

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 2012-25 are now available for comment. They were requested by Jason Torchinsky, Esq., and Michael Bayes, Esq., on behalf of American Future Fund/American Future Fund Political Action/McIntosh, and are scheduled to be considered by the Commission at its public meeting on October 4, 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 2012-25, 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 October 3, 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@fee.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 2012-25, 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. 12-69



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Washington, DC 20463

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September 28, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman *AH by KCB*
General Counsel

Kevin Deeley *KCB*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

Subject: AO 2012-25 (American Future Fund/American Future Fund
Political Action/McIntosh) (Drafts A and B)

For Meeting of *104-12*

SUBMITTED LATE

Attached are proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for October 4, 2012.

Attachment

1 ADVISORY OPINION 2012-25

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Jason Torchinsky, Esq.
Michael Bayes, Esq.
Holtzman Vogel Josefiak PLLC
Suite 100
45 North Hill Drive
Warrenton, VA 20186

DRAFT A

10 Dear Messrs. Torchinsky and Bayes:

11 We are responding to your advisory opinion request on behalf of American Future
12 Fund (“AFF”) and American Future Fund Political Action (“AFFPA”), concerning the
13 application of the Federal Election Campaign Act (the “Act”) and Commission
14 regulations to your proposed joint fundraising efforts, which propose to create four joint
15 fundraising committees.

16 The Commission concludes that the two proposed joint fundraising committees
17 that would not involve a Federal candidate’s/officeholder’s authorized campaign
18 committee may operate consistent with the Act, but based on the information provided in
19 the request, the two proposed joint fundraising committees that would involve a Federal
20 candidate’s/officeholder’s authorized committee may not.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 April 10, 2012, and email received on July 13, 2012.

24 AFF is an incorporated non-profit social welfare organization exempt from
25 taxation under section 501(c)(4) of the Internal Revenue Code. AFFPA is registered with
26 the Commission as a multicandidate, nonconnected political committee. AFFPA plans to
27 establish a non-contribution account that would solicit and receive unlimited

1 contributions from individuals, corporations, and labor organizations for the purpose of
2 financing its independent political activity.¹ AFF and AFFPA have some overlapping
3 management, but AFFPA is not a separate segregated fund connected to AFF. The
4 requestors represent that they operate separately and are not affiliated with each other
5 under Commission regulations.

6 The proposed joint fundraising committees (“Joint Committees”) may include one
7 or more of the following participants: AFF, AFFPA, AFFPA’s non-contribution account,
8 a Federal candidate’s/officeholder’s authorized campaign committee, and an independent
9 expenditure only political committee (“IEOPC”).²

10 The Joint Committees would be established as separate political committees that
11 would act as the fundraising representative of all the participants. The Joint Committees
12 would establish separate depository accounts. In one account, each Joint Committee
13 would deposit funds raised for AFFPA and the Federal candidate’s/officeholder’s
14 authorized campaign committee. In another account, each Joint Committee would
15 deposit funds raised for AFF, AFFPA’s non-contribution account, and a participating
16 IEOPC. Each participant would accept only funds that it may lawfully receive under the
17 Act.

18 The participants plan to execute a written agreement that would specify how the
19 expenses of and contributions received by each Joint Committee would be allocated

¹ See Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, Oct. 5, 2011, <http://www.fec.gov/press20111006postcarey.shtml>.

² Requestors represent that any IEOPC would accept funds consistent with Advisory Opinion 2010-11 (Commonsense Ten), in which the Commission stated that a nonconnected political committee may raise and spend funds outside the limitations of the Act from individuals, other political committees, corporations, and labor organizations for the purpose of financing independent expenditures. Requestors represent that any IEOPC that participates in a Joint Committee would (1) report to the Commission as an IEOPC, and (2) not be affiliated with AFFPA.

1 among the participants, and propose four different combinations of participants in the
2 Joint Committees.

3 1. AFF and AFFPA

4 This proposed Joint Committee would allocate the first \$5,000 received from
5 individuals to AFFPA, while contributions received from individuals in excess of \$5,000
6 would be allocated to AFF. All corporate and labor organization contributions would be
7 allocated to AFF.

8 This Joint Committee's pre-event publicity and solicitations would specify that
9 AFFPA is raising funds for use in connection with Federal elections, and that AFF is
10 raising funds to be used in a manner consistent with its status as a section 501(c)(4) social
11 welfare organization.

12 2. AFF, AFFPA, AFFPA's non-contribution account and/or an IEOPC

13
14 This proposed Joint Committee would allocate the first \$5,000 received from
15 individuals to AFFPA. Any amounts in excess of \$5,000 received from individuals, as
16 well as all corporate and labor organization contributions received, would be split evenly
17 between AFF, AFFPA's non-contribution account, and/or an IEOPC.

18 3. AFF, AFFPA, and the Federal Candidate's/Officeholder's Authorized Campaign
19 Committee³

20

³ The request is joined by Mr. David McIntosh and David McIntosh for Indiana. Although Mr. McIntosh was a Federal candidate in the 2012 primary election for the Fifth Congressional District of Indiana, his candidacy ended on May 8, 2012 when he lost in that primary election. The lack of a specific, identified federal candidate does not preclude the Commission from providing AFF and AFFPA with an Advisory Opinion analyzing their plan to engage in a joint fundraising effort with a federal candidate/officeholder, and their authorized campaign committee. See Advisory Opinion 2011-12 (Majority PAC) (evaluating a plan submitted by two political action committees to ask unnamed federal candidates to solicit unlimited individual, corporate, and labor organization contributions on behalf of the Committees).

1 This proposed Joint Committee would allocate the first \$5,000 received from
2 individuals to the Federal candidate's/officerholder's authorized campaign committee: the
3 first \$2,500 for the primary election, and the next \$2,500 for the general election. The
4 next \$5,000 received from individuals would be allocated to AFFPA. Any amounts
5 received from individuals in excess of \$10,000 would be allocated to AFF. All corporate
6 and labor organization contributions received would also be allocated to AFF.

7 This Joint Committee would make the following representations in its
8 solicitations:

- 9 • “[T]his is a joint fundraising committee comprised of AFF, AFFPA, and the
10 Federal candidate's/officerholder's authorized campaign committee”;
- 11 • “AFFPA and the Federal candidate's/officerholder's authorized campaign
12 committee are raising only funds for use in connection with Federal
13 elections”; and
- 14 • “AFF is raising non-Federal funds to be used in a manner consistent with its
15 status as a Section 501(c)(4) social welfare organization.”

16 This Joint Committee's solicitations would not be signed by the Federal candidate
17 or officerholder.

18 4. *AFF, AFFPA, AFERA's non-contribution account, as IEQPC, and the Federal*
19 *Candidate's/Officerholder's Authorized Campaign Committee*

20
21 This Joint Committee would allocate the first \$5,000 received from individuals to
22 the Federal candidate's/officerholder's authorized campaign committee: the first \$2,500
23 for the primary election, and the next \$2,500 for the general. The next \$5,000 received
24 from individuals would be allocated to AFFPA. Any amounts received from individuals

1 in excess of \$10,000 would be split evenly between AFFPA's non-contribution account
2 and the IEOPC. All corporate or labor organization contributions received would be split
3 evenly between AFF, AFFPA's non-contribution account, and the IEOPC.

4 This Joint Committee would make the following representations:

5 • "This is a joint fundraising committee comprised of AFF, AFFPA, AFFPA's
6 non-contribution *Carey* account, the FEC-registered independent expenditure-
7 only committee, and the authorized campaign committee of a federal
8 candidate/officeholder";

9 • "AFFPA and the Federal candidate/officeholder's campaign committee are
10 raising only Federally-permissible funds for use in connection with Federal
11 elections";

12 • "AFFPA's non-contribution *Carey* account and the FEC-registered
13 independent expenditure-only committee are raising lawfully permitted funds
14 for use in connection with Federal elections"; and

15 • "AFF is raising non-Federal funds to be used in a manner consistent with its
16 status as a Section 501(c)(4) social welfare organization."

17 Under all four proposals, the Joint Committee participants would specify in a
18 written agreement how the fundraising proceeds will be allocated. The Joint Committee
19 would also keep records and file reports as required by 11 CFR 102.17(c)(4) and (8).

20 The joint fundraising expenses would be allocated to the participants in
21 proportion to the funds raised and distributed to each participant. Each participant would
22 pay their own fundraising expenses. To the extent that advanced funds are needed, the

1 requestors have not determined with any specificity how, or by what method, those funds
2 will be advanced.

3 Under all four proposals, the Joint Committee would solicit funds in writing,
4 and/or by telephone, or other forms of direct contact. They would also hold one or more
5 fundraising events, although no funds would be solicited at the fundraising events. All
6 solicitations for contributions would include a fundraising notice with the information
7 required by 11 CFR 102.17.

8 When a Federal candidate's/officeholder's authorized campaign committee is a
9 participant, the joint fundraising solicitations would indicate that the authorized
10 committee is one of the participants in the Joint Committee. The Federal candidate or
11 officeholder would not hold titles, such as an "honorary chairperson," that identify the
12 candidate or officeholder as serving in a position specifically related to fundraising. On
13 pre-event solicitation materials, the Federal candidate or officeholder may be identified as
14 the event's speaker. The candidate or officeholder would not be featured any more or
15 less prominently in the Joint Committee public materials than the other participants.

16 The Federal candidate or officeholder would be involved in the Joint Committee
17 in the same manner as any other participant. That is, he or she would have the
18 opportunity to review and edit all materials prepared for use in connection with the joint
19 fundraising efforts, but he or she would not be involved in preparing any of the joint
20 fundraising materials. The Federal candidate or officeholder may also be involved in
21 other logistical tasks such as the coordination of scheduling with other participants when
22 he or she appears at fundraising events. And the Federal candidate or officeholder or his

1 or her representative may provide the names of potential individual contributors to other
2 participants.

3 The AFFPA's non-contribution account or an IEOPC may use funds raised
4 through the Joint Committee to support the candidacy of the participating Federal
5 candidate or officeholder through public communications. Such public communications
6 may contain express advocacy. The public communications that do not contain express
7 advocacy may or may not identify or refer to the participating Federal candidate or
8 officeholder. The AFFPA's non-contribution account or an IEOPC would not be
9 providing, communicating, or discussing with the participating Federal candidate or
10 officeholder any information about the plans, activities, or needs beyond those involving
11 the Joint Committee fundraising. Solicitations by the Joint Committee involving
12 AFFPA's non-contribution account or an IEOPC would not indicate how AFFPA's non-
13 contribution account or the IEOPC would use the funds received.

14 ***Question Presented***

- 15 1. *May AFF and AFFPA serve as participants in a joint fundraising committee?*
16
17 2. *May AFF, AFFPA, AFFPA's non-contribution account, and/or an IEOPC serve*
18 *as participants in a joint fundraising committee?*
19
20 3. *May AFF, AFFPA, and a Federal candidate's/officeholder's authorized*
21 *campaign committee serve as participants in a joint fundraising committee?*
22
23 4. *May AFF, AFFPA, AFFPA's non-contribution account, an IEOPC, and a Federal*
24 *candidate's/officeholder's authorized campaign committee serve as participants*
25 *in a joint fundraising committee?*
26

27 ***Legal Analysis and Conclusions***

28
29 *Question 1: May AFF and AFFPA serve as participants in a joint fundraising*
30 *committee?*
31

1 Yes, AFF and AFFPA may serve as participants in the Joint Committee as
2 described.

3 Commission regulations allow a political committee to “engage in joint
4 fundraising with other political committees or with unregistered committees or
5 organizations.” 11 CFR 102.17(a)(1)(i). The regulations further specify that participants
6 may include political party committees (including non-Federal party committees),
7 candidate committees, multicandidate committees, and unregistered organizations which
8 do not qualify as collecting agents under 11 CFR 102.6(b).⁴ 11 CFR 102.17(a)(2).

9 The participants in a joint fundraising effort must either select a participating
10 committee to serve as their joint fundraising representative or establish a separate
11 political committee.⁵ 11 CFR 102.17(a)(1)(i). The joint fundraising representative must
12 be a reporting political committee and must also be an authorized committee of each
13 participant who is a candidate for Federal office. *Id.* If the participants establish a
14 separate political committee to act as a fundraising representative, that committee must
15 “collect contributions, pay fundraising costs from gross proceeds and from funds
16 advanced by participants, and disburse net proceeds to each participant.” 11 CFR
17 102.17(t)(1). Commission regulations also require the participants or the fundraising

⁴ A collecting agent collects and transmits contributions to a separate segregated fund (“SSF”) that is related to the collecting agent, such as an affiliated committee or a connected organization. 11 CFR 102.6(b)(1), (2). As noted above, AFF and AFFPA represent that they are not affiliated and that AFF is not the connected organization for AFFPA. Thus, AFF is not a collecting agent of AFFPA (or another political committee) and is not, for that reason, prohibited from participating in joint fundraising.

⁵ If the participants establish a separate political committee to serve as their fundraising representative, that committee must not participate in any other joint fundraising effort. It may, however, conduct more than one joint fundraising effort for the participants. 11 CFR 102.17(a)(1)(i).

1 representative to establish a separate depository account to be used solely for the receipt
2 and disbursement of the joint fundraising proceeds. 11 CFR 102.17(c)(3).

3 Joint fundraising participants must also enter into a written agreement, identifying
4 the fundraising representative and stating a formula for the allocation of fundraising
5 proceeds. 11 CFR 102.17(c)(1). Commission regulations require the fundraising
6 representative to retain the written agreement for three years and make it available to the
7 Commission upon request. *Id.* Finally, the fundraising representative must provide
8 disclaimers on every solicitation for contributions,⁶ as well as screen and report all
9 contributions received.

10 It is clear that AFFPA and AFF may serve as participants in a joint fundraising
11 committee. The regulations expressly contemplate that “unregistered . . . organizations,”
12 which are distinct from “political party committees,” may participate in joint fundraising
13 committees. 11 CFR 102.17(a)(1)(i). AFF is an unregistered organization.⁷ Therefore,
14 there is nothing in the Act or Commission regulations which categorically prohibits
15 incorporated entities such as AFF from engaging in joint fundraising efforts, provided
16 their participating is consistent with the other requirements of the Act.

⁶ In addition to the disclaimer requirements under 11 CFR 110.11, a joint fundraising notice must be included with every solicitation for contributions. This notice must include: the names of all participating committees in the joint fundraising activity; the allocation formula to be used for distributing the joint fundraising proceeds; a statement informing contributors that, notwithstanding the stated allocation formula, they may designate their contributions for a particular participant or participants; and a statement informing contributors that the allocation formula may change if a contributor makes a contribution exceeding the amount limitations under the Act and Commission regulations. *See* 11 CFR 102.17(c)(2)(i)(A)–(D).

⁷ Advances made by a participant that exceeds its proportionate share of the fundraising costs are treated as contributions to the other participants. 11 CFR 102.17(b)(3)(ii). An excess advance by AFF, whether of funds or mailing lists, would be a prohibited contribution from AFF to AFFPA. *Id.*

1 Further, based on the requestors' representations, a Joint Committee involving
2 AFFPA and AFF would meet the requirements for establishing a lawful joint fundraising
3 effort. First, they plan to create and register a new political committee to serve as their
4 joint fundraising representative. This committee would be a "reporting political
5 committee." 11 CFR 102.17(a)(1)(i). Second, they intend to enter into a written
6 agreement naming the new political committee as their joint fundraising representative.
7 Third, they have established a formula for allocating the joint fundraising proceeds and
8 expenses. Fourth, they plan to provide joint fundraising disclaimers on every solicitation
9 for contributions and follow all the recordkeeping and reporting requirements of section
10 102.17. Finally, the joint fundraising committee would establish separate bank accounts
11 that would segregate contributions that are subject to the limitations and prohibitions of
12 the Act from those that are not.⁸

13 Accordingly, the Commission concludes that AFF and AFFPA may serve as
14 participants in the proposed joint fundraising committee.

15 *Question 2: May AFF, AFFPA, AFFPA's non-contribution Carey account and/or an*
16 *IEOPC serve as participants in a joint fundraising committee?*
17

⁸ Nothing prohibits the Joint Committee from raising for AFF funds outside the Act's amount limitations and source restrictions. Although 11 CFR 102.17(a) seems to characterize part 300 of the Commission's regulations as prohibiting *any* person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, part 300's prohibitions apply to only those categories of persons described in that part: specifically, national party committees; State, district, and local party committees and organizations; Federal candidates and officeholders; and State and local candidates. See 11 CFR 300.1. Because AFF is not an organization covered by part 300, AFF's joint fundraising activities are not proscribed by the general paragraph about part 300 at 11 CFR 102.17(a).

1 For the reasons given in Question 1, AFF and AFFPA, including its non-
2 contribution account, and an IEOPC – may participate in a Joint Committee as
3 described.⁹

4 *Question 3: May AFF, AFFPA, and a Federal candidate's/officeholder's authorized*
5 *campaign committee serve as participants in a joint fundraising committee?*

6
7 No, these entities cannot – as proposed – serve as participants in the Joint
8 Committee. As an entity established, financed, maintained, or controlled by a Federal
9 candidate or officeholder, the proposed Joint Committee may not solicit, receive, direct,
10 transfer, or spend funds in connection with an election for Federal office or any election
11 other than an election for Federal office unless the funds are subject to the limitations and
12 prohibitions of the Act. Because the Joint Committee would raise funds in unlimited
13 amounts from individuals and from corporations and labor organizations, potentially in
14 connection with a Federal or non-Federal election, the proposed joint fundraising
15 activities would be prohibited under the Act and Commission regulations.

16 Federal officeholders and candidates, their agents, and entities directly or
17 indirectly established, financed, or maintained, or controlled by, or acting on behalf of,
18 Federal officeholders and candidates, may not solicit, receive, direct, transfer, or spend
19 funds in connection with an election for Federal office, “unless the funds are subject to
20 the limitations, prohibitions, and reporting requirements” of the Act. 2 U.S.C.

⁹ AFFPA asks about the participation of AFFPA's non-contribution account in the joint fundraising effort. AFFPA itself may participate in a joint fundraising committee regardless of the account it uses in this endeavor. A non-contribution account, however, is not a separate political committee but rather a separate account of AFFPA. See *Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (a nonconnected political committee that makes direct contributions to candidates may receive unlimited funds into a separate bank account for the purpose of financing independent expenditures); see also Press Release, FEC Statement on *Carey v. FEC: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account*, Oct. 5, 2011, <http://www.fec.gov/press20111006postcarev.shtml>.

1 441i(e)(1)(A); 11 CFR 300.61. These same persons are similarly prohibited from
2 soliciting, receiving, directing, transferring, or spending funds in connection with any
3 election other than an election for Federal office unless the funds are raised within the
4 Act's contribution limits and are not from prohibited sources. 2 U.S.C. 441i(e)(1)(B); 11
5 CFR 300.62.

6 To determine whether an entity is directly or indirectly established, financed,
7 maintained, or controlled by a Federal candidate or officeholder, the Commission
8 considers ten factors identified in 11 CFR 300.2(c), "as well as any other relevant
9 factors." These factors must be examined "in the context of the overall relationship"
10 between the candidate or officeholder and the entity. 11 CFR 300.2(c)(2). One of the
11 enumerated factors in section 300.2 that the Commission must examine is whether a
12 Federal candidate or officeholder "directly or through its agent, had an active or
13 significant role in the formation of the entity." 11 CFR 300.2(c)(ix). Another factor is
14 whether a Federal candidate or officeholder "directly or through its agent, has the
15 authority or ability to direct or participate in the governance of the entity through
16 provision of constitutions, bylaws, contracts, or other rules, or through formal or informal
17 practices or procedures." 11 CFR 300.2(c)(ii).

18 As a participant in this joint fundraising effort, a Federal candidate or officeholder
19 and agents of his or her authorized campaign committee would be among the persons
20 who formed the Joint Committee. Under these circumstances, the Joint Committee
21 would be treated as another authorized committee of that Federal candidate or
22 officeholder under Commission regulations, 11 CFR 102.17(a)(1)(i), and that Federal
23 candidate or officeholder would be required to authorize the Joint Committee in writing

1 for the Joint Committee to receive contributions “on [his or her] behalf.” *See* 2 U.S.C.
2 431(6); 11 CFR 100.5(f)(1). The Federal candidate or officeholder, therefore, would
3 directly and through agents from his or her authorized campaign committee have an
4 active or significant role in the Joint Committee’s formation. 11 CFR 300.2(c)(2)(ix).
5 This factor alone is sufficient to determine that the Joint Committee would be an entity
6 “established, financed, maintained or controlled by” the Federal candidate or
7 officeholder.

8 The Commission concludes that the proposed Joint Committee would be an entity
9 “directly or indirectly established, financed, or maintained, or controlled by, or acting on
10 behalf of” a Federal candidate or officeholder. 2 U.S.C. 441i(e)(1)(A).¹⁰ Therefore, to
11 the extent the Joint Committee solicits, receives, directs, transfers, or spends funds in
12 connection with an election for Federal office or any election other than an election for
13 Federal office, those funds would need to be subject to the Act’s amount limitations and
14 source prohibitions.¹¹ 2 U.S.C. 441i(e)(1); 11 CFR 300.61-62. Funds raised by the Joint
15 Committee that are not in connection with an election, however, need not be so limited.
16 *See* Advisory Opinion 2003-20 (Reyes) (explaining that when “analyzing the application

¹⁰ The Joint Committee would also be an “agent” of the Federal candidate or officeholder. *See* 11 CFR 300.2(b) (defining an agent of a Federal candidate as “any person who has actual authority, either express or implied,” to “solicit, receive, direct, transfer, or spend funds in connection with any election”). Indeed, even before BCRA amended the Act, it was well established that an entity conducting a fundraiser on behalf of a candidate would be acting as the candidate’s agent. *See, e.g.*, Advisory Opinion 1997-23 (Steers) (finding that a commercial fundraising firm conducting a joint direct mail fundraiser was acting as agent for each participating campaign committee); Advisory Opinion 1979-23 (DSCC) (concluding that a party committee conducting a joint fundraising event with candidates was an “authorized agent” of the participating candidates).

¹¹ This conclusion is consistent with the Commission’s joint fundraising rules at 11 CFR 102.17, which, as discussed above, explicitly provide that “[n]othing in this section shall supersede 11 CFR part 300.” 11 CFR 102.17(a). Federal candidates fall within the scope of 11 CFR part 300. *See* 11 CFR 300.1(c)(4).

1 of 2 U.S.C. § 441i(e), the threshold question is whether the funds involved are in
2 connection with a Federal or non-Federal election under subsection (e)(1)” and [i]f the
3 funds are not raised or spent in connection with an election, then the funds do not fall
4 within the scope of section 441i(e)” and need not be limited with regard to source or
5 amount).

6 Here, the Joint Committee intends to solicit and receive unlimited donations from
7 individuals as well as corporations and labor organizations. Such funds will be
8 distributed to AFF. Requestors have not indicated whether the Joint Committee will raise
9 such funds for AFF in connection with any Federal or non-Federal election or whether
10 AFF will spend such funds in connection with a Federal or non-Federal election. Rather,
11 requestors have stated that the Joint Committee will raise funds for AFF “to be used in a
12 manner consistent with its status as a 501(c)(4) social welfare organization.” Requestors
13 have also acknowledged that “AFF engages in a small amount of FEC-regulated
14 activity,” although “its major purpose is not Federal election campaign activity.”

15 Absent a specific representation to the contrary, it is possible that funds raised by
16 the Joint Committee, to be distributed to AFF, could be spent in connection with a
17 Federal or non-Federal election. As such, the proposed fundraising activities under
18 Question 3 would not comply with section 441i(e) of the Act. 2 U.S.C. 441i(e)(1); *see*
19 Advisory Opinion 2011-12 (Majority PAC and House Majority PAC) (concluding that
20 entities covered by 441i(e) may not solicit unlimited funds in connection with an election,
21 even if the recipient committee may lawfully accept such funds). If, however, the Joint
22 Committee limited its solicitation of funds on behalf of AFF to be used for purposes not

1 in connection with a Federal or non-Federal election, section 441i(e) would not limit the
2 proposed joint fundraising activities.¹²

3 *Question 4: May AFF, AFFPA, AFFPA's non-contribution account, an IEOPC, and a*
4 *Federal candidate's/officeholder's authorized campaign committee serve as participants*
5 *in a joint fundraising committee?*

6
7 No, these entities cannot – as proposed – serve as participants in the Joint
8 Committee. For the reasons discussed in Question 3, the Joint Committee, as an entity
9 established, financed, maintained, or controlled by a Federal candidate or officeholder,
10 may not solicit, receive, direct, transfer, or spend funds in connection with an election for
11 Federal office or any election other than an election for Federal office unless the funds
12 are subject to the limitations and prohibitions of the Act. Because the Joint Committee
13 would raise funds in unlimited amounts from individuals and from corporations and labor
14 organizations for AFFPA's non-contribution account and/or an IEOPC, the proposed
15 joint fundraising activities under Question 4 would be prohibited under the Act and
16 Commission regulations. The proposed joint fundraising activities would similarly be
17 prohibited because the Joint Committee would raise funds in unlimited amounts from
18 individuals and from corporations and labor organizations for AFF, potentially in
19 connection with a Federal or non-Federal election.¹³

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your

¹² Alternatively, the proposed joint committee could solicit funds consistent with the Act's source and amount limitations. See Advisory Opinion 2011-21 (Constitutional Conservatives Fund PAC); Advisory Opinion 2011-12 (Majority PAC and House Majority PAC). This, however, was not proposed in the request.

¹³ As explained in footnote 15, *supra*, a joint committee limited to raising funds consistent with the Act's source and amount limitations could be created with the participants proposed here.

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

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On behalf of the Commission,

Caroline C. Hunter
Chair

1 ADVISORY OPINION 2012-25

2

3 Jason Torchinsky, Esq.

4 Michael Bayes, Esq.

5 Holtzman Vogel Josefiak PLLC

6 Suite 100

7 45 North Hill Drive

8 Warrenton, VA 20186

9

DRAFT B

10 Dear Messrs. Torchinsky and Bayes:

11 We are responding to your advisory opinion request on behalf of American Future
12 Fund (“AFF”), American Future Fund Political Action (“AFFPA”), Mr. David McIntosh,
13 and David McIntosh For Indiana (“McIntosh Committee”) (collectively, “Requestors”),
14 concerning the application of the Federal Election Campaign Act (the “Act”) and
15 Commission regulations to your proposed joint fundraising efforts, which propose to
16 create four joint fundraising committees.

17 The Commission concludes that the two proposed joint fundraising committees
18 that would not include the McIntosh Committee may operate consistent with the Act.
19 The requests regarding the two proposed joint fundraising committees that would include
20 the McIntosh Committee do not qualify as advisory opinion requests because none of the
21 Requestors presently is a Federal candidate, an agent of a Federal candidate, or a Federal
22 candidate’s authorized committee capable of raising funds. As such, these requests
23 regard the activities of third parties.

24 ***Background***

25 The facts presented in this advisory opinion are based on your letter received on
26 April 10, 2012, emails received on July 13 and September 17, 2012, and publicly
27 available reports filed by the McIntosh Committee with the Commission.

1 AFF is an incorporated non-profit social welfare organization exempt from
2 taxation under section 501(c)(4) of the Internal Revenue Code. AFFPA is registered with
3 the Commission as a multicandidate, nonconnected political committee. AFFPA plans to
4 establish a non-contribution account that would solicit and receive unlimited
5 contributions from individuals, corporations, and labor organizations for the purpose of
6 financing its independent political activity.¹ AFF and AFFPA have some overlapping
7 management, but AFFPA is not registered as a separate segregated fund connected to
8 AFF. Requestors represent that they operate separately and are not affiliated with each
9 other under Commission regulations.

10 On July 25, 2011, David McIntosh filed with the Commission a Statement of
11 Candidacy seeking to represent the Fifth Congressional District of Indiana in the United
12 States House of Representatives. Mr. McIntosh designated the McIntosh Committee as
13 his principal campaign committee. On May 8, 2012, Mr. McIntosh lost the primary
14 election for the Indiana's Fifth Congressional District. In reports filed with the
15 Commission after the primary election, the McIntosh Committee has indicated that it has
16 cash on hand and that no debts or obligations were owed to it. *See Reports and*
17 *Disbursements by David McIntosh for Indiana, filed July 31, 2012, available at*
18 <http://query.nictusa.com/cgi-bin/fecimg/?c00484683>.

19 Requestors represent that the proposed joint fundraising committees ("Joint
20 Committees") may include one or more of the following participants: AFF, AFFPA,

¹ See Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, Oct. 5, 2011, <http://www.fec.gov/press20111006postcarey.shtml>.

1 AFFPA's non-contribution account, the McIntosh Committee, and an independent
2 expenditure only political committee ("IEOPC").²

3 The Joint Committees would be established as separate political committees that
4 would act as the fundraising representative of all the participants. The Joint Committees
5 would establish separate depository accounts. In one account, each Joint Committee
6 would deposit funds raised for AFFPA and the McIntosh Committee. In another account,
7 each Joint Committee would deposit funds raised for AFF, AFFPA's non-contribution
8 account, and a participating IEOPC. Each participant would accept only funds that it
9 may lawfully receive under the Act.

10 The participants plan to execute a written agreement that would specify how the
11 expenses of, and contributions received by, each Joint Committee would be allocated
12 among the participants, and propose four different combinations of participants in the
13 Joint Committees.

14 1. AFF and AFFPA

15 This proposed Joint Committee would allocate the first \$5,000 received from
16 individuals to AFFPA, while contributions received from individuals in excess of \$5,000
17 would be allocated to AFF. All corporate and labor organization contributions would be
18 allocated to AFF.

19 This Joint Committee's pre-event publicity and solicitations would specify that
20 AFFPA is raising funds for use in connection with Federal elections, and that AFF is

² Requestors represent that any IEOPC would accept funds consistent with Advisory Opinion 2010-11 (Commonsense Ten), in which the Commission stated that a nonconnected political committee may raise and spend funds outside the limitations of the Act from individuals, other political committees, corporations, and labor organizations for the purpose of financing independent expenditures. Requestors represent that any IEOPC that participates in a Joint Committee would (1) report to the Commission as an IEOPC, and (2) not be affiliated with AFFPA.

1 raising funds to be used in a manner consistent with its status as a section 501(c)(4) social
2 welfare organization.

3 **2. AFF, AFFPA, AFFPA's non-contribution account and/or an IEOPC**

4
5 This proposed Joint Committee would allocate the first \$5,000 received from
6 individuals to AFFPA. Any amounts in excess of \$5,000 received from individuals, as
7 well as all corporate and labor organization contributions received, would be split evenly
8 between AFF, AFFPA's non-contribution account, and/or an IEOPC.

9 **3. AFF, AFFPA, and the McIntosh Committee**

10
11 This proposed Joint Committee would allocate the first \$5,000 received from
12 individuals to the McIntosh Committee: the first \$2,500 for the primary election, and the
13 next \$2,500 for the general election. The next \$5,000 received from individuals would be
14 allocated to AFFPA. Any amounts received from individuals in excess of \$10,000 would
15 be allocated to AFF. All corporate and labor organization contributions received would
16 also be allocated only to AFF.

17 This Joint Committee would make the following representations in its
18 solicitations:

- 19
- 20 • "This is a joint fundraising committee comprised of AFF, AFFPA, and the
[McIntosh Committee]";
 - 21 • "AFFPA and the [McIntosh Committee] are raising only funds for use in
22 connection with Federal elections"; and
 - 23 • "AFF is raising non-Federal funds to be used in a manner consistent with its
24 status as a Section 501(c)(4) social welfare organization."

25 This Joint Committee's solicitations would not be signed by Mr. McIntosh.

1 4. AFF, AFFPA, AFFPA's non-contribution account, an IEOPC, and the McIntosh
2 Committee

3
4 This Joint Committee would allocate the first \$5,000 received from individuals to
5 the McIntosh Committee (the first \$2,500 for the primary election, and the next \$2,500
6 for the general). The next \$5,000 received from individuals would be allocated to
7 AFFPA. Any amounts received from individuals in excess of \$10,000 would be split
8 evenly between AFFPA's non-contribution account and the IEOPC. All corporate or
9 labor organization contributions received would be split evenly between AFF, AFFPA's
10 non-contribution account, and the IEOPC.

11 This Joint Committee would make the following representations:

- 12 • "This is a joint fundraising committee comprised of AFF, AFFPA, AFFPA's
13 non-contribution *Carey* account, the FEC-registered independent expenditure-
14 only committee, and the [McIntosh Committee]";
- 15 • "AFFPA and the [McIntosh Committee] are raising only Federally-
16 permissible funds for use in connection with Federal elections";
- 17 • "AFFPA's non-contribution *Carey* account and the FEC-registered
18 independent expenditure-only committee are raising lawfully permitted funds
19 for use in connection with Federal elections"; and
- 20 • "AFF is raising non-Federal funds to be used in a manner consistent with its
21 status as a Section 501(c)(4) social welfare organization."

22 Under all four proposals, the Joint Committee participants would specify in a
23 written agreement how the fundraising proceeds will be allocated. The Joint Committee
24 would also keep records and file reports as required by 11 CFR 102.17(c)(4) and (8).

1 The joint fundraising expenses would be allocated to the participants in
2 proportion to the funds raised and distributed to each participant. Each participant would
3 pay its own fundraising expenses. To the extent that advanced funds are needed,
4 Requestors have not determined with any specificity how, or by what method, those
5 funds will be advanced.

6 Under all four proposals, the Joint Committee would solicit funds in writing,
7 and/or by telephone, or other forms of direct contact. They would also hold one or more
8 fundraising events, although no funds would be solicited at the fundraising events. All
9 solicitations for contributions would include a fundraising notice with the information
10 required by 11 CFR 102.17.

11 When the McIntosh Committee is a participant, the joint fundraising solicitations
12 would indicate that the authorized committee is one of the participants in the Joint
13 Committee. The candidate would not hold titles, such as an “honorary chairperson,” that
14 identify the candidate as serving in a position specifically related to fundraising. On pre-
15 event solicitation materials, the Federal candidate may be identified as the event’s
16 speaker. The candidate would not be featured any more or less prominently in the Joint
17 Committee public materials than the other participants.

18 Mr. McIntosh would be involved in the Joint Committee in the same manner as
19 any other participant. That is, Mr. McIntosh would have the opportunity to review and
20 edit all materials prepared for use in connection with the joint fundraising efforts, but he
21 would not be involved in preparing any of the joint fundraising materials. Mr. McIntosh
22 may also be involved in other logistical tasks such as the coordination of scheduling with
23 other participants when he appears at fundraising events. And Mr. McIntosh or his

1 representative may provide the names of potential individual contributors to other
2 participants.

3 The AFFPA's non-contribution account or an IEOPC may use funds raised
4 through the Joint Committee to support the candidacy of Mr. McIntosh through public
5 communications. Such public communications may contain express advocacy. The
6 public communications that do not contain express advocacy may or may not identify or
7 refer to Mr. McIntosh. The AFFPA's non-contribution account or an IEOPC would not
8 be providing, communicating, or discussing with Mr. McIntosh any information about the
9 plans, activities or needs beyond those involving the Joint Committee fundraising.

10 Solicitations by the Joint Committee involving AFFPA's non-contribution account or an
11 IEOPC would not indicate how AFFPA's non-contribution account or the IEOPC would
12 use the funds received.

13 ***Question Presented³***

- 14 1. *May AFF and AFFPA serve as participants in a joint fundraising committee?*
15
16 2. *May AFF, AFFPA, AFFPA's non-contribution account, and/or an IEOPC serve*
17 *as participants in a joint fundraising committee?*
18
19 3. *May AFF, AFFPA, and the McIntosh Committee serve as participants in a joint*
20 *fundraising committee?*
21
22 4. *May AFF, AFFPA, AFFPA's non-contribution account, an IEOPC, and the*
23 *McIntosh Committee serve as participants in a joint fundraising committee?*
24
25

³ This advisory opinion is limited to addressing Requestors' "specific transaction[s] or activit[ies]." 2 U.S.C. 437f(a)(1). To the extent Requestors also ask general questions of interpretation and pose hypotheticals, such questions "do not qualify as advisory opinion requests" and accordingly are not addressed in this advisory opinion. 11 CFR 112.1(b).

1 ***Legal Analysis and Conclusions***⁴

2
3 ***Question 1: May AFF and AFFPA serve as participants in a joint fundraising***
4 ***committee?***

5
6 Yes, AFF and AFFPA may serve as participants in the Joint Committee as
7 described.

8 Commission regulations allow a political committee to “engage in joint
9 fundraising with other political committees or with unregistered committees or
10 organizations.” 11 CFR 102.17(a)(1)(i). The regulations further specify that participants
11 may include political party committees (including non-Federal party committees),
12 candidate committees, multicandidate committees, and unregistered organizations which
13 do not qualify as collecting agents under 11 CFR 102.6(b).⁵ 11 CFR 102.17(a)(2).⁶

14 The participants in a joint fundraising effort must either select a participating
15 committee to serve as their joint fundraising representative or establish a separate

⁴ The Commission notes that this advisory opinion implicates issues that may also be the subject of a forthcoming Commission rulemaking in light of the court rulings in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

⁵ A collecting agent collects and transmits contributions to a separate segregated fund (“SSF”) that is related to the collecting agent, such as an affiliated committee or a connected organization. 11 CFR 102.6(b)(1), (2). As noted above, AFF and AFFPA represent that they are not affiliated and that AFF is not the connected organization for AFFPA. On the basis of this representation, AFF would not be collecting agent of AFFPA (or another political committee) and is not, for that reason, prohibited from participating in joint fundraising. The Commission notes, however, that it has previously considered joint fundraising activities a relevant factor, among a number of other factors, in evaluating whether entities are connected or affiliated. *See, e.g.*, Advisory Opinion 1997-15 (Nickalo). The question of whether AFF is the connected organization for (or affiliated with) AFFPA is outside the scope of this advisory opinion. If AFF were to become a collecting agent of AFFPA (or any other political committee), it would not be able to participate in a joint fundraising committee.

⁶ 11 CFR 102.17(a) states that “[n]othing in this section shall supersede 11 CFR Part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring Federal funds for Federal election activities.” 11 CFR 102.17(a). However, because AFF is not an organization whose activities are covered by Part 300, AFF’s proposed joint fundraising activities are not restricted by the reference to Part 300 in 11 CFR 102.17(a).

1 political committee.⁷ 11 CFR 102.17(a)(1)(i). The joint fundraising representative shall
2 be a reporting political committee and shall also be an authorized committee of each
3 participant who is a candidate for Federal office. *Id.* If the participants establish a
4 separate political committee to act as a fundraising representative, that committee must
5 “collect contributions, pay fundraising costs from gross proceeds and from funds
6 advanced by participants, and disburse net proceeds to each participant.” 11 CFR
7 102.17(b)(1). Commission regulations also require the participants or the fundraising
8 representative to establish a separate depository account to be used solely for the receipt
9 and disbursement of the joint fundraising proceeds. 11 CFR 102.17(c)(3).

10 Joint fundraising participants must also enter into a written agreement, identifying
11 the fundraising representative and stating a formula for the allocation of fundraising
12 proceeds. 11 CFR 102.17(c)(1). Commission regulations require the fundraising
13 representative to retain the written agreement for three years and make it available to the
14 Commission upon request. *Id.* Finally, the fundraising representative must provide
15 appropriate disclaimers on every solicitation for contributions,⁸ as well as screen and
16 report all contributions received.

⁷ If the participants establish a separate political committee to serve as their fundraising representative, that committee must not participate in any other joint fundraising effort. It may, however, conduct more than one joint fundraising effort for the participants. 11 CFR 102.17(a)(1)(i).

⁸ In addition to the disclaimer requirements under 11 CFR 110.11, a joint fundraising notice must be included with every solicitation for contributions. This notice must include: the names of all participating committees in the joint fundraising activity; the allocation formula to be used for distributing the joint fundraising proceeds; a statement informing contributors that, notwithstanding the stated allocation formula, contributors may designate their contributions for a particular participant or participants; and a statement informing contributors that the allocation formula may change if a contributor makes a contribution not subject to the amount limitations under the Act and Commission regulations. *See* 11 CFR 102.17(c)(2)(i)(A)–(D).

1 As a threshold matter, the Commission has never considered whether a
2 corporation such as AFF is an “unregistered ... organization” that can establish a joint
3 fundraising committee along with a political committee such as AFFPA. When this
4 regulation was originally adopted, corporations were prohibited from making both
5 contributions and expenditures in connection with Federal elections, and therefore would
6 have been unable to participate in joint fundraising efforts such as those proposed here.
7 However, the plain meaning of the regulatory text appears to cover organizations such as
8 AFF and there is no other provision – such as those found at Part 300 implementing
9 certain joint fundraising restrictions established by BCRA – that explicitly prohibits such
10 organizations from participating in regulated joint fundraising activities. *See. Orion*
11 *Reserves Ltd. v. Salazar*, 553 F.3d 697, 707 (D.C. Cir. 2009) (an agency's interpretation
12 of its own regulations is entitled to deference when the plain language of the regulation
13 does not require another interpretation). Therefore, the Commission concludes that AFF
14 and AFFPA may form a joint fundraising committee together, provided they adhere to the
15 other requirements of the Act and Commission regulations, as described below.

16 Based on Requestors’ representations, a Joint Committee involving AFFPA and
17 AFF would also meet the other requirements for establishing a lawful joint fundraising
18 effort. First, they plan to create and register a new political committee to serve as their
19 joint fundraising representative. This committee would be a “reporting political
20 committee.” 11 CFR 102.17(a)(1)(i). Second, they intend to enter into a written
21 agreement naming the new political committee as their joint fundraising representative.
22 Third, they have established a formula for allocating the joint fundraising proceeds and
23 expenses. Fourth, they plan to provide joint fundraising disclaimers on every solicitation

1 for contributions and follow all the recordkeeping and reporting requirements of section
2 102.17. Finally, the joint fundraising committee would establish separate bank accounts
3 that would segregate contributions that are subject to the limitations and prohibitions of
4 the Act from those that are not.

5 Because AFF and AFFPA indicate they will comply with all provisions of the
6 joint fundraising committee rules at 11 CFR 102.17, they may engage in their proposed
7 activity, notwithstanding that AFF is a corporation.

8 Any joint fundraising effort that AFF and AFFPA establish, however, must
9 adhere to the prohibitions on corporate contributions and facilitation of contributions.

10 The Act and Commission regulations prohibit corporations from making direct
11 contributions to candidates, and contributions to political committees like AFFPA, which
12 make direct contributions in connection with a Federal election.⁹ 2 U.S.C. 441b(a); 11
13 CFR 114.2(b)(1); *see also United States v. Danielczyk*, 633 F.3d 611, 617-618 (4th Cir.
14 2012) (upholding federal prohibition on direct corporate contributions and distinguishing
15 it from prohibition on independent expenditures struck down in *Citizens United*);
16 *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-25 (9th Cir. 2011) (upholding
17 analogous municipal prohibition on direct corporate contributions). Commission
18 regulations also generally prohibit corporations from facilitating the making of
19 contributions that the corporation itself would be prohibited from making. 11 CFR
20 114.2(f)(1). “Facilitation” means using corporate resources to engage in fundraising

⁹ A “contribution” includes “any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [Federal] election.” 2 U.S.C. 441b(b)(2); *see also* 2 U.S.C. 431(8); 11 CFR 100.52(a). “Anything of value” includes all in-kind contributions, including the provision of goods and services without charge or at less than the usual and normal charge. *See* 11 CFR 100.52(d)(1).

1 activities in connection with any Federal election. *Id.* Facilitation of fundraising
2 activities includes a corporation's use of its customer, client, or other lists to solicit
3 contributions, unless the corporation receives advance payment for the fair market value
4 of the list. 11 CFR 114.2(f)(2)(i)(C). Facilitation also includes the failure to reimburse a
5 corporation within a commercially reasonable time for the use of corporate facilities. 11
6 CFR 114.2(f)(2)(i)(B).

7 Here, AFF will be using its corporate resources to engage in joint fundraising with
8 AFFPA through the Joint Committee. However, AFF's participation in the Joint
9 Committee will not necessarily constitute a contribution to, or the facilitation of
10 contributions to, AFFPA.¹⁰ AFFPA and AFF have indicated that each entity will pay the
11 Joint Committee's fundraising expenses in proportion to the funds received by the Joint
12 Committee on that entity's behalf. AFF, thus, will not be paying AFFPA's share of the
13 Joint Committee's expenses. To the extent that the Joint Committee incurs expenses –
14 such as, for example, start-up costs or the use of mailing lists – before each participant's
15 appropriate proportion of those expenses can be determined, AFFPA should advance
16 these start-up costs and be reimbursed by AFF later based on AFF's share of the costs as

¹⁰ AFF also asks whether its joint fundraising activity through the Joint Committee would be treated as "Federal campaign activity" for purposes of determining whether AFF has the requisite "major purpose" to be deemed a political committee by the Commission. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (construing the term "political committee" to encompass only organizations that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate"). The Commission concludes that AFF's activity in the Joint Committee will not *categorically* be Federal campaign activity or, in itself, make AFF a political committee. The joint fundraising may constitute "Federal campaign activity," depending on its content. For example, AFF engages in what it refers to as "FEC-regulated activity," Advisory Opinion Request at 2, and solicitations for such activity would constitute Federal campaign activity.

1 specified in the written joint fundraising agreement.¹¹ Any advance paid by AFFPA
2 should include the cost of resources owned by AFF, such as donor or member lists, or the
3 use of AFF's name, trademarks or service marks. See 11 CFR 114.2(f)(2)(i)(C); AO
4 2007-10 (Reyes).

5 Consistent with the requirements set forth above, the Commission concludes that
6 AFF and AFFPA may serve in a joint fundraising committee established under 11 CFR
7 102.17.

8 *Question 2: May AFF, AFFPA, AFFPA's non-contribution Carey account and/or an*
9 *IEOPC serve as participants in a joint fundraising committee?*

10

11 For the reasons given in Question 1, AFF and AFFPA, including its non-
12 contribution account, and an IEOPC – may participate in a Joint Committee, provided
13 they adhere to the requirements as described in the response to Question 1.¹²

14 *Question 3: May AFF, AFFPA, and the McIntosh Committee serve as participants in a*
15 *joint fundraising committee?*

16

17 This request does not qualify as an advisory opinion request because at this time
18 none of the Requestors is a Federal candidate, an agent of a Federal candidate, or a
19 Federal candidate's authorized committee capable of raising funds. An analysis of the

¹¹ Advances made by a participant that exceeds its proportionate share of the fundraising costs are treated as contributions to the other participants. 11 CFR 102.17(b)(3)(ii). An excess advance by AFF, whether of funds or mailing lists, would be a prohibited contribution from AFF to AFFPA. *Id.*

¹² AFFPA asks about the participation of AFFPA's non-contribution account in the joint fundraising effort. AFFPA itself may participate in a joint fundraising committee regardless of the account it uses in this endeavor. A non-contribution account, however, is not a separate political committee but rather a separate account of AFFPA. See *Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (a nonconnected political committee that makes direct contributions to candidates may receive unlimited funds into a separate bank account for the purpose of financing independent expenditures); see also Press Release, FEC Statement on *Carey v. FEC: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account*, Oct. 5, 2011, <http://www.fec.gov/press2011/1006postcarey.shtml>.

1 restrictions under 2 U.S.C. 441i(e) on any such person would thus regard the activities of
2 third persons.

3 Commission regulations require that a request for an advisory opinion concern
4 only the activities of the requesting party or parties. 11 CFR 112.1(b). Requests
5 regarding the activities of third parties do not qualify as advisory opinion requests. *Id*;
6 *see also* Advisory Opinion 2006-30 (ActBlue) (declining to answer a question about the
7 reporting requirements of political committees that were not parties to the advisory
8 opinion request); Advisory Opinion 1999-17 (Bush Exploratory Committee) (declining to
9 answer questions about the activities of the campaign committee of requestor's opposing
10 candidate); Advisory Opinion 1991-24 (CUNA) (declining to answer a question
11 regarding the activities of credit union members that did not join the advisory opinion
12 request); Advisory Opinion 1991-2 (MCI) (the Commission could not address questions
13 about the activities of two organizations that were not parties to the request).

14 Although Mr. McIntosh was a Federal candidate in the 2012 primary election for
15 the Fifth Congressional District of Indiana, his candidacy ended on May 8, 2012 when he
16 lost in that primary election. In reports filed with the Commission after the 2012 primary
17 election, the McIntosh Committee has indicated that it has cash on hand and that no debts
18 or obligations were owed to it.¹³ *See* Reports and Disbursements by David McIntosh for
19 Indiana, filed July 31, 2012, available at [http://query.nictusa.com/cgi-](http://query.nictusa.com/cgi-bin/fecimg/?c00484683)
20 [bin/fecimg/?c00484683](http://query.nictusa.com/cgi-bin/fecimg/?c00484683). The McIntosh Committee, therefore, may not raise

¹³ Requestors have stated in a supplement dated September 17, 2012, that the McIntosh Committee has expenses for which it "currently does not have sufficient funds to pay." However, the conclusions reflected in this advisory opinion are based on the McIntosh Committee's official disclosure reports filed with the Commission.

1 contributions in connection with the past primary campaign. None of the other
2 Requestors is a Federal candidate, an agent of a Federal candidate, or a Federal
3 candidate's authorized committee capable of raising funds. Although the other
4 Requestors may also wish to engage in joint fundraising with other authorized candidate
5 committees, issuing an opinion about such committees' potential liability under 2 U.S.C.
6 441i(e) would constitute an opinion about those other committees, not any of the
7 Requestors.¹⁴

8 Accordingly, because the question about the participation of a Federal candidate
9 or a Candidate Committee in the Joint Committee concerns the activities of a third party,
10 this question does not qualify as an advisory opinion request.¹⁵ 11 CFR 112.1(b), (d).

11 *Question 4: May AFF, AFFPA, AFFPA's non-contribution account, an IEOPC, and the*
12 *Candidate Committee serve as participants in a joint fundraising committee?*
13

14 For the reasons discussed in question 3, this question does not "qualify[y] as an
15 advisory opinion request." 11 CFR 112.1(b), (d).

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a

¹⁴ The Commission has responded to requests for advisory opinions from entities seeking to involve Federal candidates in fundraising when no candidate was party to the request, but those entities were seeking to have Federal candidates solicit funds for the requesting entities. *See, e.g.*, Advisory Opinion 2011-12 (Majority PAC); Advisory Opinion 2010-07 (Yes on FAIR). Here, the proposed transaction or activity involves funds being raised for a Federal candidate's authorized committee, not just solicitation by a candidate for a requesting entity.

¹⁵ Although Mr. McIntosh "may consider candidacy in 2014," running for office and engaging in joint fundraising is not "a specific transaction or activity" that he "plans to undertake" at present. 11 CFR 112.1(b) (emphasis added). Therefore, this question also would not qualify as an advisory opinion request because Mr. McIntosh's 2014 candidacy "pos[es] a hypothetical situation." 11 CFR 112.1(b), (d).

1 conclusion presented in this advisory opinion, then the Requestors may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 The cited advisory opinions are available on the Commission's Web site at,
9 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database
10 at <http://www.fec.gov/searchao>.

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17

On behalf of the Commission,

Caroline C. Hunter
Chair