Perkins Coie

700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscole.com

Marc Erik Elias
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com

Comment on AOR 2013-04

July 22, 2013

BY HAND DELIVERY

Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request 2013-04

Dear Ms. Werth:

We are writing on behalf of the Democratic Governors Association ("DGA") and Jobs and Opportunity ("J&O") in response to comments (the "Comments") filed by the Campaign Legal Center and Democracy 21 (the "Commenters"), in connection with the above-referenced advisory opinion.[1]

The Commenters ask that the Commission look to the "plain language of the statute" to resolve this request. We agree. When it wrote the Bipartisan Campaign Reform Act ("BCRA"), Congress chose *not* to extend the financing restrictions on voter registration, voter identification, get-out-the-vote activity, or generic campaign activity to organizations, like J&O, that did not count any state or local officeholders or candidates among its membership. Consequently, neither the statute nor the Commission's regulations provide any legal basis to restrict J&O from using nonfederal funds to pay for these election activities.

I. The Commission lacks any legal authority to subject J&O to the FEA restrictions at 2 U.S.C. § 441i(b)(1)

J&O is an unincorporated nonprofit association located in the District of Columbia. It plans to make independent expenditures in selected gubernatorial races, including expenditures for

[1] Jobs and Opportunity has filed a Form 8871 with the Internal Revenue Service.

activity that will qualify as Federal election activity ("FEA") under 11 C.F.R. § 100.24. Under District of Columbia law, an "unincorporated nonprofit association" means an organization "consisting of 2 or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes." D.C. Code § 29-1102(5). J&O's membership consists of just two individuals – Colm O'Comartun, the executive director of DGA, and Ben Metcalf, the chief operating officer of DGA – neither of whom is a state or local candidate or officeholder.

As the Commenters effectively concede, having at least two members who are state or local candidates or officeholders is the *sine qua non* of being classified as an "association or similar group of candidates for State or local office or of individuals holding State or local office." *See* Comments at 4 ("Homeowners associations are not subject to the restrictions; trade associations are not subject to the restrictions; bar associations are not subject to the restrictions. Associations of state or local candidates or officeholders are subject to BCRA's FEA restrictions."). Neither of J&O's members are state or local candidates or officeholders. Therefore, by law, J&O cannot *itself* be classified as an "association or similar group of candidates for State or local office or of individuals holding State or local office."

Recognizing this, Commenters next allege that "J&O is the agent of DGA" and, as a result, "must also be required to pay for FEA with federal funds." Comments at 7. To support this argument, Commenters cite to the Commission's coordination regulations, the Restatement (Third) of Agency, and an enforcement action involving a federally-chartered savings association. *Id.* at 7-8.[2] Noticeably absent from the commenters' argument is any analysis of section 441i of the Act or part 300 of the Commission's regulations. From the Commenters' perspective, the omission is understandable: these provisions clearly establish that while the FEA restrictions apply to an "association or similar group of candidates for State or local office or of individuals holding State or local office," they do *not* apply to an entity "acting on behalf" of such an association or an entity established, financed, maintained, or controlled by such an association. Therefore, even assuming *arguendo* that DGA is an "association or similar group of candidates for State or local office or of individuals holding State or local office," the Commission lacks legal authority to subject J&O to the FEA restrictions.

On this issue, the plain language of section 441i(b)(1) of the Act is unambiguous – the FEA restrictions cover associations of state or local candidates or officeholders, but do *not* extend to entities that they establish, finance, maintain, or control, or that act on their behalf:

[2] The conciliation agreement cited by Commenters, MUR 6168, addresses the circumstances in which a corporate subsidiary is considered to be distinct from its corporate parent for purposes of 2 U.S.C. § 441b(a). That issue, which draws heavily from corporate law principles and long predates BCRA, is inapposite to the narrow question of which associations are subject to the FEA restrictions found in 2 U.S.C. § 441i(b)(1).

> 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.

2 U.S.C. § 441i(b)(1) (emphasis added). Here, Congress expressly provided that the FEA restrictions apply to a State, district, or local committee of a political party *along with* entities established, financed, maintained, or controlled by such committees *and* officers or agents acting on their behalf. But Congress chose *not* to include language extending the FEA restrictions to entities established, financed, maintained, or controlled by an association of state or local candidates or officeholders, or to officers or agents acting on behalf of such associations.

This omission was not accidental. When it included associations of state or local officeholders and candidates within BCRA's ambit, Congress was acting at the very edge of its constitutional powers. Congress justified this intrusion into nonfederal elections as a prophylactic step to prevent federal candidates and national party committees from using these associations to supplant state and local party committees as the vehicles through which the coordinated campaign was run. It was reasonable for Congress to stop there rather than try to lay one prophylaxis upon another, by extending BCRA's restrictions to entities that acted in concert with associations of state or local candidates and officeholders, but did not include any such candidates or officeholders among its members.

Congress took a careful, balanced approach in this area, choosing to apply certain restrictions only to "principals" while applying others to persons and entities acting in concert with "principals" as well. When Congress wanted to extend BCRA's restrictions to "agents" of the principal or entities "established, financed, maintained, or controlled by" the principal, it did so explicitly. *See* 2 U.S.C. § 441i(a)(2) ("The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee."); § 441i(e)(1) ("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, shall not ...."). Commenters' "request that [the Commission] read" additional restrictions into section 441i(b)(1) "when it is clear that Congress knew how to specify [these restrictions] when it wanted to, runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, n. 9 (2004), *citing* 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th rev. ed. 2000).

The Commission's regulations also clearly preclude a finding that J&O is subject to the FEA restrictions. For purposes of part 300, the Commission defined the term "agent" to *not* include persons acting on behalf of associations of state or local candidates or officeholders. In its explanation and justification of the regulation, the Commission expressly rejected Commenters' claim that a part 300 "agent" includes any person deemed to be an agent under the common law or under another section of the Act. *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 F.R. 49064, 49082 (July 29, 2002) ("[T]he Supreme Court has made it equally clear that not every nuance of agency law should be incorporated into Federal statutes where full incorporation is not necessary to effect the statute's underlying purpose.").

Instead, the Commission recognized that "Title I of BCRA refers to 'agents' in order to implement specific prohibitions and limitations with regard to particular, enumerated activities *on behalf of specific principals*." *Id.*, 67 F.R. at 49083 (emphasis added). The regulation itself provides that "[f]or the purposes of part 300 of chapter I, agent means any person who has actual authority, either express or implied, to engage in any of the following activities *on behalf of the specified persons*: ... national committee of a political party ... State, district, or local committee of a political party ... an individual who is a Federal candidate or an individual holding Federal office ... [and] an individual who is a candidate for State or local office ...." 11 C.F.R. §§ 300.2(b)(1) - (4). A person is not an "agent" for purposes of part 300 unless it acts on behalf of one of the principals specifically enumerated in parts 300.2(b)(1) through (4). Because J&O is not acting on behalf of any of these four principals, it cannot be classified as an "agent" for purposes of part 300.[3]

Likewise, the Commission recognized that the term "establish, finance, maintain, or control" only "appears in BCRA in the context of national party committees ... of State, district, and local political party committees ... and of Federal candidates and Federal officeholders." 67 F.R. at 49083. The regulation specifies that BCRA's restrictions extend beyond the principal only where the entity at issue is established, financed, maintained, or controlled by a "national, State, district, and local committees of a political party, candidates, and holders of Federal office, including an officer, employee, or agent of any of the foregoing persons ...." 11 C.F.R. § 300.2(c)(1). On the other hand, the restrictions do not extend to entities established, financed, maintained, or controlled by associations of state or local candidates or officeholders. Because J&O is not established, financed, maintained, or controlled by one of the three sponsors enumerated in part 300.2(c), it is not an entity "established, financed, maintained, or controlled" by a covered sponsor for purposes of part 300.

[3] Commenters do not allege that J&O is an agent of any particular state officeholder or candidate for purposes of 11 C.F.R. §§ 300.70 - .72. Nor could they. A person is an "agent" of a state officeholder or candidate only when it has actual authority to spend funds for a public communication on the officeholder or candidate's behalf. *Id.* § 300.2(b)(4). As an independent expenditure organization, J&O does not have such actual authority.

The Commission simply lacks the legal authority to subject to J&O to the FEA restrictions set forth in section 441i(b)(1). J&O is not an association of state or local candidates or officeholders, because its membership does not include any state or local candidates or officeholders. It is not an "agent" for purposes of part 300, because the FEA restrictions do not extend to persons acting on behalf of an association of state or local candidates or officeholders, and J&O is not authorized to act on behalf of any of the four principals enumerated in part 300.2(b). Finally, the FEA restrictions do not extend to entities that are established, financed, maintained, or controlled by an association of state or local candidates or officeholders, and J&O is not established, financed, maintained, or controlled by any of the three sponsors enumerated in part 300.2(c).

II. Allowing J&O to spend nonfederal funds on independent expenditures in support of nonfederal candidates would not lead to a circumvention of BCRA

Commenters suggest that allowing J&O to spend nonfederal funds on independent expenditures that qualify as voter registration, voter identification, get-out-the-vote activity, or generic campaign activity would "invite massive circumvention of BCRA's soft money prohibition." Comments at 7. Commenters do not marshal any factual evidence for this claim, which reflects a basic misunderstanding of how political campaigns operate in practice.

First, J&O is not a viable substitute for a state or local party committee. For federal candidates and national party committees, state or local party committees provide an attractive vehicle through which a *coordinated* voter registration, voter identification, and GOTV campaign can be run. However, the Commission's coordination regulations would preclude J&O from coordinating public communications with federal candidates or party committees that refer to a federal candidate close to an election, and would even preclude J&O from coordinating public communications during the pre-election window that include generic messages such as "Vote Democratic." 11 C.F.R. § 109.21. There is no way to run an effective coordinated campaign with these types of restrictions.

Second, BCRA prohibits federal candidates and national party committees from soliciting or directing any nonfederal funds to J&O. *See* 2 U.S.C. §§ 441i(a), (e). The commenters' concern that "parties would react ... by directing soft money contributions" to J&O is particularly off-base, given that federal law would prohibit national party committees from "directing" *any* funds to J&O because it does not report to the Federal Election Commission. *Id.* § 441i(a)(1). There is no evidence – either in the Commission's enforcement history or the Commenters' analysis – that federal candidates or national party committees have attempted to circumvent the restrictions on soliciting or directing soft money to organizations like J&O.

Third, there is no legal basis for the Commission to conclude that donors would seek to "purchase influence" with federal officeholders and candidates by donating to J&O. *See McConnell v. FEC*, 540 U.S. 93, 161 (citing this concern in upholding restrictions on state and

local party committees). The Supreme Court has held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). In turn, the D.C. Circuit, sitting *en banc*, held that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010). If contributions to groups that make independent expenditures in *federal elections* cannot corrupt federal officeholders, neither can contributions to groups that make independent expenditures in *nonfederal elections*.

Fourth, state coordination laws will require that much of the work of J&O be conducted separately from the elected officials who comprise DGA's membership.[4] Just as federal law bars independent expenditure committees from coordinating their activities with officeholders and candidates, many state laws do the same. These state laws will generally preclude DGA members from requesting or suggesting that particular expenditures be made; being involved in decisions regarding the content, intended audience, means and mode, timing or frequency, or size, prominence, or duration of a communication; or allocating funds among various campaign activities, such as television or radio ads, digital communications, and field organizing. Instead, the law in these states dictate that these decisions be made by personnel walled off from DGA's members and other DGA staff working closely with candidates and party committees.

III. The Commission has the authority to find that DGA is not subject to the FEA restrictions

While the Commission lacks any legal authority to subject J&O to the FEA restrictions, we agree that the Commission *could* interpret section 441i(b)(1) to apply to DGA. Notwithstanding the commenters' arguments to the contrary, however, the statute does not *compel* such a finding. Instead, Congress granted the Commission the authority to determine which associations consisting of one more state or local candidates or officeholders are subject to the FEA restrictions.

In arguing otherwise, Commenters point to 2 U.S.C. § 431(20)(A), which they describe as "detailed and comprehensive," "unusually precise," and intended "not [to] leave any room ... to be restricted in its scope by administrative interpretation." Comments at 2. But Commenters here are talking about the definition of FEA, which is not at issue in this request, rather than the definition of an "association or similar group of candidates for State or local office or of individuals holding State or local office," which is. Commenters also argue that the decision in

[4] Commenters suggest that DGA's members have the power to "hire, fire, or otherwise control J&O's officers and decision makers." Comments at 7. But this ignores the fact that Mr. O'Comartun and Mr. Metcalf's legal status as members of J&O is independent from their status as officers of DGA. Even if DGA terminated Mr. O'Comartun and Mr. Metcalf tomorrow, they would still be recognized as members of J&O under District of Columbia law. *See* D.C. Code §§ 29-1102(4), 29-1115.

Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004) forecloses the Commission from interpreting the statute to exclude DGA from the reach of the FEA restrictions. But *Shays* stands for a distinct proposition: that the Commission may not exempt associations of state or local candidates and officeholders, as a whole, from any FEA restrictions that apply to state or local party committees. It does not speak to the question of which associations qualify as associations of state or local candidates and officeholders for purposes of 2 U.S.C. § 441i(b)(1).[5]

In BCRA, Congress did not define the term "association or similar group of candidates for State or local office or of individuals holding State or local office." When it wrote the implementing regulations in 2002, the Commission considered whether the term "should be further defined in the regulations, and if so, about examples of such associations or groups in the final regulations." 67 F.R. at 49096. That the Commission considered this step indicated its belief, at the time BCRA was passed, that Congress had granted it some authority to define which associations that counted two or more state or local candidates and officeholders as members should be included and which should not be.

Where a statute does not speak directly to the precise question at issue, administrative agencies may offer reasonable interpretations of that statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The Commission is "precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). In the absence of clear direction from Congress, the Commission may interpret the term "association or similar group of candidates for State or local office or of individuals holding State or local office" to exclude interstate associations like the DGA. It should do so here, for the reasons set forth in the original request.

Very truly yours,

Marc E. Elias
Jonathan S. Berkon
Counsel for Democratic Governors Association and Jobs & Opportunity

[5] The dicta from the *Shays* decision naming the DGA was a direct quotation from the plaintiffs' brief on which one of the Commenters, Democracy 21, was a signatory. It did not reflect a determination by the court that DGA was a covered association.