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By Electronic Mail

July 5, 2007

Comment on
AOR 2007-11

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comment on AOR 2007-11 (California state parties)

Dear Ms. Duncan:

These comments are filed on behalf of Democracy 21 and the Campaign Legal Center with regard to AOR 2007-11, a request by California Republican Party and the California Democratic Party, seeking guidance from the Commission as to whether a Federal officeholder or candidate may be "publicized" on materials sent by the state party committees that solicit non-Federal funds for the parties, *i.e.*, whether the Federal officeholder or candidate may solicit non-federal funds.

The Commission should advise the state parties that Federal candidates and officeholders may not solicit non-Federal funds on pre-event materials, advertisements and other communications, for the reasons set forth below.

i.

The Bipartisan Campaign Reform Act (BCRA) imposes a broad prohibition on the solicitation of non-Federal funds by Federal candidates and officeholders. 2 U.S.C. § 441i(c)(1). Section 441i(c)(3), however, provides that "notwithstanding" this prohibition, a Federal candidate or officeholder "may attend, speak, or be a featured guest at a fundraising event" for a state party committee.

By regulation, the Commission has construed this exception to permit Federal candidates and officeholders not just to "attend" and "speak" at state party fundraising events, but also to engage in overt solicitation of soft money funds. 11 C.F.R. § 300.64(b) (Federal candidates and officeholders "may speak at such events without restriction or regulation.")¹ The regulation

¹ Commenters here support the ongoing litigation that challenges the validity of section 300.64(b). In the *Shays I* litigation, the federal district court for the District of Columbia found that the Commission's interpretation of the statute set forth in this regulation "likely contravenes what Congress

further provides that state parties “may advertise, announce or otherwise publicize” that a Federal candidate or officeholder “will attend, speak, or be a featured guest” at a fundraising event, and may “publiciz[c] such appearance in pre-event invitation materials and in other party committee communications.” *Id.* at 300.64(a).

The question presented here is whether the exception in subpart (b) that allows a Federal candidate or officeholder to solicit soft money by speaking at a state party fundraising event means that the candidate or officeholder can also solicit soft money in the pre-event publicity materials and advertisements that are authorized by subpart (a).

ii.

The exception created by rule that permits a Federal candidate or officeholder to solicit soft money extends only to the candidate or officeholder *speaking at the event itself*. It does not extend to the written materials, invitations or publicity that precedes the event.

First and foremost, this is true as a textual matter. The subpart (b) regulation says that Federal candidates and officeholders “may speak at such events without restriction or regulation” – in other words, that they may solicit soft money when they “speak at such events.” This exception is specific and narrow. By its language, it does not extend beyond speaking at a state party fundraising event, and does not by its terms extend to pre-event publicity, invitations or other materials.

Although subpart (a) authorizes state parties to “publicize” the fact that a Federal candidate “will attend, speak or be a featured guest” at an event, it does *not*, unlike subpart (b), say that such publicity or advertisements can be done “without restriction or regulation.” Subpart (a) simply authorizes state parties to include the name of the Federal candidate in the invitations to the event or in publicity about the event. It does not state that Federal candidates and officeholders may solicit soft money as part of the publicity or invitations related to the event and, unlike subpart (b), it provides no exemption from the otherwise applicable prohibition on the solicitation of soft money by Federal candidates.

This conclusion is buttressed by the discussion in the 2005 Explanation and Justification for section 300.64. “Candidate Solicitation at State, District, and Local Party Fundraising Events,” 70 Fed. Reg. 37649 (June 30, 2005). The E&J reinforces the narrow and specific scope of the subpart (b) solicitation exception. The E&J takes note of the fact that state parties “are free within the rule to publicize featured appearances of Federal officeholders and candidates at these events, including references to these individuals in invitations.” 70 Fed. Reg. at 37651. But in the immediately following sentence, only partially quoted in the AOR (*see* AOR at 2), the

intended when it enacted the provision, as well as what the Court views to be the more natural reading of the statute,” and further found that “there is little doubt that this [regulation] creates the potential for abuse,” *Shays v. FEC*, 337 F.Supp. 2d 28, 91 (D.D.C. 2004) *aff’d* 414 F.3d 76 (D.C. Cir. 2005), but did not strike down the provision on *Chevron* grounds. Instead, the court found the Commission’s explanation for the provision was “faulty,” “unreasonable” and “arbitrary.” 337 F.Supp. 2d at 92-93. The Commission’s second effort at explaining its regulation, 70 Fed. Reg. 37649 (June 30, 2005), is currently under review by the court in the *Shays III* case. *Shays v. FEC*, No. 06-1247 (D.D.C. filed July 11, 2006).

Commission goes on to make clear that the rule does *not* permit Federal candidates and officeholders to make solicitations in the pre-event materials:

However, Federal officeholders and candidates are prohibited from serving on “host committees” for a party fundraising event at which non-Federal funds are raised or from signing a solicitation in connection with a party fundraising event at which non-Federal funds are raised, *on the basis that these pre-event activities are outside the statutory exemption in section 441i(e)(3) permitting Federal candidates and officeholders to “attend, speak, or be a featured guest” at fundraising events for State, district, or local party committees.*

Id. (emphasis added). If “pre-event activities” are “outside the statutory exemption,” then it follows that the solicitation prohibition applies to Federal candidates and officeholders with regard to all “pre-event activities” such as invitations, publicity or other materials “in connection with a party fundraising event.”

The Commission made this very point when it emphasized the “limited nature” of the subpart (b) exemption and repeated that it *does not* apply to pre-event activities:

The limited nature of this statutory exemption embodied in 11 CFR 300.64 is evident in that it does not permit Federal officeholders and candidates to solicit non-Federal funds for State parties in written solicitations, pre-event publicity or through other fundraising appeals. *See* 11 CFR 300.64(a).

Id. The Commission said that the exemption “is carefully circumscribed and only extends to what Federal candidates and officeholders say at the State party fundraising events themselves.” *Id.* at 37653. Further, to the same effect:

The regulation tracks the statutory language by explicitly allowing Federal candidates and officeholders to attend *fundraising* events and in no way applies to what Federal candidates and officeholders do outside of State party fundraising events. Specifically, *the regulation does not affect the prohibition on Federal candidates and officeholders 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.* Unlike oral remarks that a Federal candidate or officeholder may deliver at a State party fundraising event, *when a Federal candidate or officeholder signs a fundraising letter or makes any other written appeal for non-Federal funds, there is no question that a solicitation has taken place that is restricted by 2 U.S.C. 441i(e)(1).* Moreover, *it is equally clear that such a solicitation is not within the statutory safe harbor at 2 U.S.C. 441i(e)(3) that*

Congress established for Federal candidates and officeholders to attend and speak at State party fundraising events.

Id. (first emphasis in original; others added).

Finally, the E&J makes the point that there is little harm to letting candidates and officeholders speak without restriction (*i.e.*, solicit non-Federal funds) at fundraising events themselves, because the real fundraising takes place before the event:

The Commission agrees with the commenters that additional restrictions on what a candidate may say once at the fundraising event provides little, if any, anti-circumvention protection since, as one commenter noted in oral testimony, “the ask has already been made... The people are already there. They are motivated to be there” and the funds have already been received by the party committee before the Federal candidate and officeholder speaks at the fundraising event.

Id. at 37653. Whatever one thinks of this rationale, its invocation by the Commission bolsters the conclusion that the exception to speak “without restriction or regulation” applies only to what the candidate or officeholder can say “once at the fundraising event,” and not to the candidate’s activities before the event (when the “ask” is being made), including the pre-event publicity or materials used to advertise or invite participation in the event.

iii.

Both the language of section 300.64 and the Commission’s discussion of it in the E&J distinguish between a Federal candidate or officeholder making a solicitation for soft money at a state party fundraising event itself (which falls within the “limited nature” of the exemption) on the one hand, and the candidate or officeholder making a solicitation for soft money as part of any pre-event activities or materials, including publicity, advertising or invitations, all of which fall outside the scope of the exemption.

By contrast, the AOR erroneously seeks to draw a different distinction – “between invitations publicizing featured appearances sent out by *party committees*, which can contain solicitations for non-Federal funds consistent with the regulation, and solicitations for non-Federal funds by *Federal candidates and officeholders* in ‘fundraising letters’ and ‘telephone calls’ or ‘other fundraising appeal[s],’ which would be impermissible under the regulation.” AOR at 3 (emphasis in original). Based on this purported distinction, the AOR concludes that the regulation “allow[s] the party committees themselves to solicit [non-Federal] funds and, in that same communication, publicize the featured appearance of a Federal candidate or officeholder at an event for which non-Federal funds are solicited.” *Id.*

As the discussion above demonstrates, this is a complete misreading of the regulation and the E&J. The E&J language referring to “fundraising letters” and “telephone calls,” quoted by the AOR but set out in full context at p.3 above, does not distinguish, as the AOR attempts to,

between solicitations sent out by the parties, and solicitations sent out by the candidates or officeholders. Rather, the E&J explains that the statutory prohibition applies to any solicitations by a Federal candidate or officeholder “in fundraising letters, telephone calls or any other fundraising appeal made before or after the fundraising event,” no matter who sends them out. Even if an invitation or other publicity is sent out by the party committee, the prohibition applies to any solicitation by the Federal candidate or officeholder that is part of that pre-event written material. Although the AOR asserts this rule would “defy logic,” AOR at 3, it is the precise rule drawn by the Commission, based on the “limited nature” of the exemption in section 441i(e)(3).

iv.

Given that the exemption to the solicitation prohibition set forth in section 300.64(b) applies only insofar as the Federal officeholder or candidate “may speak” at a state party fundraising event itself, the exemption does not cover the pre-event invitations, publicity and materials relating to the event. Those written materials are subject to the underlying solicitation prohibition in section 441i(e)(1) of the statute, and section 300.62 of the Commission’s rules.

Thus, the rules for pre-event materials, publicity and invitations for state party fundraising events are the same as the rules that apply to pre-event materials for other fundraising events, *i.e.*, fundraising events for state candidates, or non-party groups, where section 441i(e)(1) applies both to the event itself and to the pre-event materials.

The Commission by advisory opinion has set forth rules as to how the solicitation ban applies to pre-event materials and invitations. In A.O. 2003-3 (Cantor), the Commission advised a Federal officeholder that the solicitation prohibition is not implicated for “publicity for an event where that publicity does not constitute a solicitation or direction of non-Federal funds by a covered person....” A.O. 2003-3 at 6-7. If the publicity does contain a solicitation, however, and the Federal candidate or officeholder agrees to have his name used in the materials, there must be an express disclaimer that makes clear the Federal officeholder is not soliciting non-Federal funds. The Commission set forth a “two-fold” analysis:

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).

Id. at 7 (emphasis added). In A.O. 2003-36 (RGA), the Commission applied this same “two-fold” analysis, stating, “If the covered individual approves, authorizes, or agrees or consents to be named or featured in a solicitation, the solicitation must contain a clear and conspicuous

express statement that it is limited to funds that comply with the amount limits and source prohibitions of the Act.” *Id.* at 6. Importantly, the Commission in the RGA advisory opinion took care to qualify the statement it made in the earlier Cantor A.O.:

Although Advisory Opinion 2003-03 might be read to mean that a disclaimer is required in publicity or other written solicitations that explicitly ask for donations “in amounts exceeding the Act’s limitations or from sources prohibited from contributing under the Act,” that was not the Commission’s meaning. The Commission wishes to make clear 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.*

Id. at n.9 (emphasis added).² Citing both the Cantor and RGA advisory opinions, the Commission in A.O. 2003-37 (ABC) summarized the rule for how the solicitation ban applies to pre-event publicity:

Section 441i(c)(1)(B) and section 300.62 only apply to an event where that invitation constitutes a solicitation of funds, and where the covered person approved, authorized, or agreed or consented to be featured, or named in, the invitation (e.g., through the use of his name or likeness). The mere mention of a covered person in the text of a written invitation does not, without more, constitute a solicitation or direction of non-Federal funds by that covered person. However, a candidate’s consent or agreement to be mentioned in an invitation as an honored guest, featured speaker or host, where that invitation is a solicitation, constitutes a solicitation by the candidate. Thus, *if a candidate agrees or consents to be named in a fundraising solicitation as an honored guest, featured speaker or host, or if the invitation constitutes a solicitation for any other reason, then the solicitation must contain a clear and conspicuous statement that the entire solicitation is limited to funds that comply with the amount limits and source prohibitions of the Act. See generally Advisory Opinions 2003-36 and 2003-03.*

A.O. 2003-37 at 18 (emphasis added).³

² The 2005 E&J on section 300.64 makes reference to the Cantor and RGA advisory opinions but does not question the guidance set forth in them. *See* 70 Fed. Reg. at 37654.

³ We recognize that as a formal matter, A.O. 2003-37 was “superseded” by the Explanation and Justification issued by the Commission in the “Political Committee” rulemaking. “Political Committee Status,” 69 Fed. Reg. 68056, 68063 (Nov. 23, 2004) (“Advisory Opinion 2003-37 is hereby superseded.”) The statement “superseding” the advisory opinion was made in the context of a discussion of new rules setting forth the formula for how political committees should allocate spending between their federal and

Applying these rules to the three questions set forth in the AOR, the Commission should advise the state parties that pre-event invitations, publicity or materials may not contain the name of a Federal officeholder or candidate (with that person's knowledge or approval, as would be the case here) if those materials constitute a solicitation for non-Federal funds (*i.e.*, funds in excess of federal contribution limits or from prohibited sources). If the materials contain a general solicitation, the Federal officeholder's name may be used in conjunction with a "clear and conspicuous express statement" that limits the solicitation to Federally permissible sources and amounts. A.O. 2003-36 at 6. Accordingly, the first two AOR questions must be answered in the negative. The written material discussed in the third AOR question would use the name of a covered individual in a manner that would not constitute a solicitation; accordingly, there would be no prohibition on the use of the covered individual's name.

We appreciate the opportunity to submit these comments.

Respectfully,

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non-federal accounts, where the new rules differed from those set forth in the advisory opinion. ("The final rules are simpler than the approach taken in Advisory Opinion 2003-37.") But the advisory opinion dealt with a wide-range of other matters, not affected by the rulemaking, including the application of section 300.64. While it may be technically true that the Commission now treats the advisory opinion as "superseded" *in toto* and thus of no precedential value on any issue it discusses, the opinion nonetheless remains instructive, at least as to those issues that were not addressed by the political committee rulemaking. Given that the ABC opinion (with regard to section 300.64) builds on the Cantor and RGA opinions, both of which do remain good law, we cite it here for whatever continuing instructive value on this specific issue that the Commission may decide to assign it.