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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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

July 24, 2013

MEMORANDUM

TO: The Commission

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

Adav Noti *AN*
Acting Associate General Counsel

Amy Rothstein *ARR*
Assistant General Counsel

Esther Heiden *EH*
Attorney

Theodore M. Lutz *TML*
Attorney

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

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.

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:

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, and your email dated June 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 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, Jobs & Opportunity is not required to use federal funds to pay for voter
11 registration, GOTV, voter identification, or generic campaign activity that meet the
12 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). This requirement also applies
17 to state and local party committees — a category that the statute parenthetically defines 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). Section 441i(b) does *not*, however, define associations of state or local
22 officeholders to include entities established, financed, maintained, or controlled by those
23 associations or by their agents. Further, the Commission’s regulatory implementation of

1 section 441i does not encompass such entities. *See* 11 C.F.R. § 300.2(c) (providing that
2 regulatory definition of “directly or indirectly establish, finance, maintain, or control” for
3 purposes of section 441i applies “to national, State, district, and local committees of a
4 political party, candidates, and holders of Federal office”). Thus, the sole issue presented
5 by this question is whether Jobs & Opportunity is an “association or similar group” of
6 state candidates or officeholders within the meaning of section 441i(b).

7 The Commission concludes it is not. The request indicates that the members of
8 Jobs & Opportunity will include the Association’s executive director and its chief
9 operating officer; other Association employees are likely to play a role in the day-to-day
10 operations of the organization. Persons that will decide how Jobs & Opportunity spends
11 its money will include Association officers and employees. The potential involvement of
12 the Association’s *members* in Jobs & Opportunity’s spending and operations will not
13 fundamentally alter the essential nature of Jobs & Opportunity such that it would, itself,
14 become an “association or similar group” of state officeholders. As such, the
15 Commission concludes that Jobs & Opportunity is not required to use federal funds to
16 pay for the activity described in the request.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
20 any of the facts or assumptions presented, and such facts or assumptions are material to a
21 conclusion presented in this advisory opinion, then the requestors may not rely on that
22 conclusion as support for their proposed activity. Any person involved in any specific
23 transaction or activity that is indistinguishable in all its material aspects from the

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

5 On behalf of the Commission,
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7
8

9 Ellen L. Weintraub
10 Chair