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 Jason Torchinsky and Michael Bayes, counsel, on behalf of the American Future Fund.

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

Attachment

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June 4, 2012

Commission Secretary
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Dear Madame Secretary:

We submit these comments on Drafts A and B in response to AOR 2012-19 released on May 31, 2012. We urge the Commission to reject Draft B and adopt Draft A.

Draft A correctly identifies the applicable standard set forth by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1, 44 n.51 (1976):

> Section 608 (e) (2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (*e. g.*, FDR), the candidate's nickname (*e. g.*, Ike), his office (*e. g.*, the President or the Governor of Iowa), or his status as a candidate (*e. g.*, the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).

This definition now appears at 2 U.S.C. § 431(18). Commission regulations at 11 C.F.R. § 100.17 mirror this language. See also *Federal Election Commission v. NOW*, 713 F. Supp. 428, 433 (D.D.C. 1989) ("An *explicit* and unambiguous reference to the candidate must be mentioned in the communication...) (emphasis added); Advisory Opinion 1998-9 (finding a candidate was clearly identified during a special election when the communication urged people to vote for a particular political party and there was only one candidate on the ballot). None of the advertisements proposed by American Future Fund includes a candidate's name, photograph or drawing, or includes any other unambiguous reference such as a candidate's initials,

nickname, or status as a candidate. We acknowledge that the examples provided in footnote 51 (initials, nickname, and status as a candidate) are not exclusive. However, if the Commission is to expand on this list, it must be faithful to the Supreme Court's formulation, and additional qualifying examples must be as explicit, clear, and unambiguous as the use of initials (FDR and LBJ), nicknames (Ike and the Gipper), office (the President or the Mayor) or candidacy status (the Republican nominee for President).

Draft B generally concludes that the various terms and phrases included in the request are all understandable as (our paraphrase) references to President Obama. *See* Draft B's references to "commonly understood" (page 4), "merely short-hand" (page 4), "common shorthand" (page 8), and "the only logical reading" (page 9). These conclusions, however, have an unmistakable "we know it when we see it" nature to them, which is perhaps unavoidable because Draft B is not guided by the objective standard set forth in *Buckley*'s footnote 51 and 11 C.F.R. § 100.17. *See also FEC v. Christian Action Network*, 894 F.Supp. 946, 956 (W.Va 1995) ("the term 'codeword' cannot, by its very definition, be said to express a direct message"). These various references indicate an approach that is plainly contrary to the statutory requirement that the reference to a clearly identified candidate must be "unambiguous." The term "unambiguous" means "clear" or "precise" (Merriam-Webster's), or "not open to more than one interpretation" (Oxford). The Commission, of course, has considerable experience with this standard in another context. *See* 11 C.F.R. § 100.22(b) ("The electoral portion of the communication is unmistakable, *unambiguous*, and suggestive of only one meaning") (emphasis added). If a term, or reference, is subject to more than one reasonable interpretation, or open to more than one interpretation, it is, by definition, *not* "unambiguous."

As demonstrated below, the terms that Draft B concludes are references to a clearly identified candidate all have more than one accepted meaning – which makes each one of those terms "ambiguous" for purposes of 2 U.S.C. § 431(18).

While largely disregarding *Buckley*'s requirements, Draft B does include a reference to a work by a deceased New Zealand-born linguist for an understanding of one of the terms used in the proposed scripts. Reliance on this resource, through an example of "metonymy," suggests fairly strongly that the term being analyzed is, in fact, subject to more than one interpretation.

As noted above, the applicable standard for "clearly identified" is an objective one. One commenter's assertion that "Requestor knows fully well who it wants to talk about, and knows fully well whom it would be understood to be 'referring' to," is an utterly irrelevant subjective consideration. The same commenter's suggestion that "[t]o grant this request would allow Requestor and other such groups to run ads attacking or touting 'Obamacare' or 'Romneycare' before targeted voters in the very week before the election and pay for them with secret funds," is fine as political rhetoric, but it tells the Commission nothing about the applicable legal

standard, other than that the commenter hopes the Commission will disregard that standard in furtherance of the "good fight" against "attack ads" and "secret funds." Notwithstanding the Supreme Court's statements regarding the value of disclosure in *Citizens United* v. *FEC*, the Court has never granted the FEC authority to administer the Act in a manner that is more expansive than otherwise justified by its language and terms simply because the only consequence of regulation is disclosure.

"The White House"

Rather than relying on an example of "metonymy" in an English usage manual, a better source for a definition of "White House" might perhaps be Merriam-Webster's Dictionary, which defines "White House" as "a residence of the president of the United States" and also "the executive department of the United States government." *See* www.m-w.com. The Oxford English Dictionary defines "White House" as "the official residence of the US president in Washington, DC.," and indicates that the term can also be used to refer to "the US president, presidency, or government." *See* www.oxforddictionaries.com. While an example of metonymy is perhaps informative, a term with multiple definitions in well-known dictionaries cannot possibly be as "unambiguous" as Draft B insists.

In its discussion of Advertisement #6, Draft B explains: "Moreover, here, as in earlier proposed advertisements that reference the 'White House,' reading that term as a reference to the President, rather than as a personification of his residence, is the only logical reading." As shown above, these are not the only choices. The "White House" also refers to "the executive department of the United States government." In addition, "the White House" reports having nearly 500 employees. *See* http://www.whitehouse.gov/briefing-room/disclosures/annual-records/2011 (Visited June 1, 2012).

"The Administration"

Draft B also concludes that "[t]he references to 'the Administration' and 'this Administration' likewise unambiguously reference President Obama. Those terms are merely short-hand for the Obama Administration: ...." The *Obama* Administration itself, however, disagrees. On the White House website, "the Administration" is described as follows: "The Obama-Biden administration consists of thousands of individuals in a variety of departments working to advance the President's agenda at home and abroad." *See* http://www.whitehouse.gov/administration. President Obama's and Vice President Biden's transition website also made clear that "the Administration" refers to the entire Executive Branch. *See* http://change.gov/learn/administration. A term that refers to "thousands of individuals" cannot possibly "unambiguously reference President Obama."

The Oxford English Dictionary lists several definitions of the term "administration," including: "the management of public affairs; government;" and "the officials in the executive branch of government under a particular chief executive." Merriam-Webster's definition includes, "a group constituting the political executive in a presidential government." It seems clear that the term does not unambiguously mean "President Obama."

"The Government"

In its discussion of Advertisement #3, Draft B concludes that a reference to "the government" is a reference to a clearly identified candidate because the President is "the 'government' official who resides and maintains his office at the White House and [is] the only person at the White House with executive authority to change the 'American energy plan.'" Only in a dictatorship does the term "government" unambiguously refer to a single person.

Draft B's acrobatic explanation is contrary to the clear instructions provided in footnote 51 of *Buckley* and the Commission's own regulations at 11 C.F.R. §§ 100.17 and 100.29 for determining when a reference to a clearly identified candidate is made. *Buckley* and the aforementioned regulations provide an objective test that does not require a multi-step analysis of a hypothetical viewer's likely thought process. In addition, it is simply not true that President Obama is the only person in the government "with executive authority to change the 'American energy plan.'" The Department of Energy, the Nuclear Regulatory Commission (an independent agency), the Federal Energy Regulatory Commission (also an independent agency), and the Environmental Protection Agency, among others, all have authority to impact American energy policy.

No dictionary defines "the government" as "the President of the United States." The definitions that come closest to this are: (1) "the executive branch of the United States federal government;" and (2) "the group of people in office at a particular time; administration." *See* Merriam-Websters and Oxford English Dictionary. "The government" cannot reasonably be construed as an unambiguous reference to any clearly identified candidate. Among civilian employees alone, "the government" employs more than three million people. See http://www2.census.gov/govs/apes/10fedfun.pdf (visited June 1, 2012). The executive branch itself employs more than 2.7 million people (http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp) (visited June 1, 2012).

In 2006, the Commission's counsel noted in litigation that the Commission had not taken a position on whether "your Senator" is an unambiguous reference to a clearly identified candidate, and indicated that there is ambiguity in the term because it refers to two people. The Commission's attorney stating during oral argument in *Christian Civic League* v. *FEC*:

> MR. KOLKER: I don't believe the Commission has taken a definitive position on "Your Senators." ...I think—I don't mean to split hairs, but if you said, "Your Senator," there's more ambiguity than the plural because we have more than one Senators.

Hr'g Tr. at 27 (April 24, 2006 hearing). *See* http://moresoftmoneyhardlaw.com/updates/outside_groups.html?Archive=1&AID=697 (visited June 1, 2012). If there is ambiguity inherent in the phrase "Your Senators," as the Commission's counsel indicated, then certainly references to "the government," "the administration" or "the White House" are even more ambiguous.

Unidentified Audio Clips

In its discussion of Advertisement #2, Draft B concludes that "[i]ncluding an audio clip of the President in such an advertisement unambiguously makes his identity apparent. 11 C.F.R. § 100.29(b)(2)." Commission regulations require that "the identity of the candidate is otherwise apparent through an unambiguous reference . . . ." In the proposed script, there is no such *reference* at all. The audio clip is not labeled, identified, or referenced in any way. Commission regulations and footnote 51 in *Buckley* require an actual *reference*.

"Obamacare" and "Romneycare"

We support Draft A's treatment of the terms "Obamacare" and "Romneycare." We also offer the following comments on Draft B's discussion of Advertisements 7 and 8:

1. Contrary to the assertion made in Draft B, AFF absolutely ***does not*** "recognize[] that, on their face, the repeated references to 'Obamacare' in Advertisement 7 are explicit references to the name of a clearly identified candidate for Federal office. 11 CFR 100.29(b)(2)."

   The request stated: "The factual circumstances presented here make clear that the reference to 'Obamacare,' which of course includes the name 'Obama,' is most reasonably construed as a reference to a piece of legislation. It is, in the context presented, *not* a reference to President Obama the candidate." Advisory Opinion Request 2012-19 at 10.

   Draft A correctly grasps this distinction: "Similarly, here, on the plain face of AFF's proposed ad, the reference to 'Obamacare' is clearly a reference to legislation rather than to candidate President Obama himself."

2. Draft B appears to conclude that the Commission's decision in 2002 not to adopt a regulatory exemption references to the popular name of a bill or law settles this issue. Draft B does not discuss the legislative history uncovered (apparently for the first time) in drafts of Advisory Opinion 2012-20. In a separate statement released in Advisory Opinion 2012-20, Commissioners Weintraub and Bauerly agreed that the Commission has authority to grant exemptions through the advisory opinion process, subject to the parameters identified by Representative Shays in his floor statement. (Draft A also does not reference the floor statements of Representatives Shays and Meehan, but nevertheless adopts the approach the sponsors' advocated.)

3. Draft B suggests that one reason that requestor may be foreclosed from using the term "Obamacare" is because other synonymous terms exist. Draft B notes, "Even if President Obama 'recently embraced the term' 'Obamacare,' AOR at 8, the Affordable Care Act, unlike the Rusa Darrow car dealerships, can easily be identified without referencing the name 'Obama.'" While it is possible that the Affordable Care Act "can easily be *identified* without" using the term "Obamacare," the difficulty that Requestor faces is being *understood* without using the term "Obamacare."

   The point made in the request was that the national conversation and debate about health care policy almost universally utilizes the term "Obamacare." Requestor agrees that it *could* substitute "the Patient Protection and Affordable Care Act" or "government run healthcare." Nevertheless, the only question for the Commission is whether "Obamacare" is an unambiguous reference to a clearly identified candidate.

Conclusion

Finally, we note the recent decision in *Carey* v. *Federal Election Commission*, 2012 U.S. Dist. LEXIS 70783 (D.D.C. May 22, 2012), holding the Commission liable for costs and attorney's fees because the Commission unreasonably failed to acknowledge binding precedent during its consideration and subsequent litigation of the matter presented in Advisory Opinion 2010-20 (National Defense PAC). Here, *Buckley*'s footnote 51 provides the controlling standard for determining what constitutes a reference to a clearly identified candidate. Draft B does not apply this standard, and largely fails to acknowledge its existence or applicability.

We urge the Commission to reject Draft B and adopt Draft A.

Sincerely,

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