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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 9-12-13

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther *STW by SEP*
Commissioner

DATE: September 12, 2013

SUBJECT: AO 2013-04 (Democratic Governors Association/Jobs & Opportunity)
(Revised Draft A)

I request that the attached proposed draft of the subject advisory opinion be made available to the public and placed on the agenda for the September 12, 2013 Open Session.

Attachment

2

3 Marc E. Elias, Esq.

4 Jonathan S. Berkon, Esq.

5 Perkins Coie LLP

6 700 Thirteenth Street, N.W.

7 Suite 600

8 Washington, D.C. 20005-3960

9

10 Dear Messrs. Elias and Berkon:

REVISED DRAFT A

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 must use federal funds to
17 finance its federal election activity but that Jobs & Opportunity need not use federal
18 funds for the same activity.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 June 12, 2013, your email dated June 25, 2013, and your comments dated July 22, August
22 15 and September 3, 2013.

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

27 The Association’s mission is to support Democratic governors and gubernatorial
28 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 contributions outside the
4 amount limitations and source prohibitions of the Act (“nonfederal funds”). As required
5 by state law, the Association registers committees with state campaign-finance agencies
6 and maintains state-specific accounts that comply with state source restrictions and
7 amount limitations. Through these state-specific accounts, the Association spends
8 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; no officeholders or candidates will be members of Jobs &
13 Opportunity. Jobs & Opportunity plans to make “independent expenditures” in selected
14 gubernatorial races. To comply with state prohibitions on coordination, the Association’s
15 members “will generally not play a role” in decisions about Jobs & Opportunity’s daily
16 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, will use
21 nonfederal funds to pay for public communications that promote, support, attack, or
22 oppose federal candidates.

23

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 plain text of the statute encompasses groups like the Association. The
4 Commission therefore concludes that 2 U.S.C. § 441i(b)(1) and 11 C.F.R. § 300.32(a)(1)
5 require the Association to use federal funds to pay for federal election activity, as defined
6 at 2 U.S.C. § 431(20).

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

10 No, based on the facts set forth by Requestors, Jobs & Opportunity is not required
11 to use federal funds to pay for voter registration, GOTV, voter identification, or generic
12 campaign activity that meet the definition of federal election activity.

13 As discussed above, the Act and Commission regulations require any “association
14 or similar group” of state or local candidates or officeholders to pay for federal election
15 activity using funds subject to the limitations, prohibitions, and reporting requirements of
16 the Act. 2 U.S.C. § 441i(b)(1); 11 C.F.R. § 300.32(a)(1). The same provision of the Act
17 also applies to state and local party committees — a category parenthetically defined to
18 include “an entity that is directly or indirectly established, financed, maintained, or
19 controlled” by a state or local party committee, as well as “officer[s] or agent[s] acting on
20 behalf of” such party committees or entities. 2 U.S.C. § 441i(b)(1); 11 C.F.R.
21 § 300.32(a)(1). The location of this parenthetical in the statutory text indicates that it
22 applies only to state and local party committees, and not to associations of state or local
23 candidate or officeholders. By implication, section 441i(b) does *not* define such

1 associations to include entities established, financed, maintained, or controlled by those
2 associations or by their agents. Thus, the sole issue presented by this question is whether
3 Jobs & Opportunity is itself an “association or similar group” of state candidates or
4 officeholders within the meaning of section 441i(b).

5 It is not. According to the Requestors, Jobs & Opportunity is a “separate legal
6 entity from [the Association]....” Aug. 15 Comment at 1. Moreover, the Requestor
7 indicates that the Association’s members – the nation’s Democratic governors – will
8 generally be precluded by law from requesting or suggesting how Jobs & Opportunity’s
9 funds are spent. July 22 Comment at 6. While Jobs & Opportunity’s own members will
10 be Association officers, and other Association employees will play a role in its day-to-
11 day operations, these facts standing alone do not preclude Requestors’ proposed conduct
12 given the specific wording of Section 441i(b)(1) discussed above. As such, the
13 Commission concludes that Jobs & Opportunity is not required to use federal funds to
14 pay for the activity described in the request.

15 The Commission reaches this conclusion based on representations from the
16 Association and Jobs & Opportunity that the two unincorporated political organizations
17 are, and will remain, two separate legal independent entities, and that Jobs & Opportunity
18 is not merely an ‘alter ego’ of the Association. This result would necessarily be different
19 if there was such “domination of [Jobs & Opportunity’s] finances, policy, and practices”
20 by the Association such that Jobs & Opportunity would have “no separate existence of its
21 own” and be “merely a business conduit” *See* Conciliation Agreement in MUR
22 6168 (Park Federal Savings Bank) at 2-3 (May 5, 2009) (analyzing the ‘alter ego’
23 doctrine in the context of corporate contributions).

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 On behalf of the Commission,
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15

16 Ellen L. Weintraub
17 Chair