinion 2003-36 later described Advisory Opinion 2003-3 "to permit oral solicitations, and signatures on written solicitations, by a covered individual, so long as the solicitations included or were accompanied by a message adequately indicating that the covered individual is only asking for Federally permissible funds." This seems to limit the reach of Advisory Opinion 2003-3 to situations where a covered official is making an oral solicitation or is lending his/her signature to a solicitation. Obviously, neither was involved in the present matter.

Advisory Opinion 2003-36 purports to clarify Advisory Opinion 2003-3 by noting that "the covered individual may not approve, authorize, agree, or consent to appear in publicity that would constitute a solicitation by the covered person of funds that are in excess of the limits or prohibitions of the Act, regardless of the appearance of such a disclaimer." But this only adds to the confusion because it begs the question of whether the publicity "would constitute a solicitation by the covered person." If Advisory Opinion 2003-3 only reached oral solicitations or solicitations where a covered official's signature was involved, then publicity would have to involve one of these elements to fall under the 'clarification' provided in Advisory Opinion 2003-36. The circumstances involved in the present matters do not involve publicity stemming from any oral statements by Senator McCain, any signed statements by Senator McCain or, for that matter, anything else that could be construed as a "solicitation *by the covered person*."

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[9] See answers to questions 1 b, 1 c, and 3 d in Advisory Opinion 2003-3.

[10] While Respondent need not claim that the circumstances here are 'materially indistinguishable' from the facts presented in Advisory Opinion 2003-3, *see* 2 U.S.C. § 437f(c)(1)(B), Respondent is claiming that Mr. Goldman and Legal Counsel for Straight Talk America PAC had a good faith basis for believing that disclaimers like those used in the two matters at hand were legally sufficient to assure that Senator McCain would not be deemed to have made an impermissible solicitation.

The Advisory Opinion guidance issued by the Commission leaves open questions regarding the proper reach of the solicitation restriction described in the statute and regulations. Given the different facts here and the legal ambiguity regarding the use of a strong, clear disclaimer that Senator McCain was NOT soliciting funds AT ALL, it is apparent that the opinions should not be read to cover the circumstances now under consideration. Even if the Commission were to overlook the fact that Senator McCain did not approve the invitations in question, it should take no further action in these matters. Finding a violation is unjustified, but proceeding to seek a civil penalty would be inconsistent with the Commission's obligation to enforce the law fairly, because of the confusion present in the Commission's jurisprudence on this subject.

2. The Commission's Inconclusive Vote on Advisory Opinion Request 2007-11 Underscores the Inappropriateness of Finding a Violation Here.

The Commission's recent inconclusive vote regarding Advisory Opinion Request 2007-11 only complicates the Commission's ability to take enforcement action against Senator McCain. Even when dealing with a situation where it was assumed that a candidate had been consulted and had approved the invitation in question soliciting federally impermissible funds, the Commission could not generate a majority vote for the proposition that the candidate would be making an impermissible solicitation.[11] Respondent's situation involves no consultation with or approval by a covered official and, pursuant to advice of Mr. Goldman and Counsel for Straight Talk America PAC, the committees issuing the solicitations included explicit disclaimers indicating the covered official was not soliciting, and in particular was not soliciting any federally impermissible funds.

AOR 2007-11 is relevant NOT because it is dispositive of the questions presented in these MURS (although it does relate to them because the California invitation was issued by the Republican State party, jointly with Governor Schwarzenegger's campaign), but because it graphically demonstrates the existing confusion in this area of law and Commission advice. The Advisory opinion Request was jointly from the California Democratic and Republican Parties, and sought to confirm that the State parties could send out invitations to state party fundraising events featuring consenting federal candidates and officeholders, pursuant to 11 CFR 300.64(a), even if those invitations requested funds in excess of the federal limits. The inability of the Commission to provide clear guidance when a state party fundraising effort is involved surely should give the Commission pause when deciding how to enforce the law in a situation like MUR 5712 where a state party's fundraising was at least partly involved (as a joint fundraising participant).

Because the California Democratic Party was the Complainant in MUR 5712, and the invitation at issue in that Complaint involved a joint fundraiser for the California Republican

[11] *See* Minutes of an Open Meeting of the Federal Election Commission Wednesday, August 1, 2007, pp. 4, 5, available at http://www.fec.gov/agenda/2007/approve07-56.pdf.

Party and Governor Schwarzenegger's campaign committee, Counsel for Respondent had already conferred with OGC about whether the California invitation at issue here was specifically authorized by 11 CFR 300.64(a). Counsel had been advised categorically by OGC that the Commission's position was that the Regulations never authorized a State Party to solicit non-federal funds in an invitation which used a federal officeholder's name with permission. See correspondence at Attachment 3. In fact, the Commission did NOT take that position in its consideration of AOR 2007-11. The relevance of these developments in AOR 2007-11 is simply to demonstrate that OGC did not know, and could not correctly state, the Commission's position on this issue—despite their written certainty that they could. Moreover, in the course of the Commission's discussion of AOR 2007-11 at the public meeting, Commissioners themselves correctly noted the confusion of the regulations, E&Js, and guidance in this area.

Additionally, a number of Commenters on the OGC's proposed Draft Advisory Opinion Request went out of their way to note that the Staff Draft contained standards which were contrary to the widely understood Commission advice in this area. Counsel for the National Republican Congressional Committee and the Illinois Republican Party stated:

> Indeed, the Draft AO appears to revise AOs 2003-03 and 2003-36 by stating that a "disclaimer purporting to limit the Federal Candidate's or officeholder's personal solicitation to funds within the amount limits and source prohibitions that is placed together with a general solicitation of funds outside the Act's limitations and prohibitions is not sufficient." Draft AO at 5. This is further than either of the cited advisory opinions went; if this constitutes the Commission's new position, we look forward to the Commission's notice of a proposed rule on the issue. [FN 3. p4, Letter from Donald F. McGahn II.]

Similarly, the Republican National Committee expressed surprise at the OGC suggestion that a "Cantor disclaimer" did not comply with Advisory Opinions 2003-03 and 2003-36. In its written comments, the RNC said: "This is further than either of the cited advisory opinions went and constitutes a new position with respect to these opinions." FN 1, p.2, Letter of Sean Cairncross, Chief Counsel.

These statements are not cited to prove that OGC has no grounds for reading these Advisory Opinions as they do, but rather for the proposition that persons of good faith in the regulated community, attempting to comply with the law and Regulations, have legitimately interpreted them differently, and in the face of such confusion the Commission cannot fairly penalize such a reading without further public notice.

III. CONCLUSION

This is a case that should go no further. The facts indicate that Senator McCain did not personally approve the use of his name or images on these solicitations, nor did he authorize anyone else to do so in his stead. On that basis alone, the Complaints are without merit and

warrant no further action. However, even if Senator McCain were somehow responsible for the actions of Mr. Goldman (which legally he clearly is not, in light of his status as simply the Honorary Chairman of the Straight Talk America PAC, without any conversations on this subject with Mr. Goldman or other PAC staff), the matter should be dismissed on the merits of the disclaimer itself. Indeed, the facts are beyond refute that persons associated with Straight Talk America PAC in good faith advised the soliciting entities on inclusion of disclaimer language that was designed to make crystal clear that Senator McCain was not soliciting any funds of any kind, and that if there was any doubt, he certainly was not soliciting any federally impermissible funds. Further, the guidance issued by the Commission was understood by legal counsel to allow the use of curative disclaimer language in the circumstances at hand, an interpretation widely shared (as comments from party lawyers in AOR 2007-11 signal).

The Commission should find no probable cause to believe Senator McCain violated the law. Alternatively, the Commission should take no further action and close MURs 5712 and 5799.[12] While the legal restriction at issue is important and has its proper application, this is not it.

Respectfully Submitted,

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[12] The Commission also should note that the solicitation involved in MUR 5799 does not in fact solicit political contributions that would be impermissible under federal law. In 2006 a federal candidate could solicit contributions totaling $4,200 for an election cycle ($2,100 for the primary and $2,100 for the general). Under federal law an individual may solicit this total amount even if unopposed during the primary election. 11 C.F.R. § 110.1(j)(1), (2), (3); *see also* 11 C.F.R. § 102.9(e) (establishing procedures for raising general election contributions before a primary). Under South Carolina law, a candidate for Adjutant General who is unopposed in the primary (as was Adjutant General Spears) must limit contributions from a person to a total of only $3,500 for the entire election cycle. *See* S. C. Code §§ 8-13-1314(A)(1)(a) (setting $3,500 limit "within an election cycle" and 8-13-1300(10) (defining "election cycle" so that primary where candidate not opposed does not get a separate $3,500 limit). While South Carolina does permit corporate contributions, the solicitation in question gives no indication that it was soliciting from such entities. The donor card is clearly geared to individuals only.