FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT ON ADVISORY OPINION 2013-04 DEMOCRATIC GOVERNORS ASSOCIATION/JOBS & OPPORTUNITY

VICE CHAIRMAN DONALD F. MCGAHN

For the reasons set forth in the Comments submitted by the requestors, the Democratic Governors Association and Jobs & Opportunity ("J&O"), I believe that the Commission lacks the legal authority to subject J&O to the restrictions on federal election activity at 2 U.S.C. § 441i(b)(1). In their comments, the requestors note:

- "[T]he 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";[1]

- "The use of different terms in the same statute presents a question of statutory interpretation: namely, whether Congress's use of the different language signifies that the provisions mean different things or, alternatively, whether Congress used different language despite intending for the provisions to mean the same thing. The Supreme Court has provided a consistent answer to this question: where Congress uses different terms, it should be presumed that Congress means different things";[2]

- "This is not a question of first impression for the Commission. In 2002, following passage of [McCain-Feingold], the Commission and the regulated community engaged in a spirited discussion of the Commission's proposed regulation;"[3]

- "[T]he final rule did *not* extend the reach of part 300 to entities established, financed, maintained, or controlled by state associations. Instead, it expressly limited the scope of section 300.2(c) to entities established, financed, maintained, or controlled by a 'national, State, district, and local committees of a political party, candidates, and holders of

[1] Comment on Advisory Opinion Request 2013-04 dated July 22, 2013 on behalf of the Democratic Governors Association and Jobs & Opportunity at 2 (emphasis in the original).

[2] Comment on Advisory Opinion Request 2013-04 dated September 3, 2013 on behalf of the Democratic Governors Association and Jobs & Opportunity at 3.

[3] *Id.* at 4.

Federal office, including an officer, employee, or agent of any of the foregoing persons . . .";[4]

- "Draft B suggests that the Commission is empowered to import definitions of 'agency' from enforcement actions or advisory opinions addressing provisions outside of 2 U.S.C. § 441i or part 300 of the regulations. The Commission expressly rejected this position in its [Explanation & Justification] accompanying the regulation. . . . The Commission could not have been clearer. It understood the statutory references to 'agents' to implement 'specific provisions and limitations . . . *on behalf of specific principals*,' which did not include state associations";[5]

- Therefore, "Draft B . . . is entirely unmoored from the Act, the regulations, and the Commission's precedents . . . [and] abandons well-established, neutral cannons of statutory interpretation in pursuit of a desired outcome. . . .";[6]

- "[F]ollowing these neutral principles of statutory interpretation advances the regulatory objectives of the Act in the long run. Discarding them here would make it easier to undermine Congress' intent in future cases."[7]

Because the requestor has so ably set forth the relevant legal reasoning, I hereby attached and incorporate by reference the requestor's comments on question two of Advisory Opinion Request 2013-04 in lieu of a traditional statement.

Moreover, although the requestor does not have the benefit of a formal advisory opinion, I note that due process precludes any enforcement action against J&O regarding the activity discussed in question two. In addition to being beyond the Act, the interpretation set forth in Draft B importing concepts of agency into this provision was expressly rejected by the Commission.[8] As explained in *FCC v. Fox Television Stations, Inc.*, "[i]n the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and 'show that there are good reasons for its new policy.'"[9] The Commission has not clearly acknowledged a change in policy, nor has it set forth good reasons to justify such a change. Therefore, the Commission may not pursue an enforcement action against Jobs & Opportunity should they choose to act.

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[4] *Id.* at 5-6 (*quoting* 11 C.F.R. § 300.2(c)(1)) (emphasis in the original).

[5] *Id* at 6 (*quoting* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 F.R. 49064, 49082 (July 29, 2002)) (footnotes omitted).

[6] *Id* at 7.

[7] *Id.*

[8] *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 F.R. 49064 (July 29, 2002).

[9] 132 S. Ct. 2307, 2315-2316 (2012) (*"Fox II"*) (*quoting FCC v. Fox Television Stations*, 556 U.S. 502 at 515 (2009) (*"Fox I"*))

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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 must 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:

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[2] The conciliation agreement cited by Commenters, MUR 6166, 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 as surrogate state and local party committees as the vehicles through which the coordinated campaign was run. It was reasonable for Congress to stop them 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 prohibitions established by paragraph (1) apply 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.

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[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 those 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 dictates that those 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'Connell 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'Connell 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.

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office

DATE: September 4, 2013

SUBJECT: Comments on Draft AO 2013-04 (Democratic Governors Association and Jobs & Opportunity)

Attached are comments submitted by Marc E. Elias and Jonathan S. Berkon, counsel for requestors.

Attachment

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September 3, 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"), as the Commission considers Advisory Opinion 2013-04. We write for two reasons. *First*, to provide the Commission with some alternative language for the footnote that we initially proposed in our August 15, 2013 comments. The language aims to clarify that J&O could not rely on the advisory opinion if, at some point in the future, it was deemed an "alter ego" of DGA under Washington D.C. law. *Second*, to explain why we cannot endorse an opinion that seeks to regulate J&O as an "agent" of DGA.

I. The Commission can modify Draft A to withhold protection of the advisory opinion in the event J&O were deemed an "alter ego" of DGA under Washington D.C. law.

In our August 15, 2013 comments, we proposed that the Commission append a footnote to the end of the sentence on page 5, line 16 of Draft A, which would read: "This conclusion is premised on J&O remaining a separate legal entity from DGA under Washington D.C. law. If J&O were found to not be a separate legal entity from DGA under Washington D.C. law, J&O could no longer rely on this opinion." In our view, this language would withhold protection of the advisory opinion in the event J&O were deemed to be an "alter ego" of DGA under Washington D.C. law.

At the hearing on August 22, 2013, however, some commissioners expressed concern that the language did not reflect the established case law. To ensure that the footnote properly reflects

the established case law in Washington D.C., we propose the following amended language for the footnote: "This conclusion is premised on J&O not being found to be an 'alter ego' of DGA under Washington D.C. law, as articulated in *Vultch v. Furr*, 482 A.2d 811 (D.C. 1984) and subsequent cases." Such language incorporates, by reference, the full body of law that has been established by courts in Washington D.C. and does not narrow or broaden the scope of that law.

II. The Commission has no legal authority to regulate J&O as an "agent" of DGA.

We write separately to explain why we cannot endorse an opinion that seeks to regulate J&O as an "agent" of DGA. Such an opinion would be contrary to the Federal Election Campaign Act (the "Act"), the Commission's regulations, and its prior guidance.

A. The Statute

At issue in this matter is the meaning of 2 U.S.C. § 441i(b)(1), which restricts the sources and amounts of funding that can be used to finance Federal Election Activity ("FEA") by certain persons. When Congress authored this provision, it used different terms to explicate the scope of the restrictions that apply to state parties, on the one hand, and state associations of candidates and officials, on the other:

> [A]n 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.

Id. (emphasis added). Congress included the highlighted parenthetical phrase when referring to state parties; it then excluded the phrase when referring to state associations.

The differences in language can be seen even more plainly when we break the passage into its component parts. The state party restrictions apply to amounts spent on FEA 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)*** ....

Id. (emphasis added). On the other hand, the state association restrictions apply to amounts spent on FEA by:

> [A]n association or similar group of candidates for State or local office or of individuals

holding State or local office ....

Id.

The use of different terms in the same statute presents a question of statutory interpretation: namely, whether Congress's use of different language signifies that the provisions mean different things or, alternatively, whether Congress used different language despite intending for the provisions to mean the same thing. The Supreme Court has provided a consistent answer to this question: where Congress uses different terms, it should be presumed that Congress means different things. Writing for a unanimous Court, Justice Ruth Bader Ginsburg explained, "we ordinarily resist reading words or elements into a statute that do not appear on its face ... As this Court has reiterated: '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

In a 2003 advisory opinion, the Commission relied on this canon of statutory interpretation to find that the term "any election other than an election for Federal office," for purposes of part 300, included state ballot measures. FEC Adv. Op. 2003-12 (Flake). Responding to critics who argued that the Commission had not previously applied the Act to state ballot measures and that Congress had not discussed the matter during the debate over the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Commission, in an opinion signed by Chair Weintraub, pointed to the statutory language:

> As used in subparagraph (B) of section 441i(e)(1), the term, 'in connection with any election other than an election for Federal office' is, on its face, clearly intended to apply to a different category of elections than those covered by subparagraph (A), which refers to 'an election for Federal office.' This phrasing, 'in connection with any election other than an election for Federal office' also differs significantly from the wording of other provisions of the Act that reach beyond Federal elections. Particularly relevant is the prohibition on contributions or expenditures by national banks and corporations organized by authority of Congress, which applies 'in connection with any election to any political office.' 2 U.S.C. 441b(a). Where Congress uses different terms, it must be presumed that it means different things. Congress expressly chose to limit the reach of section 441b(a) to those non-Federal elections for a 'political office,' while intending a broader sweep for section 441i(e)(1)(B), which applies to 'any election' (with only the exclusion of elections to Federal office). Therefore, the Commission concludes that the scope of section 441i(e)(1)(B) is not limited to elections for a political office, and that the activities of STMP as described in your request (other than its Federal election activities and election-targeting communications) are in connection with an election other than an election for Federal office. 2 U.S.C. 441i(e)(1)(B).

Id. (emphasis added) (footnotes omitted). The Flake opinion was adopted on a 5 to 1 vote, with all three Democratic commissioners voting in the affirmative and two Republican commissioners joining them.

Draft A relies on the same canon of statutory interpretation that the Commission endorsed in 2003 and Justice Ginsburg articulated on behalf of a unanimous Court six years earlier. Draft A interprets Congress' inclusion of the parenthetical phrase "*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*" when referring to state parties, and the exclusion of the phrase when referring to state associations, to mean that Congress intended the scope of the FEA restrictions to be different for each entity. Specifically, that the FEA restrictions would apply to entities established, financed, maintained, or controlled by state parties and officers or agents acting on their behalf, but would *not* apply to entities established, financed, maintained, or controlled by state associations, or officers or agents acting on their behalf.

Draft B, on the other hand, departs from this canon of statutory interpretation. It assumes that, despite including the parenthetical phrase when writing the statute, Congress wanted the Commission to interpret the statute *as if the phrase had been included.* Given that this approach to statutory interpretation is at odds with the one adopted by the Supreme Court and this Commission, one would expect Draft B to offer a compelling reason for its proposed departure from legal norms. But rather than defend this departure, Draft B fails to even acknowledge it.

B. The Regulation

This is not a question of first impression for the Commission. In 2002, following passage of BCRA, the Commission and the regulated community engaged in a spirited discussion of the Commission's proposed regulation.

The proposed BCRA regulation defined the term "agent" to mean "any person who has actual express oral or written authority to act on behalf of a *candidate, officeholder, or a national committee of a political party, or a State, district or local committee of a political party, or an entity directly or indirectly established, financed, maintained, or controlled by a party committee.*" Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Proposed Rule, 67 F.R. 35654, 35680 (May 20, 2002) (emphasis added). Notably, a person acting on behalf of a state association was *not* included in the proposed definition of "agent" and, accordingly, would not have been covered by the restrictions of part 300 had the proposed rule been adopted as drafted. Similarly, the proposed regulation defined the term "directly or indirectly establish, maintain, finance, or control" to "appl[y] to State, district, or local committees of a political party, candidates, and holders of Federal office." *Id.* Notably, an entity directly or indirectly established, maintained, financed, or controlled by a state association was

not included in the proposed definition and, accordingly, would not have been covered by the restrictions of part 300 had the proposed rule been adopted as drafted.

The four congressional sponsors of BCRA and their allies in the reform community harshly criticized aspects of the proposed definitions. *See* Comments by Common Cause and Democracy 21 on Notice 2002-7 (May 29, 2002); Comments by Campaign and Media Legal Center on Notice 2002-7 (May 29, 2002); Comments by Center for Responsive Politics on Notice 2002-7 (May 29, 2002); Comments by Senators McCain and Feingold and Representatives Shays and Meehan on Notice 2002-7 (May 29, 2002). They admonished for including "implied authority" and "apparent authority" in the definition of "agent." They pushed to eliminate the exclusion for entities established prior to passage of BCRA. Noting that the proposed definition of "directly or indirectly establish, maintain, finance, or control" did not encompass national party committees, they contended that it should, and that it should also include "donors of Levin funds." But notably, not one of these commenters – not Common Cause, not Democracy 21, not the Campaign Legal Center, not the Center for Responsive Politics and not any of the congressional sponsors – argued that persons acting on behalf of state associations should be treated as "agents" subject to part 300 or that entities established, maintained, financed, or controlled by state associations should be subject to part 300.

The final definition of "agent" included some material changes from the proposed regulation. Unlike the proposed regulation, the final rule established that persons acting on behalf of a nonfederal candidate were subject to BCRA's prohibition on the use of nonfederal funds to pay for communications that promote, support, attack, or oppose federal candidates. But the final rule did *not* extend the reach of part 300 to persons acting on behalf of state associations. Instead, it expressly limited the definition of "agent," for purposes of part 300, to persons acting on behalf of national party committees, state or local party committees, federal candidates or officeholders, and state candidates. *See* 11 C.F.R. §§ 300.2(b)(1) - (4) ("For 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 ....")

Likewise, the final definition of "directly or indirectly establish, maintain, finance, or control" included some material changes from the proposed regulation. Unlike the proposed regulation, the final rule established that entities established, financed, maintained, or controlled by national party committees could be subject to part 300. But the final rule did *not* extend the reach of part 300 to entities established, financed, maintained, or controlled by state associations. Instead, it expressly limited the scope of section 300.2(c) to entities 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).

C. The E&J

Draft B does not include a single citation to section 300.2(b) or 300.2(c) of the regulations, which define what an "agent" means for purposes of part 300 and which entities "directly or indirectly established, maintained, financed, or controlled" by a sponsor are subject to part 300. Instead, Draft B suggests that the Commission is empowered to import definitions of "agency" from enforcement actions or advisory opinions addressing provisions outside of 2 U.S.C. § 441i or part 300 of the regulations.

The Commission expressly rejected this position in its E&J accompanying the regulation:[1]

> 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***. The final regulation limits the scope of the definition accordingly in paragraphs (b)(1) through (b)(4). Each provision in paragraphs (b)(1) through (b)(4) is tied to a specific provision in Title I of BCRA that refers an agency concept to implement a specific prohibition or limitation. The Commission emphasizes that, under the Commission's final regulation, ***a principal cannot be held liable for the actions of an agent unless*** (1) the agent has actual authority, (2) the agent is acting on behalf of his or her principal, ***and (3) the agent is engaged in one of the specific activities described in paragraphs (b)(1) through (4).***

Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 F.R. 49064, 49082 (July 29, 2002) (emphasis added). The Commission could not have been clearer. It understood the statutory references to "agents" to implement "specific prohibitions and limitations ... ***on behalf of specific principals***," which did not include state associations. *Id.* (emphasis added). It viewed the final regulation as "limit[ing] the scope of the definition accordingly." *Id.* And perhaps most importantly, it "emphasize[d] that, under the Commission's final regulation, a principal cannot be held liable for the actions of an agent unless the ... agent is engaged in one of the specific activities described in paragraphs (b)(1) through (4)." *Id.*

To recap: in 2002, the Commission said that, ***as a matter of law***, a principal could not be held liable unless a person acting on its behalf was engaged in one of the specific activities described in paragraphs (b)(1) through (4). J&O will not engage in any of these specific activities.

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[1] The Commission also expressly rejected the idea of relying on the common law to supply the definition of "agent." *See* 67 F.R. at 49082 ("[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.")

Therefore, the Commission may not regulate J&O as an agent of DGA under part 300 or otherwise hold DGA liable for any of J&O's activities, unless J&O is deemed an "alter ego" of DGA under Washington D.C. law. Draft B's suggestion to the contrary is directly at odds with the Commission's pronouncements from the 2002 E&J.[2]

III. Conclusion

We strongly urge the adoption of a modified Draft A. It is a compromise draft, grounded firmly in law, and worthy of the Commission's support. Draft B, on the other hand, is entirely unmoored from the Act, the regulations, and the Commission's precedents. Draft B abandons well-established, neutral canons of statutory interpretation in pursuit of a desired outcome. As Advisory Opinion 2003-12 shows, following these neutral principles of statutory interpretation advances the regulatory objectives of the Act in the long run. Discarding them here would make it easier to undermine Congress's intent in future cases.

Very truly yours,

Marc E. Elias
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[2] Some commissioners have expressed concern that voting in favor of Draft A would require the Commission, in the future, to identify express language in the Act before applying its restrictions to persons acting on behalf of principals. But our argument is narrower: where Congress has limited the scope of agency in the statute and where the regulations properly reflect these limitations, as they did following passage of BCRA, the Commission must abide by these limitations in future advisory opinions or enforcement actions. The scope of Draft A is limited specifically to part 300 of the regulations.