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November 16, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KS*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS by RMK*
Attorney

Subject: Draft AO 2012-25 (AFF/AFFPA)

For Meeting of 12-6-12

SUBMITTED LATE

We have been asked to have the attached document placed on the Open Session Agenda for December 6, 2012.

Attachment

1 ADVISORY OPINION 2012-25
2 Jason Torchinsky, Esq.
3 Michael Bayes, Esq.
4 Holtzman Vogel Josefiak PLLC
5 Suite 100
6 45 North Hill Drive
7 Warrenton, VA 20186
8

DRAFT

9 Dear Messrs. Torchinsky and Bayes:

10 The Commission is responding to your advisory opinion request on behalf of
11 American Future Fund (“AFF”) and American Future Fund Political Action (“AFFPA”)
12 (collectively, “Requestors”), concerning the application of the Federal Election
13 Campaign Act (the “Act”) and Commission regulations to your proposed joint
14 fundraising efforts.¹

15 The Commission concludes that the proposed joint fundraising committees could
16 operate consistent with the Act and Commission regulations.²

¹ The original advisory opinion request also inquired as to joint fundraising efforts between AFF, AFFPA, and a Federal candidate or officeholder’s authorized campaign committee. On June 19, 2012, after the Office of General Counsel raised the issue of the absence of a Federal candidate, Mr. David McIntosh – who ran in the primary for U.S. House of Representatives for the 5th District of Indiana – was added as an additional requestor to the advisory opinion request. On October 1, 2012, however, Requestors withdrew their original questions regarding joint fundraising activities involving a Federal candidate or officeholder’s authorized campaign committee.

² In a letter dated October 12, 2012, the Office of General Counsel informed Requestors that “the Commission has concluded its consideration of [their] advisory opinion request without issuing an advisory opinion. The letter stated that the Commission had voted on two drafts, labeled Drafts D and E, of an advisory opinion, copies of which were enclosed with the letter, but that neither Draft D nor Draft E had received the affirmative vote of four members of the Commission required for the Commission to render an advisory opinion. Documents related to this advisory opinion (including the documents identified as Drafts D and E) are available on the Commission’s website at <http://saos.nictusa.com/saos/searchao?AONUMBER=2012-25>.

On October 15, 2012, Requestors filed a letter requesting “reconsideration of the matter by the Commission.” Section 112.6 of the Commission’s regulations, 11 CFR 112.6, which provides that the Commission may reconsider a previously issued advisory opinion, does not apply in this instance, however, precisely because the Commission was previously unable to render an opinion. Nevertheless, on its own motion, the Commission is issuing this qualified advisory opinion to provide guidance based on the two drafts previously provided to Requestors, both of which reached the same conclusion that the proposed joint fundraising committees could operate consistent with the Act and Commission regulations but did so based on substantively differing analysis.

1 ***Background***

2 The facts presented in this advisory opinion are based on letters received on April
3 11, 2012 and June 19, 2012, and emails received on July 24, 2012, September 17, 2012,
4 and October 1, 2012.

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

14 Requestors represent that the proposed joint fundraising committees (“Joint
15 Committees”) may include one or more of the following participants: AFF, AFFPA,
16 AFFPA’s non-contribution *Carey* account, and an independent expenditure only political
17 committee (“IEOPC”).⁴

³ 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>.

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

8 The participants plan to execute a written agreement that would specify how the
9 expenses of and contributions received by each Joint Committee would be allocated
10 among the participants, and propose two different combinations of participants in the
11 Joint Committees as follows:

12 1. *AFF and AFFPA*

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

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

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

22 This proposed Joint Committee would allocate the first \$5,000 received from
23 individuals to AFFPA. Any amounts in excess of \$5,000 received from individuals, as
24

1 well as all corporate and labor organization contributions received, would be split evenly
2 between AFF, AFFPA's non-contribution *Carey* account, and/or an IEOPC.

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

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

11 Under both proposals, the Joint Committee would solicit funds in writing, and/or
12 by telephone, or other forms of direct contact. They would also hold one or more
13 fundraising events, although no funds would be solicited at the fundraising events. All
14 solicitations for contributions would include a fundraising notice with the information
15 required by 11 CFR 102.17.

16 Solicitations by the Joint Committee involving AFFPA's non-contribution *Carey*
17 account or an IEOPC would not indicate how AFFPA's non-contribution *Carey* account
18 or the IEOPC would use the funds received.

19 ***Question Presented***

- 20 1. *May AFF and AFFPA serve as participants in a joint fundraising committee?*
21
22 2. *May AFF, AFFPA, AFFPA's non-contribution Carey account, and/or an IEOPC*
23 *serve as participants in a joint fundraising committee?*
24

1 ***Legal Analysis and Conclusions***

2

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

5

6 Yes, under the circumstances described in the request and below, AFF and

7 AFFPA could serve as participants in the proposed Joint Committee.

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 that are

13 not collecting agents under 11 CFR 102.6(b). 11 CFR 102.17(a)(2).

14 As a threshold matter, the Commission has never considered whether a

15 corporation such as AFF is an “unregistered ... organization” that can jointly, with a

16 political committee, establish a joint fundraising committee. The plain language of the

17 regulatory text governing joint fundraising committees appears to cover organizations

18 such as AFF, and there is no other provision that prohibits such organizations from

19 participating in regulated joint fundraising activities.⁵ See 11 CFR 102.17(a)(1)(i); see

20 also *Orion Reserves Ltd. v. Salazar*, 553 F.3d 697, 707 (D.C. Cir. 2009) (an agency's

21 interpretation of its own regulations is entitled to deference when the plain language of

22 the regulation does not require another interpretation).

⁵ 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 Because AFF and AFFPA indicate they will comply with all provisions of the
2 joint fundraising committee rules at 11 CFR 102.17, the Commission concludes that they
3 may engage in their proposed activity, notwithstanding that AFF is a corporation.⁶ Three
4 Commissioners previously concluded that Requestors' proposed conduct would be
5 permissible, subject to the qualification that any joint fundraising effort that AFF and
6 AFFPA establish must adhere to the prohibitions on corporate contributions⁷ and
7 corporate facilitation of contributions.⁸ 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1); 11 CFR
8 114.2(f)(1); *see also United States v. Danielczyk*, 633 F.3d 611, 617-618 (4th Cir. 2012)
9 (upholding federal prohibition on direct corporate contributions and distinguishing it
10 from prohibition on independent expenditures struck down in *Citizens United*). The
11 other three Commissioners concluded that the Commission's joint fundraising regulations
12 themselves provide a mechanism for raising funds without violating those prohibitions.

⁶ 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 was unable to approve a response by the required four affirmative votes as to whether AFF's joint fundraising activity through the Joint Committee would be treated as Federal campaign activity.

⁷ 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).

⁸ "Facilitation" means using corporate resources to engage in fundraising activities in connection with any Federal election. Facilitation of fundraising activities includes a corporation's use of its customer, client, or other lists to solicit contributions, unless the corporation receives advance payment for the fair market value of the list. 11 CFR 114.2(f)(2)(i)(C). Facilitation also includes the failure to reimburse a corporation within a commercially reasonable time for the use of corporate facilities. 11 CFR 114.2(f)(2)(i)(B).

1 As noted earlier, the Commission voted on two draft advisory opinions, neither of
2 which received the requisite four votes for adoption.⁹ Review of these drafts provides
3 necessary further explanation of the positions taken by different Commissioners. Draft
4 D, sets forth the conditional basis for the conclusion in Draft D supported by three
5 Commissioners that AFF and AFFPA may serve as participants in the proposed Joint
6 Committee. Draft E sets forth the conclusion supported by three Commissioners that the
7 regulations expressly permit this activity and joint fundraising efforts complying with
8 those regulations would not violate restrictions on corporate contributions or corporate
9 facilitation.¹⁰

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

12

13 Yes, the Commission concludes that, under the circumstances described in the
14 request, AFF, AFFPA, AFFPA's non contribution *Carey* account and/or an IEOPC could
15 serve as participants in the proposed Joint Committee.¹¹ As with the response to
16 Question 1, however, review of the drafts that were not adopted by the Commission

⁹ See note 2, above. Documents related to this advisory opinion are available on the Commission's website at <http://saos.nictusa.com/saos/searchao?AONUMBER=2012-25>. The Commission voted on Drafts D and E and the vote on each draft failed by a vote of 3-3.

¹⁰ This response provides Requestors with the protection of an advisory opinion as to the conclusions common to the respective drafts. Accordingly, for practical purposes, Requestors may rely on the analysis and conclusions contained in this advisory opinion only to the extent that any joint fundraising effort adheres to the prohibitions on corporate contributions and corporate facilitation of contributions as discussed in Draft D.

¹¹ Requestors ask whether AFFPA's non-contribution *Carey* account may participate 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>.

