

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFTS A and B of ADVISORY OPINION 2012-19 are now available for comment. They were requested by Jason Torchinsky, Esq., and Michael Bayes, Esq., on behalf of the American Future Fund, and are scheduled to be considered by the Commission at its public meeting on June 7, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFTS A and B of ADVISORY OPINION 2012-19, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on June 6, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-19, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 12-44



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2012 MAY 31 P 4:39

May 31, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman
General Counsel

*pch
for AH*

For Meeting of 6-7-12

Kevin Deeley *KE*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Erin Chlopak *ERC*
Attorney

Subject: AO 2012-19 (American Future Fund) – Drafts A and B

Attached are two proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for June 7, 2012.

Attachment

1 ADVISORY OPINION 2012-19

2

3 Jason Torchinsky, Esq.

DRAFT A

4 Michael Bayes, Esq.

5 Holtzman Vogel Josefiak PLLC

6 45 North Hill Drive

7 Suite 100

8 Warrenton, VA 20186

9

10 Dear Messrs. Torchinsky and Bayes:

11 We are responding to your advisory opinion request on behalf of American Future
12 Fund (“AFF”) concerning the application of the Federal Election Campaign Act, as
13 amended (the “Act”), and Commission regulations to AFF’s proposed plan to produce
14 and distribute a series of broadcast television advertisements within 30 days of upcoming
15 primary elections and within 60 days of the November general election on both local
16 broadcast television stations and national cable outlets.

17 The Commission concludes that none of AFF’s proposed advertisements would
18 constitute an electioneering communication.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 April 19, 2012, including Exhibits 1-8, and your email received on April 26, 2012.

22 AFF plans to produce and distribute a series of broadcast television
23 advertisements within 30 days of upcoming primary elections and within 60 days of the
24 November general election, on both local broadcast television stations and national cable
25 outlets. According to AFF, these advertisements are “about American energy policy, the
26 proposal to require religious institutions to pay for insurance policies that cover certain
27 abortion-causing drugs (abortifacients), and the Patient Protection and Affordable Care

1 Act in general.” AOR at 1. The complete scripts of proposed Advertisements 1-8 are
2 attached to this advisory opinion.

3 AFF seeks to broadcast its proposed advertisements without making the
4 disclosures or including the disclaimers that the Act requires by those who finance
5 electioneering communications. AOR at 1; *see* 2 U.S.C. 434(f), 441d(a), 441d(d)(2).

6 ***Question Presented***

7 *Do proposed Advertisements 1 through 8 contain any references to a clearly*
8 *identified candidate?*

9 ***Legal Analysis and Conclusions***

10 No – none of AFF’s eight proposed advertisements refers to a clearly identified
11 Federal candidate and thus would not constitute electioneering communications under 2
12 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29.

13 The Act and Commission regulations define “electioneering communication” as
14 any broadcast, cable, or satellite communication that (1) refers to a clearly identified
15 Federal candidate; (2) is publicly distributed within 30 days before a primary election or
16 60 days before a general election; and (3) is targeted to the relevant electorate. 2 U.S.C.
17 434(f)(3)(A)(i); 11 CFR 100.29(a). AFF’s request acknowledges that each of AFF’s
18 proposed advertisements satisfies prongs two and three of this test. AFF asks whether any
19 of the proposed advertisements refers to a clearly identified Federal candidate.

20 The term “[r]efers to a clearly identified candidate means that the candidate’s
21 name, nickname, photograph, or drawing appears, or the identity of the candidate is
22 otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your
23 Congressman,’ or ‘the incumbent,’ or through an unambiguous reference to his or her

1 status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican
2 candidate for Senate in the State of Georgia.’” 11 CFR 100.29(b)(2). *See also* 2 U.S.C.
3 431(18); 11 CFR 100.17.

4 As explained in the Explanation and Justification for the electioneering
5 communications rulemaking, the regulatory definition of “refers to a clearly identified
6 candidate” is consistent with the floor statement made by Senator Feingold, one of the
7 principal sponsors of the Bipartisan Campaign Reform Act (“BCRA”) that enacted the
8 electioneering communications provision. Explanation and Justification for Final Rules
9 on Electioneering Communications, 67 Fed. Reg. 65190, 65192 (Oct. 23, 2002). In a
10 colloquy with Senator Collins, Senator Feingold explained that the phrase “refers to a
11 clearly identified candidate,” as used in BCRA’s electioneering communications
12 provision, is “precisely defined” in the preexisting Federal Election Campaign Act. 148
13 Cong. Rec. S2144 (daily ed. Mar. 20, 2002).

14 In *Buckley v. Valeo*, the Supreme Court interpreted the Act’s definition of “clearly
15 identified” to require that:

16 [T]he candidate's name, photograph or drawing, or other unambiguous
17 reference to his identity appear as part of the communication. Such other
18 unambiguous reference would include use of the candidate's initials (e. g.,
19 FDR), the candidate's nickname (e. g., Ike), his office (e. g., the President
20 or the Governor of Iowa), or his status as a candidate (e. g., the
21 Democratic Presidential nominee, the senatorial candidate of the
22 Republican Party of Georgia).

23
24 424 U.S. 1, 44 n.51 (1976).

25 ***Advertisement 1***

26 AFF proposes three substantively similar advertisements that criticize current
27 American energy policy and conclude by stating that “it’s time for an American energy

1 plan . . . that actually works for America.” AOR, Exhs. 1, 2, 3 (emphasis in the original).
2 Advertisement 1, the first of those three advertisements, attributes current America
3 energy policy to “this Administration,” “the Administration,” and “the White House.” It
4 features an announcer who asserts, “[s]ince this Administration began, gas prices are up
5 104%,” and who purports to quote “[t]he White House” (while the advertisement displays
6 an “image of the White House”) as “say[ing]: We must end our dependence on foreign
7 oil.” The announcer also asserts that “the Administration stopped American energy
8 exploration” and “banned most American oil and gas production,” and that “the White
9 House wants foreign countries to drill — so we can buy from *them*,” while the video
10 shows a “b-roll of ‘Denied’ Stamp with image of White House.” AOR, Exhibit 1
11 (emphasis in the original). The advertisement concludes by displaying the text, “Call the
12 White House at (202) 456-1414,” while the announcer instructs viewers to “[t]ell the
13 White House it’s time for an American energy plan . . . that actually works for America.”
14 *Id.* (emphasis in the original).

15 Advertisement 1 does not include any candidate’s name, nickname, photograph,
16 or drawing. Thus, the question is whether the references to “this Administration,” “the
17 Administration,” and “the White House,” as well as the instruction to “Call the White
18 House” and the visual depiction of the White House, are unambiguous references to a
19 candidate. None of these phrases or images is comparable to a candidate’s initials,
20 nickname, office held, or status as a candidate identified by the Supreme Court and
21 Commission regulations as the types of unambiguous references covered by the “clearly
22 identified” standard.

1 Just as a communication that references “Congress,” includes a depiction of the
2 Capitol, and exhorts viewers to “Call Congress” is a discussion about the legislative
3 branch of the federal government, the references in Advertisement 1 to “this
4 Administration,” “the Administration,” and “the White House,” and the exhortation to
5 “Call the White House” are a discussion about the executive branch, which consists of
6 many executive agencies staffed by officials who are not candidates for reelection.¹

7 Lastly, as discussed above, the legislative history shows Congress intended to
8 import the concept of “clearly identified candidate” from the Act’s preexisting treatment
9 of independent expenditures. 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002);² *see also*
10 11 CFR 100.16 and 100.17. Thus, any conclusions the Commission reaches about the
11 concept of “clearly identified candidate” in the context of electioneering communications
12 would apply also in the context of independent expenditures. If the Commission were to
13 conclude that the terms “Administration,” “the Administration,” and “the White House”
14 were references to a “clearly identified candidate,” then “magic words” of express
15 advocacy, such as “Support” or “Oppose,” when used in conjunction with these terms
16 would lead to the absurd result that an issue ad exhorting viewers to contact members of

¹ *See, e.g.,* Lawrence Morris, *Catholic University’s lawsuit against the federal government is a matter of religious liberty*, Washington Post (May 24, 2012, 12:38PM), http://www.washingtonpost.com/local/catholic-universitys-lawsuit-against-the-federal-govt-is-a-matter-of-religious-liberty/2012/05/24/gJQASkiPnU_story.html (“[T]he administration has refused to take seriously our profoundly held conviction that the mandate from the Department of Health and Human Services intrudes on our constitutionally protected religious liberty”) (emphasis added); John M. Broder and Clifford Krauss, *New and Frozen Frontier Awaits Offshore Oil Drilling*, Pittsburgh Post-Gazette (May 24, 2012, 1:03pm) (“There were skeptics within the administration, including [Environment Protection Agency Administrator Carol] Browner, who left the White House before the critical decisions were made.”) (emphasis added).

² Prior to BCRA, the Act used the concept of “clearly identified candidate” only in the context of independent expenditures containing express advocacy. 2 U.S.C. 431(17).

1 Congress to “Support the Administration” on a legislative matter may also constitute an
2 independent expenditure.

3 For these reasons, the Commission concludes that the voice-over, visual, and
4 textual references in Advertisement 1 do not unambiguously refer to President Obama.

5 ***Advertisement 2***

6 Advertisement 2 is nearly identical to Advertisement 1, but it omits the references
7 to “this Administration,” “the Administration,” and “the White House,” as well as the
8 images of the White House, substituting general references to “the government” and
9 images of the Washington Monument. In place of the narrator, it substitutes at one point a
10 three-second audio clip of President Obama’s voice stating, “We must end our
11 dependence on foreign oil...” The clip is introduced by an announcer who attributes the
12 statement to “[t]he government.”

13 For the reasons discussed above with respect to Advertisement 1, the references to
14 “the government” and images of the Washington monument in Advertisement 2 are not
15 references to a clearly identified federal candidate. With respect to the inclusion of an
16 audio clip of President Obama’s voice discussing his energy policy, as discussed above,
17 the legislative history of BCRA demonstrates Congress intended to import the Act’s
18 preexisting definition of “clearly identified candidate” into the electioneering
19 communications definition. Congress is also presumed to have carried forth the Supreme
20 Court’s interpretation in *Buckley* of that statutory definition.³ The Act and the Court’s
21 opinion very clearly set forth visual depictions of a candidate as being one of the means

³ See, e.g., *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944) (noting “the general rule that adoption of the wording of a statute . . . carries with it the previous judicial interpretations of the wording.”)

1 by which a candidate could be “clearly identified,” but omitted the mere use of audio of a
2 candidate’s voice. Accordingly, the Commission concludes the inclusion of an audio clip
3 of President Obama’s voice also is not a reference to a clearly identified candidate for
4 Federal office.

5 ***Advertisement 3***

6 Advertisement 3 is similar to Advertisements 1 and 2. It omits the audio clip of
7 President Obama’s voice in Advertisement 2, substituting an audio clip of the White
8 House Press Secretary making the same statement, “[w]e must end our dependence on
9 foreign oil.” Like Advertisement 2, this advertisement also omits any references to “this
10 Administration” or “the Administration,” substituting general references to “the
11 government” and including images of the Washington Monument rather than of the
12 White House. Advertisement 3, like Advertisement 1, however, concludes with an on-
13 screen textual directive to “[c]all the White House at (202) 456-1414.”

14 For the same reasoning discussed with respect to Advertisement 1, Advertisement
15 3 does not refer to a clearly identified candidate. References to “the government” and
16 images of the White House are no more references to a “clearly identified candidate” than
17 were the terms “Administration,” “the Administration,” or “the White House” in
18 Advertisement 1. The inclusion of an audio clip of the White House Press Secretary’s
19 voice in Advertisement 3 also is not a reference to a clearly identified candidate because
20 the White House Press Secretary is an employee of the federal government and is not
21 himself a candidate.

22

23

1 ***Advertisement 4***

2 AFF proposes two alternative advertisements that discuss “a proposed
3 requirement forcing ‘religious institutions to pay for abortion-causing drugs.’” AOR at 3
4 & Exhs. 4-5. Both Advertisements 4 and 5 conclude with an announcer instructing
5 viewers to “[c]all Secretary Sebelius” and “tell her it’s wrong . . . to trample the most
6 basic American right.” Advertisement 4 attributes the policy to Secretary Sebelius and
7 “the Government,” and includes “a visual depiction of the Health and Human Services
8 Building in Washington, DC.”

9 Advertisement 4 does not contain any reference to a clearly identified candidate.
10 It clearly identifies “Secretary Sebelius,” but she is not a candidate for Federal office.
11 Accordingly, Advertisement 4 does not include any audio or visual reference to a Federal
12 candidate, and it does not otherwise identify a Federal candidate through an unambiguous
13 reference. *Buckley*, 424 U.S. at 44 n.51; 11 CFR 100.29(b)(2).

14 ***Advertisement 5***

15 Advertisement 5 addresses the same topic as Advertisement 4, but attributes the
16 policy it criticizes not only to “Secretary Sebelius” and “the Government,” but also to
17 “the Administration.” In addition, Advertisement 5, unlike Advertisement 4, concludes
18 with video of “White House footage and images,” while an announcer instructs viewers
19 to “[c]all Secretary Sebelius, tell her it’s wrong for her *and the Administration* to trample
20 the most basic American right.” AOR, Exh. 5 (emphasis added).

21 The reference to “the Administration” in Advertisement 5 broadens the discussion
22 from Advertisement 4 to one about the executive branch in general, of which Secretary

1 Sebelius and the Department of Health and Human Services are a part.⁴ As discussed
2 above, Secretary Sebelius and other officials and staff of the Department of Health and
3 Human Services and “the Administration” are not candidates, and thus references to these
4 individuals and entities are not references to candidates within the meaning of the Act
5 and Commission regulations.

6 ***Advertisement 6***

7 AFF proposes two alternative advertisements that criticize the Patient Protection
8 and Affordable Care Act (“Affordable Care Act”), including by noting its second
9 anniversary and using the metaphor of “The Terrible Twos.” AOR, Exhs. 6-7.

10 Advertisement 6 refers to the law as “government run healthcare,” the “health care law,”
11 and “national, government run healthcare.” It also includes two textual references to the
12 “White House.” In both instances, the text reads: “‘White House will not mark two-year
13 anniversary’ of health care law (Washington Free Beacon, 3/19/12).”

14 Here, as in the earlier proposed advertisements that reference the “White House,”
15 the term can be understood as a reference to the elected and unelected officials and staff
16 of the executive branch, whom the advertisements apparently regard as the health care
17 law’s “parents” and “family,” and who “will not mark [its] two-year anniversary.”

18 ***Advertisement 7***

19 Advertisement 7 is identical to Advertisement 6, except that it substitutes
20 “Obamacare” for the alternative references to the Affordable Care Act included in
21 Advertisement 6. Advertisement 7 includes four textual references and two audio, voice-
22 over references to “Obamacare,” and two of the textual references appear in a sentence

⁴ See *supra*, note 1.

1 that also references the “White House”: ““White House will not mark two-year
2 anniversary of Obamacare’ (Washington Free Beacon, 3/19/12).”

3 For the reasons explained above, the references to the “White House” in
4 Advertisement 7 also are not references to a clearly identified candidate for Federal
5 office. In addition, for the reasons explained below, the six proposed references to
6 “Obamacare” in Advertisement 7 also are not references to President Obama, a clearly
7 identified candidate for Federal office.

8 As AFF notes, AQR at 9, the Commission considered and did not adopt a
9 regulatory exemption from the definition of “refers to a clearly identified candidate” for
10 “communications that mention a candidate’s name only as part of a popular name of a
11 bill.” Explanation and Justification, Final Rules on Electioneering Communications, 67
12 FR 65190, 65201 (Oct. 23, 2002) (“Electioneering Communications E&J”). However, it
13 would be begging the question to assume the lack of such an exemption leads *ipso facto*
14 to the conclusion that, as a threshold matter, references to legislation that incorporate a
15 candidate’s name necessarily refer to a clearly identified candidate. The Commission
16 certainly did not make such a categorical statement in the Electioneering
17 Communications E&J.

18 As the Commission stated in Advisory Opinion 2004-31 (Darrow), in the context
19 of the Commission’s decision not to adopt a similar exemption for business
20 advertisements:

21 The decision not to adopt a blanket exemption for such communications,
22 however, does not preclude the Commission from making a determination
23 that the specific facts and circumstances of a particular case indicate that
24 certain advertisements do not refer to a clearly identified Federal candidate
25 and, hence, do not constitute electioneering communications.

1 In AO 2004-31, the Commission concluded that “radio and television
2 advertisements that include the name ‘Russ Darrow’,” which was also the candidate’s
3 name, were not electioneering communications because they did not refer to a clearly
4 identified candidate. Instead, the Commission concluded the name “Russ Darrow” as
5 used in ads sponsored by a car dealership were references to the dealer or to Russ Darrow
6 III (the candidate’s son), who “has been the public face of the company for more than ten
7 years.” *Id.* Moreover, most of the references to “Russ Darrow” were included as part of
8 the full name of particular dealerships, such as “Russ Darrow Toyota,” “Russ Darrow
9 Kia,” and “Russ Darrow Cadillac.” *Id.*

10 Similarly, here, on the plain face of AFF’s proposed ad, the reference to
11 “Obamacare” is clearly a reference to legislation rather than to candidate President
12 Obama himself. If the Commission were to conclude otherwise, “Obamacare” would
13 have to be treated as being interchangeable with President Barack Obama, and the text in
14 Advertisement 7 would have to be understood as saying, “White House will not mark
15 two-year anniversary of President Barack Obama,” which obviously is not what the
16 communication means.

17 Moreover, as in AO 2004-31, the name “Obama” is not used on its own, but
18 rather as part of the name of something else – in this case, the moniker that has been
19 adopted by President Obama, his opponents, the media, and the public for the Patient
20 Protection and Affordable Care Act. AOR at 8 (citing Chris Cilliza and Aaron Blake,
21 *President Obama embraces ‘Obamacare’ label. But why?*, Washington Post (Mar. 26,
22 2012) and Jeff Mason, *Obama campaign: Obamacare not a bad word after all*, Reuters
23 (Mar. 26, 2012)). Thus, for the same reason “Russ Darrow Toyota” was a reference to a

1 car dealership and not a reference to Russ Darrow the candidate in AO 2004-31, here
2 “Obamacare” is a reference to the health care legislation and not a reference to President
3 Barack Obama the candidate. Lastly, just as Russ Darrow the candidate did not appear in
4 the ads in AO 2004-31, President Barack Obama does not appear and is not depicted in
5 any visual or auditory manner here, in contrast with Advertisement 2 discussed above.

6 Even assuming the term “Obamacare” falls within the ambit of what it means to
7 “refer[] to a clearly identified candidate,” the term does not fall within the legislative
8 intent behind BCRA’s electioneering communications provision. The statute itself
9 permits the Commission to promulgate any exemption for an ad that otherwise would
10 meet the definition of an electioneering communication, so long as the ad does not
11 promote or support or attack or oppose (“PASO”) a candidate. 2 U.S.C. 434(f)(3)(B)(iii).
12 The Commission’s explanation for its decision not to adopt a blanket exemption for
13 names of legislation echoes the statute’s intent: “[C]ommunications that mention a
14 candidate’s name only as part of a popular name of a bill can nevertheless be crafted in a
15 manner that *could* reasonably be understood to promote, support, attack or oppose a
16 candidate.” Explanation and Justification for Final Rules on Electioneering
17 Communications, 67 Fed. Reg. 65190, 65201 (Oct. 23, 2002) (*emphasis added*).

18 The Commission did not conclude that the use of a candidate’s name as part of
19 the popular name of a bill *would necessarily* PASO a candidate. Rather, the Commission
20 did not adopt a blanket exemption because of *the possibility* that, in some instances, such
21 a reference *could* PASO a candidate. Here, Advertisement 6 can reasonably be
22 understood as attacking or opposing the Patient Protection and Affordable Care Act, as
23 well as its “parents” and its “family”, and it links the legislation to the “White House”

1 and the “government.” As explained above, these words and phrases are references to the
2 executive branch of the federal government and not to a candidate. Thus, even assuming
3 *arguendo* the term “Obamacare” as used in Advertisement 6 falls within the ambit of
4 what it means to “refer[] to a clearly identified candidate,” the communication PASOs the
5 executive branch rather than any candidate, and thus it would not violate BCRA’s
6 legislative intent for the Commission to exempt the communication from treatment as an
7 electioneering communication.

8 Lastly, as discussed above with respect to Advertisement 1, the “clearly identified
9 candidate” standard in the electioneering communications reporting requirement is the
10 same as the standard used for independent expenditures. Thus, if “Obamacare” is
11 considered a reference to a “clearly identified candidate,” this would lead to the absurd
12 result that an issue ad exhorting viewers to contact members of Congress to “Support
13 Obamacare” also may constitute an independent expenditure.

14 ***Advertisement 8***

15 AFF’s proposed Advertisement 8 compares, on the one hand, the 2006
16 Massachusetts Act Providing Access to Affordable, Quality, Accountable Health Care
17 and, on the other hand, the Affordable Care Act – referring to the laws as “Romneycare”
18 and “the national healthcare law,” respectively, and concluding by characterizing
19 “National healthcare” as “Romneycare’s evil twin.” AOR, Exh. 8. The advertisement
20 opens with a photo of the White House and features an unspecified portion of an Obama
21 for America campaign video that, according to AFF, “does not clearly identify any

1 candidate for Federal office.”⁵ AFF’s advertisement also includes five references to
2 “Romneycare.”

3 For all the reasons discussed above regarding the references to “Obamacare” in
4 Advertisement 7, the five references to “Romneycare” in proposed Advertisement 8 are
5 not references to a “clearly identified candidate.”

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 any
9 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 its proposed activity. Any person involved in any specific
12 transaction or activity which 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 the analysis or conclusions
15 in this advisory opinion may be affected by subsequent developments in the law
16 including, but not limited to, statutes, regulations, advisory opinions, and case law.

⁵ AFF does not identify the portion of the Obama campaign video that it intends to use. Under the Commission’s regulations, in general “[t]he financing of the . . . republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate’s authorized committee, or any agent of either of the foregoing shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure.” 11 CFR 109.23(a). Based on the content of the video and the context of proposed Advertisement 8, however, it appears that AFF’s use of “a portion [of the Obama campaign video] that does not clearly identify any candidate for Federal office” may fall under an exception to this general rule, which allows for the use of campaign material “consist[ing] of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views.” 11 CFR 109.23(b)(4).

1 The cited advisory opinion is available on the Commission's Web site, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair

1 ADVISORY OPINION 2012-19

2

3 Jason Torchinsky, Esq.

DRAFT B

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Warrenton, VA 20186

9

10 Dear Messrs. Torchinsky and Bayes:

11 We are responding to your advisory opinion request on behalf of American Future
12 Fund ("AFF"), concerning the application of the Federal Election Campaign Act, as
13 amended (the "Act"), and Commission regulations to AFF's proposed plan to produce
14 and distribute a series of broadcast television advertisements within 30 days of upcoming
15 primary elections and within 60 days of the November general election on both local
16 broadcast television stations and national cable outlets.

17 The Commission concludes that seven of AFF's eight proposed advertisements
18 would constitute electioneering communications. One of AFF's proposed advertisements
19 does not refer to a clearly identified candidate for Federal office and would therefore not
20 be an electioneering communication.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 April 19, 2012, including Exhibits 1-8, and your email received on April 26, 2012.

24 AFF operates as a 501(c)(4) organization that, according to its tax return, "works
25 to promote conservative free market principles to the citizens of America." American
26 Future Fund, 2008 Return of Organization Exempt from Income Tax (Aug. 17, 2009)
27 (Obama for America Comment Attachment).

1 AFF plans to produce and distribute a series of broadcast television
2 advertisements within 30 days of upcoming primary elections and within 60 days of the
3 November general election, on both local broadcast television stations and national cable
4 outlets. According to AFF, these advertisements are “about American energy policy, the
5 proposal to require religious institutions to pay for insurance policies that cover certain
6 abortion-causing drugs (abortifacients), and the Patient Protection and Affordable Care
7 Act in general.” AOR at 1. The complete scripts of proposed Advertisements 1-8 are
8 attached to this advisory opinion.

9 AFF seeks to broadcast its proposed advertisements without making the
10 disclosures or including the disclaimers that the Act requires by those who finance
11 electioneering communications. AOR at 1; *see* 2 U.S.C. 434(f), 441d(a), 441d(d)(2).

12 ***Question Presented***

13 *Do proposed Advertisements 1 through 8 contain any references to a clearly*
14 *identified candidate?*

15 ***Legal Analysis and Conclusions***

16 The Act and Commission regulations define “electioneering communication” as
17 any broadcast, cable, or satellite communication that (1) refers to a clearly identified
18 Federal candidate; (2) is publicly distributed within 30 days before a primary election or a
19 convention or caucus of a political party or 60 days before a general election; and (3) is
20 targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a). AFF’s
21 request acknowledges that each of AFF’s proposed advertisements satisfies prongs two
22 and three of this test. AFF asks whether any of the proposed advertisements refers to a
23 clearly identified Federal candidate.

1 The term “[r]efers to a clearly identified candidate means that the candidate’s
2 name, nickname, photograph, or drawing appears, or the identity of the candidate is
3 otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your
4 Congressman,’ or ‘the incumbent,’ or through an unambiguous reference to his or her
5 status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican
6 candidate for Senate in the State of Georgia.’” 11 CFR 100.29(b)(2). *See also* 2 U.S.C.
7 431(18); 11 CFR 100.17.

8 Seven of AFF’s eight proposed advertisements refer to a clearly identified Federal
9 candidate and thus would be electioneering communications under 2 U.S.C.
10 434(f)(3)(A)(i) and 11 CFR 100.29. Advertisement 4 contains no such reference and thus
11 would not be an electioneering communication. Each advertisement is analyzed below,
12 in turn.

13 *Advertisement 1*

14 AFF proposes three substantively similar advertisements that criticize current
15 American energy policy and conclude by stating that “it’s time for an American energy
16 plan . . . that actually works for America.” AOR, Exhs. 1, 2, 3. Advertisement 1, the first
17 of those three advertisements, attributes current America energy policy to “this
18 Administration,” “the Administration,” and “the White House.” It features an announcer
19 who asserts, “[s]ince this Administration began, gas prices are up 104%,” and who
20 purports to quote “[t]he White House,” while the advertisement displays an “image of the
21 White House,” as “say[ing]: We must end our dependence on foreign oil.” The
22 announcer also asserts that “the Administration stopped American energy exploration”
23 and “banned most American oil and gas production,” and that “the White House wants

1 foreign countries to drill — so we can buy from *them*,” while the video shows a “b-roll of
2 ‘Denied’ Stamp with image of White House.” AOR, Exhibit 1. The advertisement
3 concludes by displaying the text, “Call the White House at (202) 456-1414,” while the
4 announcer instructs viewers to “[t]ell the White House it’s time for an American energy
5 plan...that actually works for America.” *Id.*

6 In the context of Advertisement 1, each of the voice-over references to “this
7 Administration,” “the Administration,” “the White House,” and the instruction to “Call
8 the White House,” as well as the visual depiction of the White House, are references to a
9 clearly identified candidate for federal office, President Barack Obama. The terms “the
10 Administration,” “this Administration,” and “the White House” are commonly
11 understood as references to “the President.”¹

12 Advertisement 1 unambiguously invokes these terms as references to President
13 Obama: the building located at 1600 Pennsylvania Avenue, of course, cannot speak, nor
14 can it “want[] foreign countries to drill,” and no viewer will interpret the final directive as
15 an instruction to tell the President’s *residence* to develop a new energy policy. The
16 images of the White House that accompany these references also unambiguously refer to
17 its principal occupant: the “b-roll of ‘Denied Stamp’ with image of [the] White House”
18 unambiguously refers to an action *by the President*, not the edifice. The references to
19 “the Administration” and “this Administration” likewise unambiguously refer to
20 President Obama. Those terms are merely short-hand for the *Obama* Administration:

¹ One of the preeminent authorities on English usage invokes the example of “the White House” as a reference to the Presidency in its definition of “metonymy,” which is “a figure of speech which consists in substituting for the name of a thing the name of an attribute of it or of something closely related.” R.W. Burchfield, *The New Fowler’s Modern English Usage* 492 (3d ed., 2000).

1 “this Administration” began with the inauguration of President Obama and it will
2 conclude with his exit from office.²

3 Thus, these voice-over, visual, and textual references in Advertisement 1
4 unambiguously invoke the identity of President Obama. 11 CFR 100.29(b)(2).

5 *Advertisement 2*

6 Advertisement 2 is nearly identical to Advertisement 1, but it omits the references
7 to “this Administration,” “the Administration,” and “the White House,” as well as the
8 images of the White House, substituting general references to “the government” and
9 images of the Washington Monument. In place of the narrator, it substitutes at one point
10 a three-second audio clip of President Obama’s voice stating, “We must end our

² See, e.g., Matthew Boyle, *Obama Threatens to Veto DOJ Budget Because It Blocks Fast and Furious Gun Control Law*, *Daily Caller*, Fox News (May 10, 2012), <http://www.foxnews.com/politics/2012/05/09/obama-threatens-to-veto-doj-budget-because-it-blocks-fast-and-furious-gun/#ixzz1uwrDpZIo> (“[T]he administration threatened it would veto the legislation because of that AFT rider . . .”) (emphasis added); Peter Wallsten, *Obama May Clarify Position on Same-Sex Marriage in Interview Today*, *Election 2012 Blog*, Wash. Post (May 9, 2012, 1:20 PM), http://www.washingtonpost.com/blogs/election-2012/post/obama-may-clarify-position-on-same-sex-marriage-in-interview-today/2012/05/09/gIQAGr61CU_blog.html (quoting a donor adviser who observed that “[t]he top 12 gay and lesbian donors in this country have all maxed out to the president” and that “there will have to be some concrete actions in fairly short order to demonstrate this administration’s desire to keep them included in this campaign”) (emphasis added); Andrew Taylor, *White House Promises Veto of GOP Spending Bill Over Cuts Below Last Year’s Debt Agreement*, *Minneapolis Star Tribune* (May 7, 2012, 5:20 PM), <http://www.startribune.com/politics/150505065.html> (“The White House on Monday vowed to veto a House spending bill . . .”); Ashley Parker & Trip Gabriel, *Romney Taking Steps to Narrow His Gender Gap*, *N.Y. Times*, Apr. 12, 2012, at A1, available at <http://www.nytimes.com/2012/04/12/us/politics/romney-taking-steps-to-narrow-his-gender-gap.html?pagewanted=all> (“[W]omen should know exactly what this administration has done and what’s happened to women in the workplace under this president’s leadership . . .”) (emphasis added); Julian E. Barnes & Adam Entous, *Pentagon to Lay Out Next Year’s Budget Cuts*, *Wall Street J.* (Jan. 25, 2012), <http://online.wsj.com/article/SB10001424052970203718504577181441296170290.html> (“The White House and Congress agreed last summer on \$487 billion in cuts to defense spending over the next 10 years . . .”) (emphasis added); Charles Riley, *White House to Propose Raise for Federal Workers*, *CNN Money* (Jan. 6, 2012, 1:05 PM), http://money.cnn.com/2012/01/06/news/economy/federal_worker_pay/index.htm (“Federal pay has been frozen since . . . Congress signed off on an Obama administration proposal The administration is expected to release its new budget in February When he first proposed the freeze, Obama said the cut was the first of many.”) (emphases added).

1 dependence on foreign oil...” The clip is introduced by an announcer who attributes the
2 statement to “[t]he government.”

3 Although Advertisement 2 omits the voice-over, visual, and textual references
4 that were determined to be unambiguous references to President Obama in Advertisement
5 1, the inclusion of an audio clip of President Obama’s voice discussing his energy policy
6 is a reference to a clearly identified candidate for Federal office. President Obama’s
7 voice is widely recognized. The advertisement criticizes the position “the government”
8 has taken on a policy issue and will be broadcast shortly before the upcoming primary
9 and general elections. Including an audio clip of the President in such an advertisement
10 unambiguously makes his identity apparent. 11 CFR 100.29(b)(2).

11 *Advertisement 3*

12 Advertisement 3 is similar to Advertisements 1 and 2. It omits the audio clip of
13 President Obama in Advertisement 2, substituting a clip of the White House Press
14 Secretary making the same statement, “[w]e must end our dependence on foreign oil.”
15 Like Advertisement 2, this advertisement also omits any references to “this
16 Administration” or “the Administration,” substituting general references to “the
17 government” and including images of the Washington Monument rather than of the
18 White House. Advertisement 3, like Advertisement 1, however, concludes with an on-
19 screen textual directive to “[c]all the White House at (202) 456-1414.”

20 Although Advertisement 3 contains fewer references to the President than
21 Advertisement 1, and it omits the audio clip of President Obama’s voice included in
22 Advertisement 2, the textual instruction to “[c]all the White House,” particularly when
23 accompanied by an audio command to “[t]ell the government it’s time for an American

1 energy plan . . . that actually works for *America*” is an unambiguous reference to a clearly
2 identified candidate for Federal office. 11 CFR 100.29(b)(2). If viewers were to follow
3 this command by calling the White House to tell “the government” about the need for a
4 different energy policy, they would necessarily be seeking to convey that message to the
5 President, the “government” official who resides and maintains his office at the White
6 House and the only person at the White House with executive authority to change the
7 “American energy plan.”

8 ***Advertisement 4***

9 AFF proposes two alternative advertisements that discuss “a proposed
10 requirement forcing ‘religious institutions to pay for abortion-causing drugs.’” AOR at 3
11 & Exhs. 4-5. Both Advertisements 4 and 5 conclude with an announcer instructing
12 viewers to “[c]all Secretary Sebelius” and “tell her it’s wrong . . . to trample the most
13 basic American right.” Advertisement 4 attributes the policy to Secretary Sebelius and
14 “the Government,” and includes “a visual depiction of the Health and Human Services
15 Building in Washington, DC.”

16 Advertisement 4 does not contain any reference to a clearly identified candidate.
17 It clearly identifies “Secretary Sebelius,” but she is not a candidate for Federal office.
18 And neither the Secretary nor the agency she leads qualifies as a reference to the
19 President. Advertisement 4 does not include any audio or visual reference to a Federal
20 candidate, and it does not otherwise identify a Federal candidate through an unambiguous
21 reference. 11 CFR 100.29(b)(2).

22

1 ***Advertisement 5***

2 Advertisement 5 addresses the same topic as Advertisement 4, but attributes the
3 policy it criticizes not only to “Secretary Sebelius” and “the Government,” but also to
4 “the Administration.” In addition, Advertisement 5, unlike Advertisement 4, concludes
5 with video of “White House footage and images,” while an announcer instructs viewers
6 to “[e]all Secretary Sebelius, tell her it’s wrong for her *and the Administration* to trample
7 the most basic American right.” AOR, Exh. 5 (emphasis added).

8 Advertisement 5 identifies “the Administration” as an entity separate from, and
9 additional to, “Secretary Sebelius,” and it clarifies any potential ambiguity regarding the
10 reference to “the Administration” by providing video “footage and images” of the White
11 House. As noted above, “the Administration” is common shorthand for the *Obama*
12 Administration and in the context of Advertisement 5, the use of “the Administration”
13 and the “White House footage and images” unambiguously references the President.³ 11
14 CFR 100.29(b)(2).

15 ***Advertisement 6***

16 AFF proposes two alternative advertisements that criticize the Patient Protection
17 and Affordable Care Act (“Affordable Care Act”), including by noting its second
18 anniversary and using the metaphor of “The Terrible Twos.” AOR, Exhs. 6-7.
19 Advertisement 6 refers to the law as “government run healthcare,” “health care law,” and

³ In the context of proposed Advertisement 5, AFF also asks whether “a reference to ‘the Administration’ [when] used to refer to an executive branch agency and/or cabinet official, . . . qualif[ies] as a reference to a clearly identified candidate for Federal office.” AOR at 7. This advisory opinion is limited to addressing AFF’s “specific transaction[s] or activit[ies].” 2 U.S.C. 437f(a)(1), and the proposed script for Advertisement 5 does not describe the type of reference upon which this question is premised. General questions of interpretation and hypothetical questions “do not qualify as advisory opinion requests.” 11 CFR 112.1(b). AFF’s question is therefore not addressed in this advisory opinion.

1 “national, government run healthcare.” It also includes two textual references to the
2 “White House”: in both instances, the text reads: “White House will not mark two-year
3 anniversary’ of health care law (Washington Free Beacon, 3/19/12).”

4 Both textual references to the White House in Advertisement 6 unambiguously
5 refer to a clearly identified Federal candidate, President Obama. Indeed, the very article
6 AFF cites in Advertisement 6 led with the sentence, “*President Obama* has no plans to
7 mark the two-year anniversary of the Affordable Care Act’s passage,” making explicit
8 that the term “White House” is being used both by AFF in Advertisement 6 and in the
9 underlying article cited in that advertisement as a reference to President Obama.

10 *President Has No Plans to Mark Two-Year Anniversary of Obamacare*, Washington Free
11 Beacon (Mar. 19, 2012) (emphasis added), [http://freebeacon.com/white-house-will-not-](http://freebeacon.com/white-house-will-not-mark-two-year-anniversary-of-obamacare/)
12 [mark-two-year-anniversary-of-obamacare/](http://freebeacon.com/white-house-will-not-mark-two-year-anniversary-of-obamacare/).

13 Moreover, here, as in the earlier proposed advertisements that reference the
14 “White House,” reading that term as a reference to the President, rather than as a
15 personification of his residence, is the only logical reading. The presidential residence
16 could not “mark [the] two-year anniversary” of the Affordable Care Act. And the
17 advertisement goes even further to clarify the meaning of “White House,” accompanying
18 its two textual statements that the “White House will not mark two-year anniversary’ of
19 health care law,” with narrated audio asserting that “now that government run healthcare
20 is turning two, its *own parents* don’t even want to celebrate,” and that “*its family* won’t
21 wish its health care law a happy birthday” AOR, Exh. 6 (emphases added). The use
22 of “White House” in Advertisement 6 thus unambiguously references a clearly identified
23 candidate for Federal office. 11 CFR 100.29(b)(2).

1 ***Advertisement 7***

2 Advertisement 7 is identical to Advertisement 6, except that it substitutes
3 “Obamacare” for the alternative references to the Affordable Care Act included in
4 Advertisement 6. Advertisement 7 includes four textual references and two audio, voice-
5 over references to “Obamacare,” and two of the textual references appear in a sentence
6 that also references the “White House”: “‘White House will not mark two-year
7 anniversary of Obamacare’ (Washington Free Beacon, 3/19/12).”

8 For the reasons explained above regarding Advertisement 6, the references to the
9 “White House” in Advertisement 7 also are references to a clearly identified candidate
10 for Federal office. In addition, for the reasons explained below, the six proposed
11 references to “Obamacare” in Advertisement 7 also are references to President Obama, a
12 clearly identified candidate for Federal office.

13 First, as AFF concedes, “the reference to ‘Obamacare,’ . . . of course includes the
14 name ‘Obama.’” AOR at 10. Thus, AFF recognizes that, on their face, the repeated
15 references to “Obamacare” in Advertisement 7 are explicit references to the name of a
16 clearly identified candidate for Federal office. 11 CFR 100.29(b)(2).

17 Second, and leaving aside the separate references to a clearly identified candidate
18 in the two statements mentioning the “White House,” the fact that Advertisement 7
19 mentions President Obama’s name “only as part of a popular name of a bill” does not
20 exempt the advertisement from the requirements for electioneering communications. As
21 AFF also recognizes, AOR at 9, the Commission considered and declined to adopt a
22 regulatory exemption for “communications that mention a candidate’s name only as part
23 of a popular name of a bill.” Explanation and Justification, Final Rules on Electioneering

1 Communications, 67 FR 65190, 65201 (Oct. 23, 2002) (“Electioneering Communications
2 E&J”). In rejecting the proposed exemption, the Commission noted that the “absence of
3 an objective standard for the popular name of a bill or law” would render the exemption
4 “an easy means of evading the electioneering communication provisions, because a
5 constructed popular name could be used to link a candidate to a popular or unpopular
6 position.” *Id.* at 65200. Because “such communications could easily promote, support,
7 attack, or oppose a Federal candidate,” the Commission concluded that “an exemption for
8 these communications [would be] beyond the Commission’s authority.”⁴ *Id.* at 65200-01.

9 Moreover, by framing a critique of the Affordable Care Act in the context of a
10 purported failure by the “White House” to “mark [the] two-year anniversary of
11 Obamacare,” Advertisement 7 illustrates precisely how “communications that mention a
12 candidate’s name only as part of a popular name of a bill can nevertheless be crafted in a
13 manner that could reasonably be understood to promote, support, attack or oppose a
14 candidate.” Electioneering Communications E&J, 67 FR at 65201. In other words,
15 Advertisement 7’s repeated use of the term “Obamacare” to link the President to a piece
16 of legislation that the advertisement criticizes exemplifies why the Commission declined
17 to adopt the regulatory exemption that AFF now asks the Commission to recognize
18 through the advisory opinion process.

19 Third, the request itself confounds its claim that “it is, as a practical matter,
20 impossible to participate in th[e] national discussion [about the Affordable Care Act]

⁴ Congress granted the Commission limited authority to exempt communications from the definition of “electioneering communications”: the Commission may do so through regulations and such regulations may exempt only communications that do not promote, support, attack, or oppose a Federal candidate. Electioneering Communications E&J, 67 FR at 65196, 65198.

1 without also using the term ‘Obamacare.’” AOR at 8. AFF itself proposes several
2 alternatives to this naming convention, including, but not limited to, the official name of
3 the law. *See* AOR at 1, 3, 7, and 8 (referring to “the Patient Protection and Affordable
4 Care Act”); *see id.*, Exh. 6 (referring to the Affordable Care Act as “government run
5 healthcare,” “health care law,” and “national, government run healthcare”).

6 Finally, AFF’s reliance on the “basic logic” in Advisory Opinion 2004-31
7 (Darrow) is misplaced. AOR at 10. In Advisory Opinion 2004-31 (Darrow), the
8 Commission determined that advertisements for a company’s car dealerships (including
9 Russ Darrow Toyota, Russ Darrow Kia, and Russ Darrow Cadillac) did not refer to the
10 candidate “Russ Darrow, Jr.” but to the dealerships themselves or to “Russ Darrow III,”
11 the candidate’s son. Russ Darrow III was the company’s president and the face of the
12 company in its advertisements, speaking and appearing on screen. The candidate, Russ
13 Darrow, Jr., did not appear in the company’s advertisements.

14 As AFF recognizes, “the factual circumstances of Advisory Opinion 2004-31 are
15 different” from the circumstances presented by its proposed use of the term “Obamacare”
16 in Advertisement 7. AOR at 10. The term “Obamacare” is *not* the official name of the
17 Affordable Care Act. “Russ Darrow,” on the other hand, was part of the actual name of
18 each of the car dealerships referenced in the advertisements at issue in Advisory Opinion
19 2004-31 (Darrow), and the company “ha[d] worked for a decade to develop [that] brand
20 name for all its dealerships.” Advisory Opinion 2004-31 (Darrow), at 2. Even if
21 President Obama “recently ‘embraced’ the term,” “Obamacare,” AOR at 8, the
22 Affordable Care Act, unlike the Russ Darrow car dealerships, can easily be identified
23 without referencing the name “Obama.”

1 **Advertisement 7 is further distinguishable from the Russ Darrow dealership**
2 **advertisements because these latter advertisements referenced the candidate's son and**
3 **namesake, Russ Darrow III, not the federal candidate, Russ Darrow, Jr. Advisory**
4 **Opinion 2004-31 (Darrow), at 2. AFF, of course, does not contend that the reference to**
5 **"Obama" in the term "Obamacare" actually refers to someone other than President**
6 **Barack Obama. On the contrary, the term is a specific and unambiguous reference to Mr.**
7 **Obama and to his role, as President, in advocating for passage of the Affordable Care**
8 **Act.**

9 **In sum, Advertisement 7 includes multiple references to a clearly identified**
10 **Federal candidate and it is not entitled to any exemption from the requirements for**
11 **electioneering communications.⁵ See 11 CFR 100.29(b)(2); Electioneering**
12 **Communications E&J, 67 FR at 65201.**

13 ***Advertisement 8***

14 **AFF's proposed Advertisement 8 compares the 2006 Massachusetts Act**
15 **Providing Access to Affordable, Quality, Accountable Health Care and the Affordable**
16 **Care Act, referring to each respectively as "Romneycare" and "the national healthcare**
17 **law," and concluding by characterizing "National healthcare" as "Romneycare's evil**
18 **twin." AOR, Exh. 8. The advertisement opens with a photo of the White House and**
19 **features an unspecified portion of an Obama for America campaign video that, according**

⁵ The Commission declines to address AFF's general questions regarding the Commission's interpretation and application of the Electioneering Communications E&J, *see* AOR at 9, because this advisory opinion is limited to addressing AFF's "specific transaction[s] or activit[ies]," 2 U.S.C. 437f(a)(1), and those general questions of interpretation "do not qualify as advisory opinion requests." 11 CFR 112.1(b).

1 to AFF, “does not clearly identify any candidate for Federal office.”⁶ AFF’s

2 advertisement also includes five references to “Romneycare.”

3 For all the reasons discussed above regarding the references to “Obamacare” in
4 Advertisement 7, the five references to “Romneycare” in proposed Advertisement 8 are
5 references to the name of the Republican presidential candidate, Governor Mitt Romney,
6 who is a candidate for Federal office.⁷ See 11 CFR 100.29(b)(2); Electioneering
7 Communications E&J, 67 FR at 65201.

8 In addition, AFF’s clarification that the term “Romneycare” is something of a
9 misnomer, because “Governor Romney did not support the entirety of that legislation,”
10 AOR at 11, undermines any argument about the necessity of describing the
11 Massachusetts law as “Romneycare.” Indeed, the very relevance of the Massachusetts
12 law, which was enacted in 2006, is its association with Governor Romney, a presidential
13 candidate who, like AFF, is seeking to distinguish the law that he signed from the federal
14 law signed by President Obama. Describing the Massachusetts law as “Romneycare” is
15 not necessary to identify the law, but it is a more effective way to reference the law as a

⁶ AFF does not identify the portion of the Obama campaign video that it intends to use. Under the Commission’s regulations, in general “[t]he financing of the . . . republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate’s authorized committee, or any agent of either of the foregoing shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure.” 11 CFR 109.23(a). Based on the content of the video and the context of proposed Advertisement 8, however, it appears that AFF’s use of “a portion [of the Obama campaign video] that does not clearly identify any candidate for Federal office” may fall under an exception to this general rule, which allows for the use of campaign material “consist[ing] of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views.” 11 CFR 109.23(b)(4). AFF’s reliance on this exception would further demonstrate that proposed Advertisement 8 contains a reference to a clearly identified candidate; it would be impossible to use a portion of the campaign video to “demonstrate a candidate’s position” without identifying the candidate holding that position.

⁷ The Commission further notes that for the reasons explained above, the “White House photo” in Advertisement 8, AOR, Exh. 8, also references a clearly identified candidate for Federal office. In context, the image of the White House in Advertisement 8 is unambiguously used as a reference to President Obama, who signed the Affordable Care Act into law, rather than a literal reference to his residence.

1 means of supporting Governor Romney's candidacy and opposing President Obama's.

2 See Electioneering Communications E&J, 67 FR at 65200.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
6 of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestors may not rely on that
8 conclusion as support for its proposed activity. Any person involved in any specific
9 transaction or activity which is indistinguishable in all its material aspects from the
10 transaction or activity with respect to which this advisory opinion is rendered may rely on
11 this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
12 conclusions in this advisory opinion may be affected by subsequent developments in the
13 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
14 The cited advisory opinion is available on the Commission's Web site, www.fec.gov, or
15 directly from the Commission's Advisory Opinion searchable database at
16 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair