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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 13-31-B**  
**AGENDA ITEM**  
**For meeting of July 25, 2013**  
**[SUBMITTED LATE]**

July 25, 2013

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*  
Deputy General Counsel

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Subject: AO 2013-04 (Democratic Governors Association/Jobs & Opportunity) (Draft C)

Attached is a proposed draft of the subject advisory opinion.

Attachment

1 ADVISORY OPINION 2013-04

2

3 Marc E. Elias, Esq.

**DRAFT C**

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:

11 We are responding to your advisory opinion request on behalf of the Democratic  
12 Governors Association (“DGA”) and Jobs & Opportunity (“J&O”). 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 neither DGA nor J&O are required to use  
17 federal funds to finance its federal election activity.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on  
20 June 12, 2013, and your email dated June 25, 2013.

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

25 DGA’s mission is to support Democratic governors and gubernatorial candidates.  
26 It maintains a staff that provides strategic advice to gubernatorial campaigns, highlights  
27 achievements of Democratic governors, provides policy guidance to Democratic  
28 governors, and criticizes the policies of Republican governors.

1           To pay for its operations, DGA accepts contributions outside the amount  
2 limitations and source prohibitions of the Act (“nonfederal funds”). As required by state  
3 law, DGA registers committees with state campaign-finance agencies and maintains  
4 state-specific accounts that comply with state source restrictions and amount limitations.  
5 Through these state-specific accounts, DGA spends nonfederal funds.

6           J&O will be a political organization under section 527 of the Internal Revenue  
7 Code and an unincorporated association under Washington, D.C., law. J&O’s members  
8 will consist only of the DGA’s executive director and its chief operating officer J&O.  
9 J&O plans to make “independent expenditures” in selected gubernatorial races. To  
10 comply with state prohibitions on coordination, DGA’s members “will generally not play  
11 a role” in decisions about J&O’s daily operations or how it spends its funds.

12           DGA and J&O will make disbursements for voter registration, GOTV activities,  
13 voter identification, and generic campaign activities in connection with the 2014  
14 elections. DGA and J&O plan to use nonfederal funds to pay for these activities. Neither  
15 organization, however, will use nonfederal funds to pay for public communications that  
16 promote, support, attack, or oppose federal candidates.

17

18    ***Questions Presented***

19        1. *Is DGA required to use federal funds to pay for voter registration, GOTV, voter*  
20            *identification, and generic campaign activity that meet the definition of federal*  
21            *election activity?*

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

4       ***Legal Analysis and Conclusions***

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

8           No, DGA is not required to use federal funds to pay for voter registration, GOTV,  
9 voter identification, and generic campaign activity that meet the definition of federal  
10 election activity because it is not the type of organization that qualifies as an “association  
11 . . . of individuals holding State or local office.”.

12           Indisputably, the Act and Commission regulations require any “association or  
13 similar group” of state or local candidates or officeholders to pay for “federal election  
14 activity” using funds subject to the limitations, prohibitions, and reporting requirements  
15 of the Act. 2 U.S.C. § 441i(b)(1); 11 C.F.R. § 300.32(a)(1). Federal election activity  
16 includes voter registration activity within 120 days before a federal election, and voter  
17 identification, GOTV, and generic campaign activity conducted in connection with an  
18 election in which a candidate for federal office appears on the ballot. 2 U.S.C. §  
19 431(20)(A)(i)-(ii); 11 C.F.R. § 100.24(b).

20           The real question presented by this request, though, is not *whether* an “association  
21 or similar group of . . . individuals holding State or local office,” must finance federal  
22 election activity with federal funds but rather *what* organizations are appropriately  
23 considered “association[s] or similar group[s] of . . . individuals holding State or local

1 office” for purposes of the Act. The Act does not provide any detail on what  
2 organizations would qualify as associations or similar groups of State or local candidate  
3 or officeholders, nor do Commission regulations define the term. Yet, the Commission’s  
4 interpretation of this term should extend no broader than is necessary to fulfill the  
5 purpose of the Act. Congress included within the scope of 441b “association[s] or similar  
6 group[s] of candidates for State or local office or of individuals holding State or local  
7 office” in order to prevent “shadow party” organizations from circumventing the federal  
8 election activity financing restrictions imposed upon state, district, and local party  
9 committees. The restrictions imposed upon state, district, and local party committees are  
10 themselves anticircumvention measures designed to prevent these party committees, with  
11 their close ties to federal candidates, from becoming a conduit for soft-money donations  
12 that the national parties could no longer accept. *McConnell v. FEC*, 540 U.S. 93, 161  
13 (2003). Those restrictions, of course, exist to prevent the national party committees from  
14 “peddling access to federal candidates and officeholders in exchange for large soft-  
15 money donations.” *Id.* at 150.

16 In order to vindicate the section 441b’s anticircumvention goals, then, the term  
17 “association or similar group of candidates for State or local office or of individuals  
18 holding State or local office” need only cover those organizations that both occupy the  
19 role of a state, district, or local party committee *and* have the same close ties to federal  
20 candidates such that donations to them could be exchanged for access.

21 The DGA does not pass this test. First, the DGA lacks all the features of state or  
22 local party committees. It is national in scope; its members do not engage, on behalf of  
23 the organization, in intrastate activities, and it has no ability to nominate candidates or

1 place them on the ballot. Indeed, it enjoys none of the benefits under state law that are  
2 afforded to state, district or local party committees; instead, it is treated for purposes of  
3 state law as a regular political committee. Second, the DGA lacks sufficient “close ties”  
4 with federal candidates such that it could render the Act’s anticorruption measures  
5 ineffective. It is not part of the national party structure nor is it part of any state party  
6 structure. DGA’s membership is limited to no more than one nonfederal officeholder  
7 from each state. In short, DGA does not afford its donors the same access to Federal  
8 candidates or officeholders as a national, state, or local party committee.

9 No valid anticircumvention concern is advanced by classifying a group like DGA  
10 an association or similar group of individuals holding State or local office for purposes of  
11 section 441b. Accordingly, it does not have to finance its voter registration, GOTV, voter  
12 identification, and generic campaign activity with Federal funds.

13 2. *Is J&O required to use federal funds to pay for voter registration, GOTV, voter*  
14 *identification, and generic campaign activity that meet the definition of federal*  
15 *election activity?*

16 No, J&O is not required to use federal funds to pay for voter registration, GOTV,  
17 voter identification, or generic campaign activity that meet the definition of federal  
18 election activity.

19 For all the reasons discussed above, J&O is not “association or similar  
20 group of candidates for State or local office or of individuals holding State or local  
21 office” for purposes of section 441b. Indeed, any circumvention concerns presented by  
22 J&O’s financing of activity that meets the definition of federal election activity are even  
23 more attenuated than with DGA. Regulation of J&O – an organization that is

1 functionally independent of any candidate – would advance none of the anticorruption  
2 concerns on which the Act is based. As such, the Commission concludes that section  
3 441i(b) does not require J&O to use federal funds to pay for the federal election activity  
4 described in the request because J&O will not be an “association or similar group” of  
5 state or local candidates or officeholders.

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

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On behalf of the Commission,

Ellen L. Weintraub  
Chair