



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office 

DATE: August 15, 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. This matter is on the August 22, 2013 Open Meeting Agenda.

Attachment

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August 15, 2013

BY HAND DELIVERY

Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
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Washington, D.C. 20463

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2013 AUG 15 PM 3:06

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 follow up to the Commission’s consideration of Advisory Opinion 2013-04. During the hearing held on July 25, 2013, several commissioners expressed interest in modifying Draft A to clarify that J&O could not rely on the advisory opinion if, at some point in the future, it were not recognized as a separate legal entity from DGA under Washington D.C. law. We believe that adding a footnote to the end of the sentence on page 5, line 16 of Draft A would be sufficient in this regard. The footnote could 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.”

We also would like to take this opportunity to clarify that J&O is currently a separate legal entity from DGA under Washington D.C. law. Washington D.C. has adopted the Uniform Unincorporated Nonprofit Association Act (“UNA Act”). *See* D.C. Code § 29-1101. Under the UNA Act, an unincorporated nonprofit association is “an unincorporated 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.” *Id.* § 29-1102(5). This year, Colin O’Comartun and Bea Metcalf, neither of whom is a state or local officeholder or candidate, joined under a written agreement – known under the UNA Act as “governing principles” – for the purpose of making independent expenditures in support of Democratic candidates for

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governor. J&O obtained a separate employee identification number from the IRS and notified the IRS of its status as a section 527 political organization by filing Form 8871.

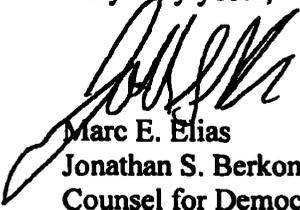
As a duly formed nonprofit unincorporated association, J&O now enjoys the full panoply of rights and obligations afforded to such associations under Washington D.C. law. J&O is a "legal entity distinct from its members and managers." *Id.* § 29-1105(a). J&O "may acquire, hold, encumber, or transfer in its name an interest in property" and "may be a beneficiary of a trust or contract, a legatee, or a devisee." *Id.* § 29-1106. Its debts, obligations, and liabilities are solely its own, *id.* § 29-1108(a)(1), and J&O has "the capacity to sue and be sued in its own name." *Id.* § 29-1109(a). J&O's governing principles confer to the membership the sole authority to select the association's management and, concurrently with the appointed manager, the legal authority to manage the association's property, affairs, and business. J&O's members may only be expelled by a vote of the majority of members and new members may be admitted only with the approval of the two founding members, Mr. O'Comartun and Mr. Metcalf. As previously stated, no state or local officeholders or candidates will be admitted as members of J&O or appointed to its management. As a result, there will be no overlapping membership between DGA and J&O.

Theoretically, there could be circumstances in which one duly formed unincorporated association is found to be the "alter ego" of another. See Nicholas G. Karambelas, "Viable Alternative: The Uniform Unincorporated Nonprofit Association Act," D.C. Bar Association, *available at* http://www.dcbar.org/for_bjwyers/resources/publications/washington_lawyer/august_2003/viable.cfm ("There is no apparent reported case law in the District of Columbia on disregarding the limited liability of an unincorporated entity ... Therefore a party seeking to cause the limited liability of a UNA to be disregarded would have to analogize from the case law that 'pierces the veil' of a corporation or look to the case law of other jurisdictions.") But the respective structures of DGA and J&O render that outcome highly unlikely. To pierce the corporate veil, "the party seeking to disregard the corporate entity [must] prove[] by affirmative evidence that there is (1) unity of ownership and interest, and (2) use of the corporate form to perpetrate fraud or wrong." *Vuitch v. Furr*, 482 A.2d 811, 815 (D.C. 1984). In other words, one must show "not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice *in respect to the transaction attacked* so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." *Id.*, n. 5. (emphasis added) (internal citations and quotations omitted). Far from having "complete domination" over the transaction at issue – whether to spend J&O funds on federal election activity – DGA's members would not generally play any role in that decision, due to their lack of authority over J&O's operations and the presence of a strict firewall to comply with state coordination laws.

DGA and J&O are recognized as separate legal entities under Washington D.C. law. While we think the prospect of this changing in the future is highly unlikely, we would not object to the inclusion of the footnote suggested earlier in these comments.

August 15, 2013
Page 3

Very truly yours,

A handwritten signature in black ink, appearing to read 'Jonathan S. Berkon', written over the typed name.

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