FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel
Press Office
Public Disclosure

FROM: Commission Secretary's Office

DATE: June 4, 2012

SUBJECT: Comment on Draft AO 2012-19
(American Future Fund)

Transmitted herewith is a timely submitted comment from Robert Bauer, counsel, on behalf of Obama for America.

Draft Advisory Opinion 2012-19 is on the June 7, 2012 open meeting agenda.

Attachment

Robert F. Bauer
PHONE (202) 434-1602
FAX (202) 654-9104
EMAIL RBauer@perkinscoie.com

Perkins Coie
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscoie.com

June 4, 2012

Federal Election Commission
Attn: Anthony Herman, General Counsel
999 E Street, NW
Washington, D.C. 20463

Re: Advisory Opinion Request 2012-19
American Future Fund

Dear Mr. Herman:

On behalf of Obama for America (OFA), I ask that these comments on Draft A be placed on the record and considered as the Commission prepares to vote on the pending request AOR 2012-19, filed by the American Future Fund (AFF). OFA previously submitted comments on the request itself.

Draft A finds that none—none—of the eight proposed references to the President would constitute references to a clearly identified candidate under 2 U.S.C. 434(f)(3)(A)(i). With no such references, AFF would have no public disclosure obligations.

The analysis as a whole is simply inconsistent with the law and with the various terms by which political advertisements, running no risk of misunderstanding, refer to the candidates they support or oppose. In sum, the Draft drifts far from both fact and law in its ambition to eviscerate the disclosure requirements that apply to electioneering communications.

Under the Draft, the spender would be free to refer to "the White House" or the "Administration" or the "government", and in no case would these terms be considered references to a clearly identified candidate. This is because, the Draft contends, these references "are a discussion of the executive branch, which consists of many executive agencies staffed by officials who are not candidates for reelection." AO 2012-19, Draft A at 5 (hereinafter Draft A).

Not so. See, for example, "A Few More of the 23 Million", MITTROMNEY.COM, http://www.youtube.com/watch?v=ETg6MONZatI&feature=youtube_gdata_player, a Romney campaign advertisement that mentions only the "government" and the "Administration", concluding with the date of the general election and leaving no doubt about which candidate the viewers should cast their ballot against. It is unambiguously clear that the

reference in this ad is not to thousands of executive branch "officials who are not candidates for reelection."

The commitment of the Draft to ruling out references and therefore preventing disclosure, without regard to law and fact, is evident in the tortured way in which it finds that an audio clip of the President is not a reference to him. The Draft suggests, without legal analysis, that an "unambiguous" reference cannot include an audio clip, but how can that be reconciled with the general focus in the law on the means by which the "identity" of a candidate is made apparent?* *See*, Draft A at 7. This President's identity, it would seem, is established by his voice, which is well known throughout the country. No American tuning into the middle of the President's Saturday radio address is uncertain about the identity of the speaker.

But the Draft also tosses aside consistency and addresses audio clips of the President and of his Press Secretary differently. In the latter case, the Draft concludes, the voice of the Mr. Carney is not a reference to a clearly identified candidate because he is not a candidate, but instead just "an employee of the federal government". *Id.* So one wonders—which is it? Are all audio clips ineligible as a matter of law for treatment as references to the candidate or does the analysis rest on which audio clip it is? Or does it matter, since according to the Draft, neither clip is a reference to a candidate but each for different reasons, in keeping with the Draft's strategy of relieving AFF of any disclosure obligations?

Then there is the Draft's contention that the term "clearly identified candidate" must be the same for electioneering communications and independent expenditures or the law will come to an "absurd result." Draft A at 5. The authors of the Draft state, but do not explain, this trepidation about inevitable "absurdity". In the first place, it is improbable that an independent expenditure would feature an appeal to vote for or vote against "the government," the "Administration," or "the White House." By their nature, independent expenditures, unlike electioneering communications, make their point straightforwardly. They do not pose as "sham issue ads" of the kind that gave rise to the regulation of electioneering communication: they don't beat around the bush. If, however, an expenditure concluded with "On November 6th, throw out this White House", there would be no reason why this is any less a reference to the President and why it would be "absurd" to consider it an independent expenditure like any other.

Finally, with this Draft, the Commission turns sharply away from the course set by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003). There, the Court noted that advertising does not thrive on literalism—that, for example, political spenders often eschew "magic words" of express advocacy on the theory that "'effective advertising leads the viewer to his or her own conclusion without forcing it down their throat". *Id.* at 194 n.77). The Court specifically rejected suggestions that Congress is bound by claims of advertisers that frequently enough

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* The Draft sidesteps any engagement with relevant precedent for the obvious reason that established authority is not its friend. The Commission has ruled, for example, that the appeal to "Vote Republican" is a "clear identification" of a candidate if, in a special election, only one Republican and one election are on the ballot. FEC Adv. Op. 1998-9 (May 22, 1998). No other personal reference was required for the identification the Commission found there — no mention of the candidate's name, nor any visual representation or audio clip of voice. Common sense won the day, exercised well within the Commission's authority. Draft A tears entirely free from this approach in suggesting that a President is not clearly identified by even his voice, or by reference to the "White House" or "the Administration" that he directs.

"strain credulity". *Id.* at 194 n.78. On this basis, the Court upheld the disclosure requirements for electioneering communications, finding them to be an "important state interest". *Id.* at 197.

What Draft A does is strain credulity, sweeping away disclosure of ads that, by any conventional legal analysis or exercise of common sense, refer to a "clearly identified candidate". And, in fact, the requestor makes no bones about its purpose of running end around the recent ruling in *Van Hollen v. FEC* that holds committees to the disclosures mandated by Congress. No. 11-0766, 2012 WL 1066717 (D.D.C. Mar. 30, 2012).

On the most spurious reasoning, Draft A would aid and abet this flight from disclosure. The Commission should reject it.

Very truly yours,

Robert Bauer
General Counsel, Obama for America

cc: Carolyn C. Hunter, Chair
Ellen L. Weintraub, Vice Chair
Cynthia L. Bauerly, Commissioner
Donald F. McGahn II, Commissioner
Matthew S. Petersen, Commissioner
Stephen T. Walther, Comissioner