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

Marc Erik Elias
Jonathan S. Berkon
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com
JBerkon@perkinscoie.com

Perkins Coie

700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscoie.com

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 *Vuitch 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 electioneering 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 reasons that, despite *excluding* 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 advocated 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 relies on agency concepts 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.

---

[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
Jonathan S. Berkon
Counsel for Democratic Governors Association and Jobs & Opportunity

[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.