AOR 2013-04

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June 12, 2013

BY HAND DELIVERY

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Mr. Herman:

As general counsel to the Democratic Governors Association ("DGA") and Jobs and Opportunity ("J&O"), we seek an advisory opinion pursuant to 2 U.S.C. § 437f. For the sole purpose of electing more Democratic governors in the 2014 elections, the DGA wishes to spend nonfederal funds on voter registration, get-out-the-vote ("GOTV") activities, voter identification, and generic campaign activity. J&O – an independent expenditure organization soon to be established by the DGA, without any officeholders or candidates as members – also wishes to spend nonfederal funds on voter registration, GOTV, voter identification, and generic campaign activity to elect more Democratic governors in the 2014 elections. Neither the DGA nor J&O plan to spend nonfederal funds to promote, support, attack or oppose any federal candidate. Requestors seek confirmation that this course of action is permissible under the Federal Election Campaign Act (the "Act").

FACTUAL BACKGROUND

The DGA is an independent, voluntary, unincorporated political organization that operates under section 527 of the Internal Revenue Code. As the principal political and public policy organization of the nation's Democratic governors, the DGA is not affiliated with a national, state, or local party committee. The DGA's membership consists of the nation's incumbent Democratic governors. Under the DGA's bylaws, no other person is permitted to be a member. As a result, no more than one officeholder from a single state can be a member of the DGA at one time.

The DGA's mission is to support Democratic governors and candidates across the nation.[1] The DGA maintains a permanent staff, which provides strategic advice to gubernatorial campaigns, highlights the achievements of Democratic governors, and criticizes the policy agenda of Republican governors. The DGA also provides policy guidance to Democratic governors and sponsors events throughout the year, which bring together Democratic governors, activists, and other stakeholders to discuss key issues facing the states. To pay for its operations, the DGA accepts contributions outside the source restrictions and amount limitations of the Act ("nonfederal funds"). As dictated by state law, the DGA registers committees with state campaign finance agencies and maintains state-specific accounts – which comply with that state's source restrictions and amount limitations – through which it makes nonfederal expenditures.[2] The DGA is also registered with the Internal Revenue Service ("IRS") and files reports of its contributions and expenditures with the IRS on Form 8872.

J&O will be a separate 527 political organization that will make independent expenditures in selected gubernatorial races. Like the DGA, J&O will be registered with the IRS and will disclose its contributions and expenditures on Form 8872. An unincorporated association under Washington D.C. law, J&O's members will include the DGA's executive director and its chief operating officer. Unlike the DGA, however, its membership does not include any officeholders or candidates. J&O has limited its membership in this way to facilitate its compliance with state laws governing the making of independent expenditures.

Both the DGA and J&O will make disbursements for voter registration, GOTV activities, voter identification, and generic campaign activities in connection with the 2014 elections. The sole purpose of these disbursements is to support Democratic candidates for governor in states holding elections in 2014. Consistent with state law, the DGA and J&O plan to use nonfederal funds to pay for these activities. Neither the DGA nor J&O plans to use nonfederal funds to pay for public communications that promote, support, attack, or oppose federal candidates.

LEGAL DISCUSSION

Congress passed 2 U.S.C. § 441i(a) to "take[] national parties out of the soft-money business."[3] As a means of preventing circumvention of section 441i(a), it also passed 2 U.S.C. § 441i(b) to "prevent the wholesale shift of soft money influence from national to state party committees by prohibiting state and local party committees from using such funds for activities that affect

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[1] *See* http://democraticgovernors.org/.

[2] In 2012, the DGA established a federally registered independent expenditure-only political committee, DGA Action, so that it could make online communications discussing the presidential race and voting rights issues. DGA Action used only funds within the source restrictions and amount limitations of the Act to pay for these communications. DGA Action also accepts nonfederal funds, which it uses in states that permit federal political committees to make nonfederal expenditures in that state.

[3] McConnell v. FEC, 540 U.S. 93, 133 (2003).

federal elections."[4] Congress "[r]ecogniz[ed] that the close ties between federal candidates and state party committees would soon render § 323(a)'s anticorruption measures ineffective if state and local committees remained available as a conduit for soft-money donations" and therefore "designed [section 441i(b)] to prevent donors from contributing nonfederal funds to such committees to help finance 'Federal election activity ...'"[5]

Section 441i(b)'s state, district and local party restrictions extend also to "association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office."[6] Neither Congress nor the Commission has defined this term. In a 2002 rulemaking, the Commission considered "whether [the term] should be further defined in the regulations, and if so, about examples of such associations or groups to include in the final regulations."[7] But the Commission decided not to further define the term or provide examples of covered associations.

The FEA restrictions impose severe First Amendment burdens on those associations and groups covered by the Act. The definition of FEA encompasses a broad range of core political activities, including emails urging someone to register to vote or to vote; answering questions about how to complete a voter registration form; informing a registered voter when the polling place opens; or acquiring information about potential voters.[8] The Act makes it illegal for a state candidate association to pay for this activity with nonfederal funds, even when the activity is directed solely at nonfederal elections. Indeed, these restrictions are even stricter than those imposed on state or local political party committees, which at least have the option of using Levin funds.[9] The practical effect is that these associations and groups covered by the Act are restricted from engaging in this activity.

This request presents an important question of first impression for the Commission: *which associations or groups are subject to restrictions on registering, identifying, and turning out voters?* In light of the serious constitutional questions that the FEA restrictions raise and the congressional silence on which associations or groups are covered, the Commission ought to define the term "association or similar group of candidates for State or local office or of individuals holding State or local office" narrowly. Specifically, it should exclude *interstate* associations like the DGA, which pose no risk of supplanting state or local parties as the vehicles through which federal candidates and national party committees conduct their federal activity. And it certainly ought to exclude J&O, which does not have any officeholders or candidates as members.

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[4] *Id.* at 133-34.
[5] *Id.* at 97.
[6] 2 U.S.C. § 441i(b)(1); 11 C.F.R. § 300.32(a)(1).
[7] Prohibitive and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064-01, 49,096 (July 29, 2002) (to be codified at 11 C.F.R. pts. 100, 300).
[8] 11 C.F.R. § 100.24.
[9] *See* 2 U.S.C. § 441i(b)(2); 11 C.F.R. §§ 300.31 & 300.32.

I. The DGA is not required to pay for voter registration, GOTV, voter identification, or generic campaign activities with federal funds.

The FEA restrictions impose severe First Amendment burdens on state and local party committees and those associations and groups covered by the Act. By forcing these party committees and groups to pay for voter registration, GOTV, and voter identification with funds that are in short supply, they sharply limit the extent to which these committees and groups can engage in core political activity. Moreover, these restrictions are not limited to activities directed at a federal election; they apply to activities intended solely to influence nonfederal elections as well.

The Supreme Court upheld the FEA restrictions as applied to state and local party committees only after first establishing that "donations made solely for the purpose of influencing state or local elections ... are unaffected by [the Act's] requirements and prohibitions."[10] The Court then examined Congress' justification for the FEA restrictions – that, in their absence, federal candidates would "[direct] soft-money contributors to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties."[11] The Court upheld the strict FEA restrictions only on these narrow, anti-circumvention grounds, concluding that they are "narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption: those contributions to state and local parties that can be used to benefit federal candidates directly."[12]

As noted above, Congress extended the FEA restrictions to "association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office." The legislative record is bereft of any discussion as to why Congress decided to extend the FEA restrictions to these associations and groups. Nonetheless, the evidence suggests that Congress took this step solely to prevent federal candidates and national party committees from using *intrastate* associations of state and local officeholders as vehicles to circumvent the restrictions on state and local party committees.

The best evidence of Congress' intent can be found in the statute itself. Rather than create a stand-alone provision barring "association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office" from spending nonfederal funds on FEA, Congress includes these associations and groups in a provision titled "State, district and local committees":

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[10] McConnell, 540 U.S. at 122.
[11] *Id.* at 165.
[12] *Id.* at 167.

> Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), *or by an association or similar group of candidates for State or local office or of individuals holding State or local office*, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.[13]

The inclusion of state and local associations in a provision directed at state and local party committees is indicative of Congress' intent. Congress feared that an association of officeholders or candidates *within a particular state or locality* could establish a shadow party organization, raise nonfederal funds into that organization, and spend these funds on FEA, all with the tacit endorsement of federal candidates and the national party committees. To guard against this threat of circumvention, Congress applied the restrictions on state and local party committees to associations of officeholders or candidates that, absent the restriction, could easily supplant the party organization within the same state or locality. Had Congress intended something broader, it would have created a stand-alone provision directed at associations and groups and likely would have extended to them the same Levin Fund allowance that state and local party committees enjoy. As the Commission itself noted in 2002, it "is implausible that Congress intended to federalize State and local election activity ... without any mention of the issue during the floor debate on BCRA."[14]

In the Act, Congress failed to define the term "association or similar group of candidates for State or local office or of individuals holding State or local office" and instead delegated to the Commission the authority to determine which associations or groups pose the requisite threat of circumvention to be covered.[15] In exercising this authority here, the Commission ought to find that the DGA does not pose a threat of circumvention and, therefore, is not subject to the FEA restrictions. The DGA is an *interstate* association that consists of no more than one officeholder from each state and supports no more than one candidate for office in each state. It lacks all the features of state or local party committees: it is national in scope; its members do not engage in intrastate associational activities; it has no ability to nominate candidates or place them on the

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[13] 2 U.S.C. § 441i(b)(1) (emphasis added).

[14] 67 Fed. Reg. at 49,070. While the Commission's 2002 FEA restrictions were struck down in Shays v. FEC, 337 F. Supp.2d 28, 101-107 (D.D.C. 2004) ("*Shays I*"), that decision does not limit the Commission's flexibility to define the term "association or similar group of candidates for State or local office or of individuals holding State or local office." Shays I merely held that "association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office" may not enjoy special exemptions from the FEA restrictions; it did not opine on which associations or groups should be subject to the restrictions in the first place.

[15] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (where Congress' statute does not speak directly to the precise question at issue, a court will uphold an implementing agency's reasonable interpretation).

ballot; and it is treated as a political action committee, not a party committee, under state law. This latter point is particularly important. Unlike a legislative caucus committee, which is often afforded the same or similar privileges under state campaign finance laws as a political party committee, the DGA is treated no differently than political committees established by nonprofit organizations like the Sierra Club or the Chamber of Commerce. Accordingly, there is no chance that the DGA could supplant state or local party committees as the vehicle through which federal candidates seek to influence federal elections.

Given the severe constitutional burdens that the FEA restrictions impose, and the absence of any real threat of circumvention, the Commission should confirm that the DGA may spend nonfederal funds on voter registration, GOTV, voter identification, or generic campaign activities.[16]

II. J&O is not required to pay for voter registration, GOTV, voter identification, or generic campaign activities with federal funds.

The case for excluding J&O from the grip of the FEA restrictions is even stronger.

First, J&O's membership does not include any officeholders or candidates. While Congress imposed FEA restrictions on "association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office," it conspicuously declined to extend these restrictions to organizations that are directly or indirectly established, financed, maintained, or controlled by such associations or groups.[17] As a result, there is simply no basis in the Act or regulations to extend the FEA restrictions to an association or group without a state officeholder or candidate among its members, regardless of its relationship with organizations that do have officeholders or candidates as members.

Second, the circumvention risk is even lower where, as here, the organization in question is not able to work closely with candidates. J&O is restricted by state laws from coordinating its activities with candidates for governor. An organization that cannot coordinate its efforts with state candidates is not a vehicle that federal candidates or national party committees can use to influence federal elections.

Third, extending the FEA restrictions to J&O would require the Commission to regulate the content of independent speech in nonfederal elections, which poses no threat of corruption or the appearance of corruption to federal candidates and officeholders. The Supreme Court has

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[16] In exercising this delegation of authority, it is reasonable – and, indeed, advisable – for the Commission to consider the severe constitutional burdens imposed by the rule. *See* Free Enterprise Fund. V. Public Co. Accounting Oversight Bd., 130 S. Ct 3138, 3151 (2010) (suggesting the Supreme Court would grant some deference to an agency's constitutional interpretation within the agency's area of technical expertise).

[17] *Compare* 2 U.S.C. §§ 441i(b)(1),(2).

repeatedly held that the absence of prearrangement and coordination of campaign activities "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[18] Accordingly, contributions to groups that make only independent expenditures cannot corrupt or create the appearance of corruption, particularly where the independent expenditures are directed at nonfederal elections.[19] Requiring J&O to refrain from spending nonfederal funds on voter registration, GOTV, voter identification, or generic campaign activities would pose serious constitutional concerns in light of *Citizens United* and its progeny.

CONCLUSION

The requester seeks confirmation that the DGA and J&O may spend nonfederal funds for voter registration, GOTV, voter identification and generic campaign activities.

Very truly yours,

Marc E. Elias
Jonathan S. Berkon
General Counsel to Democratic Governors Association and Jobs and Opportunity

[18] Citizens United, 558 U.S. 310, 130 S.Ct. 876, 908 (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976)).
[19] Speechnow.org v. Fed. Election Comm'n, 599 F.3d 686, 694 (D.C. Cir. 2010).

DGA/J&O AOR
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Amy:

Per our conversation, here are answers to your questions. Can you confirm that the request is now complete?

1) Who decides how J&O spends its money?

The group of persons that will decide how J&O spends its money will include DGA officers and other DGA employees. In order to comply with state prohibitions against coordination, the DGA's members – which consist entirely of Democratic governors – will generally not play a role in deciding how J&O's funds will be spent.

2) Any plans for DGA to fund J&O?

That has not been determined yet. But it is possible that DGA will provide funds to J&O.

3) Does DGA have the authority to direct or participate in the governance of J&O, and will it have the authority to hire, fire, or otherwise control J&O's officers or other decision makers?

J&O's two members are officers of the DGA. Other DGA employees are likely to play a role in the day-to-day operations of J&O. In order to comply with state prohibitions against coordination, the DGA's members – which consist entirely of Democratic governors – will generally not play a role in the day-to-day operations of J&O.

Regards,
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cannot be used by the taxpayer, for the purpose of (i) avoiding penalties that may be imposed on the taxpayer under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein (or any attachments).

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