

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

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

DRAFT C of ADVISORY OPINION 2012-25 is now available for comment. It was requested by Jason Torchinsky, Esq., and Michael Bayes, Esq., on behalf of American Future Fund/American Future Fund Political Action/McIntosh, and is 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 DRAFT C 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@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 2012-25, 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
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999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
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FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 28, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 10-4-12

FROM: Anthony Herman
General Counsel

AH by RMK

SUBMITTED LATE

Kevin Deeley
Acting Associate General Counsel

KD by RMK

Robert M. Knop
Assistant General Counsel

RMK

Neven F. Stipanovic
Attorney

NFS

Subject: AO 2012-25 (American Future Fund/American Future Fund
Political Action/McIntosh) (Draft C)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for October 4, 2012.

Attachment

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 C

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 (collectively “requestors”), concerning the application
14 of the Federal Election Campaign Act (the “Act”) and Commission regulations to your
15 proposed joint fundraising efforts, which propose to create four joint fundraising
16 committees.¹

17 The Commission concludes that the two proposed joint fundraising committees
18 that would not include a Federal candidate’s/officeholder’s authorized campaign
19 committee may operate consistent with the Act, but the two proposed joint fundraising
20 committees that would include a Federal candidate’s/officeholder’s authorized campaign
21 committee may not.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on
24 April 10, 2012, and emails received on July 13 and September 17, 2012, and publicly
25 available information.

¹ Mr. McIntosh ran for Congress in Indiana’s Fifth Congressional District, but was defeated in the May 8, 2012 Republican primary. He thus was no longer a candidate at the time he joined this request. Nevertheless, because all of the questions posed in the request directly implicate proposed conduct by other requestors besides Mr. McIntosh and David McIntosh for Indiana, the Commission has determined that they are valid advisory opinion requests. See 2 U.S.C. 437(g); 11 CFR 112.1.

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.² AFF and AFFPA have some overlapping
7 management, but AFFPA is not registered as a separate segregated fund connected to
8 AFF. The requestors represent that they operate separately and are not affiliated with
9 each other under Commission regulations.

10 The proposed joint fundraising committees (“Joint Committees”) may include one
11 or more of the following participants: AFF, AFFPA, AFFPA’s non-contribution account,
12 a Federal candidate’s/officeholder’s authorized campaign committee, and an independent
13 expenditure only political committee (“IEOPC”).³

14 The Joint Committees would be established as separate political committees that
15 would act as the fundraising representative of all the participants. The Joint Committees
16 would establish separate depository accounts. In one account, each Joint Committee
17 would deposit funds raised for AFFPA and the Federal candidate’s/officeholder’s
18 authorized campaign committee. In another account, each Joint Committee would
19 deposit funds raised for AFF, AFFPA’s non-contribution account, and a participating

² 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>.

³ 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 IEOPC. Each participant would accept only funds that it may lawfully receive under the
2 Act.

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

7 *1. AFF and AFFPA*

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

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

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

17

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

22 *3. AFF, AFFPA, and a Federal candidate's/officeholder's authorized campaign*
23 *committee*

24

1 This proposed Joint Committee would allocate the first \$5,000 received from
2 individuals to the Federal candidate's/officeholder'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 only to AFF.

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

- 9 • "This is a joint fundraising committee comprised of AFF, AFFPA, and the
10 Federal candidate's/officeholder's authorized campaign committee";
- 11 • "AFFPA and the Federal candidate's/officeholder's campaign committee are
12 raising only federal funds for use in connection with Federal elections"; and
- 13 • "AFF is raising non-Federal funds to be used in a manner consistent with its
14 status as a Section 501(c)(4) social welfare organization."

15 This Joint Committee's solicitations would not be signed by the Federal
16 candidate/officeholder.

17 4. AFF, AFFPA, AFFPA's non-contribution account, an IEOPC, and a Federal
18 candidate's/officeholder's authorized campaign committee

19
20 This Joint Committee would allocate the first \$5,000 received from individuals to
21 the Federal candidate's/officeholder's authorized campaign committee (the first \$2,500
22 for the primary election, and the next \$2,500 for the general). The next \$5,000 received
23 from individuals would be allocated to AFFPA. Any amounts received from individuals
24 in excess of \$10,000 would be split evenly between AFFPA's non-contribution account

1 and the IEOPC. All corporate or labor organization contributions received would be split
2 evenly between AFF, AFFPA's non-contribution account, and the IEOPC.

3 This Joint Committee would make the following representations:

- 4 • "This is a joint fundraising committee comprised of AFF, AFFPA, AFFPA's
5 non-contribution *Carey* account, the FEC-registered independent expenditure-
6 only committee, and the authorized campaign committee of a federal
7 candidate/officeholder";
- 8 • "AFFPA and the Federal candidate's/officeholders' campaign committee are
9 raising only federally-permissible funds for use in connection with Federal
10 elections";
- 11 • "AFFPA's non-contribution *Carey* account and the FEC-registered
12 independent expenditure-only committee are raising lawfully permitted funds
13 for use in connection with Federal 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 Under all four proposals, the Joint Committee participants would specify in a
17 written agreement how the fundraising proceeds will be allocated. The Joint Committee
18 would also keep records and file reports as required by 11 CFR 102.17(c)(4) and (8).

19 The joint fundraising expenses would be allocated to the participants in
20 proportion to the funds raised and distributed to each participant. Each participant would
21 pay its own fundraising expenses. To the extent that advanced funds are needed, the
22 requestors have not determined with any specificity how, or by what method, those funds
23 will be advanced.

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

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

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

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

12 ***Question Presented***⁴

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

25 ***Legal Analysis and Conclusions***⁵

⁴ This advisory opinion is limited to addressing the requestors' "specific transaction[s] or activit[ies]." 2 U.S.C. 437f(a)(1). To the extent the 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).

⁵ 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).

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

3

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

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

12 The participants in a joint fundraising effort must either select a participating
13 committee to serve as their joint fundraising representative or establish a separate
14 political committee.⁸ 11 CFR 102.17(a)(1)(i). The joint fundraising representative shall
15 be a reporting political committee and shall also be an authorized committee of each

⁶ 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 a 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.

⁷ 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).

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

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

15 As a threshold matter, the Commission has never considered whether a
16 corporation such as AFF is an “unregistered ... organization” that can establish a joint
17 fundraising committee along with a political committee such as AFFPA. When this
18 regulation was originally adopted, corporations were prohibited from making both
19 contributions and expenditures in connection with Federal elections, and therefore would

⁹ 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 have been unable to participate in joint fundraising efforts such as those proposed here.
2 However, the plain meaning of the regulatory text appears to cover organizations such as
3 AFF and there is no other provision – such as those found at Part 300 implementing
4 certain joint fundraising restrictions established by BCRA – that explicitly prohibits such
5 organizations from participating in regulated joint fundraising activities. *See Orion*
6 *Reserves Ltd. v. Salazar*, 553 F.3d 697, 707 (D.C. Cir. 2009) (an agency's interpretation
7 of its own regulations is entitled to deference when the plain language of the regulation
8 does not require another interpretation). Therefore, the Commission concludes that AFF
9 and AFFPA may form a joint fundraising committee together, provided they adhere to the
10 other requirements of the Act and Commission regulations, as described below.

11 Based on the requestors' representations, a Joint Committee involving AFFPA
12 and AFF would also meet the other requirements for establishing a lawful joint
13 fundraising effort. First, they plan to create and register a new political committee to
14 serve as their joint fundraising representative. This committee would be a "reporting
15 political committee." 11 CFR 102.17(a)(1)(i). Second, they intend to enter into a written
16 agreement naming the new political committee as their joint fundraising representative.
17 Third, they have established a formula for allocating the joint fundraising proceeds and
18 expenses. Fourth, they plan to provide joint fundraising disclaimers on every solicitation
19 for contributions and follow all the recordkeeping and reporting requirements of section
20 102.17. Finally, the joint fundraising committee would establish separate bank accounts
21 that would segregate contributions that are subject to the limitations and prohibitions of
22 the Act from those that are not.

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

4 Any joint fundraising effort that AFF and AFFPA establish, however, must
5 adhere to the prohibitions on corporate contributions and facilitation of contributions.
6 The Act and Commission regulations prohibit corporations from making direct
7 contributions to candidates, and contributions to political committees like AFFPA, which
8 make direct contributions in connection with a Federal election.¹⁰ 2 U.S.C. 441b(a); 11
9 CFR 114.2(b)(1); *see also United States v. Danielczyk*, 633 F.3d 611, 617-618 (4th Cir.
10 2012) (upholding federal prohibition on direct corporate contributions and distinguishing
11 it from prohibition on independent expenditures struck down in *Citizens United*);
12 *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-25 (9th Cir. 2011) (upholding
13 analogous municipal prohibition on direct corporate contributions). Commission
14 regulations also generally prohibit corporations from facilitating the making of
15 contributions that the corporation itself would be prohibited from making. 11 CFR
16 114.2(f)(1). “Facilitation” means using corporate resources to engage in fundraising
17 activities in connection with any Federal election. *Id.* Facilitation of fundraising
18 activities includes a corporation’s use of its customer, client, or other lists to solicit
19 contributions, unless the corporation receives advance payment for the fair market value
20 of the list. 11 CFR 114.2(f)(2)(i)(C). Facilitation also includes the failure to reimburse a

¹⁰ 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 corporation within a commercially reasonable time for the use of corporate facilities. 11

2 CFR 114.2(f)(2)(i)(B).

3 Here, AFF will be using its corporate resources to engage in joint fundraising with
4 AFFPA through the Joint Committee. However, AFF's participation in the Joint
5 Committee will not necessarily constitute a contribution to, or the facilitation of
6 contributions to, AFFPA.¹¹ AFFPA and AFF have indicated that each entity will pay the
7 Joint Committee's fundraising expenses in proportion to the funds received by the Joint
8 Committee on that entity's behalf. AFF, thus, will not be paying AFFPA's share of the
9 Joint Committee's expenses. To the extent that the Joint Committee incurs expenses –
10 such as, for example, start-up costs or the use of mailing lists – before each participant's
11 appropriate proportion of those expenses can be determined, AFFPA should advance
12 these start-up costs and be reimbursed by AFF later based on AFF's share of the costs as
13 specified in the written joint fundraising agreement.¹² Any advance paid by AFFPA
14 should include the cost of resources owned by AFF, such as donor or member lists, or the
15 use of AFF's name, trademarks or service marks. See 11 CFR 114.2(f)(2)(i)(C);
16 Advisory Opinion 2007-10 (Reyes).

¹¹ 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.

¹² 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 Consistent with the requirements set forth above, the Commission concludes that
2 AFF and AFFPA may serve in a joint fundraising committee established under 11 CFR
3 102.17.

4 *Question 2: May AFF, AFFPA, AFFPA's non-contribution Carey account and/or an*
5 *IEOPC serve as participants in a joint fundraising committee?*
6

7 For the reasons given in response to Question 1, AFF and AFFPA, including its
8 non-contribution account, and an IEOPC – may participate in a Joint Committee,
9 provided they adhere to the requirements described in the response to Question 1.¹³

10 *Question 3: May AFF, AFFPA, and a Federal candidate's/officeholder's authorized*
11 *campaign committee serve as participants in a joint fundraising committee?*
12

13 No, these entities cannot serve as participants in the Joint Committee as described,
14 because the Joint Committee would be an entity established, financed, maintained, or
15 controlled by a Federal candidate/officeholder. As such, the Joint Committee may not
16 raise unlimited funds from individuals or any funds from corporations and labor
17 organizations, as it proposes.

18 Federal officeholders and candidates, their agents, and entities directly or
19 indirectly established, financed, or maintained, or controlled by, or acting on behalf of,
20 Federal officeholders and candidates, may not raise or spend funds in connection with an
21 election for Federal office, “unless the funds are subject to the limitations, prohibitions,
22 and reporting requirements” of the Act. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. Persons

¹³ 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/press20111006postcarey.shtml>.

1 subject to section 441i(e) also may not raise or spend funds in connection with any
2 election other than an election for Federal office unless the funds are raised within the
3 Act's contribution limits and are not from prohibited sources. 2 U.S.C. 441i(e)(1)(B); 11
4 CFR 300.62.

5 A joint fundraising committee is required to be an authorized committee of each
6 Federal candidate or officeholder participating in the joint fundraising activity. 11 CFR
7 102.17(a)(1)(i) If a candidate/officeholder's authorized campaign committee were a
8 participant in this joint fundraising effort, the Joint Committee would be treated as
9 another authorized committee of that candidate/officeholder under Commission
10 regulations, and the candidate/officeholder would be required to authorize the Joint
11 Committee in writing for the Joint Committee to receive contributions "on [the
12 candidate's/officeholder's] behalf". See 2 U.S.C. 431(6); 11 CFR 100.5(f)(1). This
13 factor alone is sufficient to determine that the Joint Committee would be an entity
14 "established, financed, maintained or controlled by" the Federal candidate/officeholder.
15 Thus the Joint Committee could not permissibly raise unlimited funds.

16 In addition, agents of the Federal candidate/officeholder would be among the
17 persons who formed the Joint Committee. The Federal candidate/officeholder, therefore,
18 would directly and/or through his or her agents have an active or significant role in the
19 Joint Committee's formation. 11 CFR 300.2(c)(2)(ix). This factor is also sufficient to
20 determine that the Joint Committee would be an entity "established, financed, maintained
21 or controlled by" the candidate/officeholder. See Advisory Opinion 2003-12
22 (Representative Flake) ("Having concluded that Representative Flake established [the

1 entity], it is not necessary to determine whether he will finance, maintain or control [the
2 entity]”).

3 Moreover, the Joint Committee would also “act as a fundraising representative”
4 for the Federal candidate/officeholder and/or his or her authorized campaign committee.
5 This relationship would necessitate that the candidate/officeholder have the authority and
6 ability to participate in the governance of the Joint Committee. 11 CFR 300.2(c)(2)(ii).
7 Indeed, the request indicates that, although the Joint Committee would ultimately be
8 responsible for preparing fundraising solicitations, the candidate/officeholder would have
9 editorial control over every solicitation.

10 For all of these reasons, the Commission concludes that the Joint Committee
11 would be an entity “directly or indirectly established, financed, or maintained, or
12 controlled by, or acting on behalf of” a Federal candidate/officeholder. 2 U.S.C.
13 441i(e)(1)(A).¹⁴ As such an entity, the Joint Committee would be required to comply
14 with section 441i(e) of the Act; all funds that the Joint Committee solicits, receives, and
15 disburses in connection with an election for Federal office must be subject to the
16 limitations, prohibitions, and reporting requirements of the Act.¹⁵ 2 U.S.C.
17 441i(e)(1)(A); 11 CFR 300.61.

¹⁴ The Joint Committee would also be an “agent” of the participating Federal candidate/officeholder. See 11 CFR 300.2(b) (defining an agent of a Federal candidate/officeholder 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 or officeholder would be acting as his or her 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).

¹⁵ 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

1 Because another Joint Committee participant (AFF) intends to solicit and receive
2 unlimited contributions from individuals as well as corporate and labor organization
3 funds through the Joint Committee, the Joint Committee, with a Federal
4 candidate/officeholder and/or his or her authorized campaign committee's participation,
5 would not comply with section 441i(e) of the Act. Federal candidates and officeholders
6 "may not solicit unlimited contributions from individuals, corporations, or labor
7 organizations on behalf of independent expenditure-only political committees." *See*
8 Advisory Opinion 2011-12 (Majority PAC and House Majority PAC). Although such
9 committees may accept unlimited contributions, "the Act's solicitation restrictions remain
10 applicable to *contributions solicited by* Federal candidates, officeholders, and national
11 party committees and their agents." *Id.*; *see also* Explanation and Justification for Final
12 Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67
13 FR 49064, 49106 (July 29, 2002) (rejecting an interpretation of section 441i(e)(1)(A) as
14 covering only funds "that would eventually benefit the candidate's own campaign").

15 Accordingly, a Joint Committee with a Federal candidate's/officeholder's
16 authorized campaign committee as a participant could not receive any funds in
17 connection with an election for Federal office from corporations or labor organizations,
18 or contributions not subject to the limits in the Act. Because this proposed Joint
19 Committee would solicit, receive, and disburse funds for AFF that are outside the Act's
20 limitations, prohibitions, and reporting requirements, the Joint Committee may not

1 receive unlimited funds from individuals or any funds from corporations or labor
2 organizations as proposed.¹⁶

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 serve as participants in the Joint Committee because the
8 Joint Committee would be an entity established, financed, maintained, or controlled by a
9 Federal candidate/officeholder. For the reasons discussed in question 3, the Joint
10 Committee may not raise unlimited funds from individuals or any funds from
11 corporations and labor organizations as it proposes.¹⁷

12 This response constitutes an advisory opinion concerning the application of the
13 Act and Commission regulations to the specific transaction or activity set forth in your
14 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
15 of the facts or assumptions presented, and such facts or assumptions are material to a
16 conclusion presented in this advisory opinion, then the requestors may not rely on that
17 conclusion as support for its proposed activity. Any person involved in any specific
18 transaction or activity which is indistinguishable in all its material aspects from the
19 transaction or activity with respect to which this advisory opinion is rendered may rely on
20 this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
21 conclusions in this advisory opinion may be affected by subsequent developments in the

¹⁶ A joint committee could, however, be created with AFF, AFFPA, and a Federal candidate/officeholder and/or his or her authorized committee as participants if it only solicited 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.

¹⁷ As with question 3, 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 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
2 The cited advisory opinions are available on the Commission's Web site at,
3 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database
4 at http://www.fec.gov/searchao.

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On behalf of the Commission,

Caroline C. Hunter
Chair