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Washington, DC 20463

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AGENDA ITEM
For meeting of July 25, 2013
[SUBMITTED LATE]

July 24, 2013

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Subject: AO 2013-04 (Democratic Governors Association/Jobs & Opportunity) (Draft B)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on July 25, 2013.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2013-04

2

3 Marc E. Elias, Esq.

DRAFT B

4

Jonathan S. Berkon, Esq.

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Washington, D.C. 20005-3960

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10 Dear Messrs. Elias and Berkon:

11 We are responding to your advisory opinion request on behalf of the Democratic
12 Governors Association (“Association”) and Jobs & Opportunity. The Association and
13 Jobs & Opportunity seek to spend nonfederal funds on “federal election activity” —
14 specifically voter registration, get-out-the-vote (“GOTV”), voter identification, and
15 generic campaign activity — to support Democratic gubernatorial candidates in the 2014
16 elections. The Commission concludes that the Association and Jobs & Opportunity must
17 use federal funds to finance their federal election activity.

18 ***Background***

19 The facts presented in this advisory opinion are based on your advisory opinion
20 request (“AOR”), consisting of your letter received on June 12 and your email dated June
21 25, 2013.

22 The Association is an unincorporated political organization that holds tax-exempt
23 status under section 527 of the Internal Revenue Code. Its membership consists only of
24 incumbent Democratic governors. The Association is not affiliated with a national, state,
25 or local party committee.

26 The Association’s mission is to support Democratic governors and gubernatorial
27 candidates. It maintains a staff that provides strategic advice to gubernatorial campaigns,

1 highlights achievements of Democratic governors, provides policy guidance to
2 Democratic governors, and criticizes the policies of Republican governors.

3 To pay for its operations, the Association accepts nonfederal funds — that is,
4 contributions outside the amount limitations and source prohibitions of the Federal
5 Election Campaign Act of 1971, as amended (the “Act”). As required by state law, the
6 Association registers committees with state campaign-finance agencies and maintains
7 state-specific accounts that comply with state source restrictions and amount limitations.
8 Through these state-specific accounts, the Association spends nonfederal funds.

9 Jobs & Opportunity will be a political organization under section 527 of the
10 Internal Revenue Code and an unincorporated association under Washington, D.C. law.
11 Jobs & Opportunity’s members will consist only of the Association’s executive director
12 and its chief operating officer; therefore, unlike the Association, no officeholders or
13 candidates will be members of Jobs & Opportunity. Jobs & Opportunity plans to make
14 “independent expenditures” in selected gubernatorial races. To comply with state
15 prohibitions on coordination, the Association’s members “will generally not play a role”
16 in decisions about Jobs & Opportunity’s daily operations or how it spends its funds.

17 The Association and Jobs & Opportunity will make disbursements for voter
18 registration, GOTV activities, voter identification, and generic campaign activities in
19 connection with the 2014 elections. The Association and Jobs & Opportunity plan to use
20 nonfederal funds to pay for these activities. Neither organization, however, plans to use
21 nonfederal funds to pay for public communications that promote, support, attack, or
22 oppose federal candidates.

1 ***Questions Presented***

2 1. *Is the Association required to use federal funds to pay for voter registration,*
3 *GOTV, voter identification, and generic campaign activity that meet the definition*
4 *of federal election activity?*

5 2. *Is Jobs & Opportunity required to use federal funds to pay for voter registration,*
6 *GOTV, voter identification, and generic campaign activity that meet the definition*
7 *of federal election activity?*

8 ***Legal Analysis and Conclusions***

9 1. *Is the Association required to use federal funds to pay for voter registration,*
10 *GOTV, voter identification, and generic campaign activity that meet the definition*
11 *of federal election activity?*

12 Yes, because it is an “association . . . of individuals holding State or local office,”
13 the Association is required to use federal funds to pay for voter registration, GOTV, voter
14 identification, and generic campaign activity that meet the definition of federal election
15 activity.

16 The Act and Commission regulations require any “association or similar group”
17 of state or local candidates or officeholders to pay for “federal election activity” using
18 funds subject to the limitations, prohibitions, and reporting requirements of the Act.

19 2 U.S.C. § 441i(b)(1); 11 C.F.R. § 300.32(a)(1). Federal election activity includes voter
20 registration activity within 120 days before a federal election, and voter identification,
21 GOTV, and generic campaign activity conducted in connection with an election in which
22 a candidate for federal office appears on the ballot. 2 U.S.C. § 431(20)(A)(i)-(ii); 11
23 C.F.R. § 100.24(b).

1 The Association falls squarely within the express terms of section 441i(b): It is
2 “an association . . . of individuals holding State office,” *i.e.*, incumbent Democratic
3 governors. The Association argues that Congress intended this provision to reach only
4 intrastate organizations — those akin to “shadow” state parties — not interstate groups
5 like the Association. But the plain text of the statute encompasses, and does not
6 distinguish between, intrastate and interstate associations of individuals holding state or
7 local office. Indeed, after the Commission’s original implementation of section 441i(b)
8 exempted associations of state officeholders from some GOTV financing restrictions, a
9 federal court struck down the exemption as “contrary to Congress’s clearly expressed
10 intent” in section 441i(b). *Shays v. FEC*, 337 F. Supp. 2d 28, 102-04 (D.D.C. 2004); *see*
11 *also id.* at 102 (quoting plaintiffs’ identification of “the Democratic or Republican
12 Governors Association” as groups that could engage in “just the sort of circumvention
13 that BCRA sought to prevent” if they were exempted from section 441i(b)). The
14 Commission therefore concludes that 2 U.S.C. § 441i(b)(1) and 11 C.F.R. § 300.32(a)(1)
15 require the Association to use federal funds to pay for federal election activity, as defined
16 at 2 U.S.C. § 431(20).

17 2. *Is Jobs & Opportunity required to use federal funds to pay for voter registration,*
18 *GOTV, voter identification, and generic campaign activity that meet the definition*
19 *of federal election activity?*

20 Yes, Jobs & Opportunity is required to use federal funds to pay for voter
21 registration, GOTV, voter identification, and generic campaign activity that meet the
22 definition of federal election activity.

1 As discussed above, the Act and Commission regulations require any
2 “association or similar group” of state or local candidates or officeholders to pay for
3 federal election activity using funds subject to the limitations, prohibitions, and reporting
4 requirements of the Act. 2 U.S.C. § 441i(b)(1); 11 C.F.R. § 300.32(a)(1). In upholding
5 the constitutionality of section 441i(b), the Supreme Court noted that the provision was
6 part of a “coherent scheme” to ban the use of “large soft-money contributions to
7 influence federal elections.” *McConnell v. FEC*, 540 U.S. 93, 161 (2003).

8 The Association falls squarely within the prohibition on nonfederal funds of 2
9 U.S.C. § 441i(b). Thus, the requestors’ proposal with regard to Jobs & Opportunity
10 would permit the Association to do through Jobs & Opportunity what the Association
11 itself is prohibited from doing: use nonfederal funds to pay for voter registration, GOTV,
12 voter identification, and generic campaign activity. AOR at 2.

13 The proposal described by the requestors suggests that the Association will have
14 complete control of Jobs & Opportunity. Although the requestors describe these
15 organizations as “separate,” *id.*, the request states that “[Jobs & Opportunity]’s two
16 members are officers of the [Association],” namely, the Association’s executive director
17 and chief operating officer, *id.* at 2, 8; “[t]he group of persons that will decide how [Jobs
18 & Opportunity] spends its money will include [Association] officers and other
19 [Association] employees,” *id.* at 8; “[o]ther [Association] employees are likely to play a
20 role in the day-to-day operations of [Jobs & Opportunity],” *id.* at 8; and “it is possible
21 that [the Association] will provide funds to [Jobs & Opportunity],” *id.* Moreover, the
22 requestors assert that members of the Association — the nation’s Democratic governors
23 — will “generally” not play a role in deciding how Jobs & Opportunity’s funds are spent

1 or in its day-to-day operations in order to comply with state law prohibitions against
2 coordination. This caveated representation suggests that Association members will
3 indeed play such a role when state law does not so prohibit. *Id.*

4 In short, Jobs & Opportunity will be managed, staffed, and potentially funded by
5 the Association and its employees and members. In the context of corporate
6 contributions, the Commission has stated that “[c]ourts will disregard the fiction of a
7 separate legal entity when there is such domination of finances, policy, and practices by
8 the parent that the subsidiary has no separate existence of its own and is merely a
9 business conduit for its principal.” Conciliation Agreement in MUR 6168 (Park Federal
10 Savings Bank) at 2-3 (May 5, 2009). For these reasons, and because an entity “may not
11 do through another what [it] could not do directly,” Advisory Opinion 2007-27 (ActBlue)
12 (applying 2 U.S.C. § 441b), the Commission concludes that Jobs & Opportunity’s use of
13 nonfederal funds to pay for federal election activity would violate section 441i(b).¹
14 Accordingly, Jobs & Opportunity must use federal funds to pay for federal election
15 activity.

¹ Even if Jobs & Opportunity were not so closely intertwined with the Association, the control that the Association maintains over Jobs & Opportunity raises concerns about circumvention of section 441i(b). Section 441i(a) bars national political parties from raising or spending nonfederal funds specifically because Congress had “been taught the hard lesson of circumvention by the entire history of campaign finance regulation.” *McConnell v. FEC*, 540 U.S. 93, 161 (2003). Therefore, section 441i(b) was “designed to foreclose wholesale evasion of [section 441i(a)]’s anticorruption measures by sharply curbing state committees’ ability” to spend nonfederal funds in connection with federal elections. *Id.* The Court has similarly recognized in many other instances Congress’s important anticorruption interest in preventing circumvention of contribution limits and other campaign finance provisions. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 35-38 (1976) (upholding contribution limits that “serve the permissible purpose of preventing individuals from evading [other] contribution limits”); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 197-99 (1981) (upholding contribution limits to multicandidate committee on anticircumvention grounds); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (“[A]ll Members of the Court agree that circumvention is a valid theory of corruption.”).

1 This response constitutes an advisory opinion concerning the application of the
2 Act and Commission regulations to the specific transaction or activity set forth in your
3 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
4 any of the facts or assumptions presented, and such facts or assumptions are material to a
5 conclusion presented in this advisory opinion, then the requestors may not rely on that
6 conclusion as support for their proposed activity. Any person involved in any specific
7 transaction or activity that is indistinguishable in all its material aspects from the
8 transaction or activity with respect to which this advisory opinion is rendered may rely on
9 this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or
10 conclusions in this advisory opinion may be affected by subsequent developments in the
11 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
12 The cited advisory opinion is available from the Commission's Advisory Opinion
13 searchable database at <http://fec.gov/searchao>.

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On behalf of the Commission,

Ellen L. Weintraub
Chair