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 Donald F. McGahn II, Counsel for the National Republican Congressional Committee and the Illinois Republican Party, 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

Commission Secretary &
Rosemary C. Smith, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Draft Advisory Opinion 2007-11

Dear Ms. Smith:

By and through the undersigned counsel, the National Republican Congressional Committee and the Illinois Republican Party wish to comment on the Commission's draft advisory opinion 2007-11 ("Draft AO"), and urge the Commission to **not adopt the Draft AO.** The National Republican Congressional Committee is the national committee of the Republican Party dedicated to electing Republicans to the U.S. House of Representatives, and its membership consists of Republican Members of the House (including those who voted in favor of the Bipartisan Campaign Reform Act).

The draft advisory opinion responds to the advisory opinion request submitted by the California Republican and Democrat state parties, 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 pre-event publicity for a State party fundraising event that include Federal candidates or officeholders as featured speakers or guests. Because the Draft AO concerns the ability of Federal officeholders to interact with state parties, this matter has a direct impact upon the activities of our clients.

The Draft AO's conclusion – that the appearance of a Federal candidate or officeholder's name on a pre-event invitation that also includes a request for funds

beyond the limits and/or prohibitions of federal law constitutes an impermissible solicitation by the named Federal candidate or officeholder – is based upon the incorrect premise that the central issue is whether or not the pre-event publicity constitutes a solicitation by a Federal candidate or officeholder. Such an analysis begs the question, as even assuming *arguendo* that such communications constitute solicitations, the communications are exempted from the prohibition on such solicitations, and the Draft AO should not be adopted.

The statute is clear in this respect. The general prohibition regarding the solicitation of so-called "soft money" by a Federal officeholder or candidate is subject to certain exceptions. One such exception is found at 2 U.S.C. § 441i(e)(3), which states that a Federal candidate or officeholder "may attend, speak, or be **a featured guest** at a fundraising event for a State, district, or local committee of a political party" (emphasis added). And, obviously, the exception does not merely allow for a Federal officeholder or candidate to merely be a guest, but instead allows for that fact to be "featured" – in other words, shared with the public. After all, Merriam-Webster's Dictionary defines "featured" to mean, "something offered to the public or advertised as particularly attractive."

That this is couched as an *exception* to the general soft money solicitation prohibition imposed by BCRA is critical. Under the plain language of the statute, a Federal candidate or officeholder being a featured guest at a state party event that is raising funds outside the Act's limits and prohibitions is not a violation of the Act. In other words, even if a solicitation of funds occurs, it is nonetheless permissible under the language of the statute so long as the Federal officeholder or candidate is listed merely as a "featured guest."

As if the plain language of the statute were not enough, the Commission's own regulations have already answered the question. Section 300.64 – the *exemption* applicable to Federal candidates and officeholders participating in State, district, and local party fundraising events – states:

> 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.

11 C.F.R. § 300.64(a).

Indeed, section 300.64 expressly targets the prohibitions imposed by sections 300.61 and 300.62 – the very provisions the Draft AO relies upon in finding the California State Parties' proposed communications impermissible! Put simply, a Federal candidate's or officeholder's name merely appearing in a state party pre-event communication that also contains a solicitation by the state party for funds outside the Act's limits and prohibitions is exempt from Section 441(e)(1)(A)'s general prohibition.

Moreover, section 300.64(a)'s exception is 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. Simply because a Federal officeholder or candidate has some sort of approval over the use of his or her name is irrelevant. Neither the statute nor the Commission's regulations limit the exception in such a manner. To impose such a rule now – even though Congress and the Commission both chose not to when confronted with the issue – would be creating a new rule out of whole cloth, and completely blur the already established distinctions between being merely a featured guest, as opposed to serving on a host committee or signing a letter.[1]

And as a practical matter, it is not wise to differentiate between pre-event publicity that an officeholder or candidate has seen or not seen. To do so would discourage Federal officeholders and candidates from communicating with their state parties – it simply makes no sense to have a rule that allows for certain pre-event publicity so long as it is kept a secret. Moreover, Federal officeholders really do need to see such materials before they are printed and made public so as to ensure compliance with other rules beyond the jurisdiction of the Commission (House Ethics, the prohibition of using an official seal of the United States, etc.). Finally, the Commission cannot assume that simply because a Federal officeholder approves a communication, that it is somehow converted into something election-related. It is not hard to imagine a Member of Congress raising funds for a state party not in his or her own state – members of the House leadership on both sides of the aisle do it all the time.

The Draft AO incorrectly relies on Advisory Opinions 2003-03 and 2003-36 in support of its conclusions as though the statutory and regulatory exemption for *state, district, and local political parties* does not exist.[2] AOs 2003-03 and 2003-36 related to Federal candidate or officeholder participation in fundraising events for, respectively, non-federal candidates and non-profit organizations. Federal officeholder/candidate interactions with state, local and district committees are treated differently under the statute. Thus, AOs concerning dealings with candidates and non-party committees are inapplicable here; indeed, the original request make clear that the very reason Commission guidance was sought in these contexts was to determine if non-federal candidate and non-profit fundraisers fit within section 441i(e)(3)'s exemption. To now apply these advisory opinions against the state party exemption turns them on their

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[1] This is found in the Explanation and Justification for the regulation. But the Draft AO turns this around to buttress its conclusions. The E&J simply states that Federal candidates or officeholders may not serve on the host committee or sign a solicitation for a state party event, actions that are not at issue here. But regardless, using the E&J as support for the draft AO's conclusions ignores the express text of the regulatory exemption that includes "publicizing such appearances in pre-event invitation materials."

[2] Moreover, it makes no sense for Congress to have created an exception to the solicitation prohibition for state, local and district committees that is contingent upon them asking for funds subject to the limits, prohibitions and reporting requirements of the Act. Only a small fraction of local and district parties register with the Commission – to adopt the Draft AO would effectively strike from the statutory exception local and district parties.

heads.[3]

Thus, we request that the Commission reject the Draft AO, as it arbitrarily ignores clear statutory language, and rewrites both the statute and the Commission's already promulgated regulations.

Respectfully submitted,

Donald F. McGahn II
Counsel, National Republican Congressional Committee & Illinois Republican Party

[3] 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.