




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 6, 2012

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

Transmitted herewith are two late submitted comments from Allison Hayward, Vice President of Policy, and Allen Dickerson, Legal Director, on behalf of the Center for Competitive Politics.

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

Attachment

Fw: Comments concerning AO 2012-19
FEC Public Records to: Commission Secretary Office

06/06/2012 03:38 PM

— Forwarded by FEC Public Records/FEC/US on 06/06/2012 03:38 PM —



Allen Dickerson
<adickerson@campaignfreedom.org>

06/06/2012 03:33 PM

To "pubrec@fec.gov" <pubrec@fec.gov>,

cc

Subject RE: Comments concerning AO 2012-19

My apologies: the previously submitted document in fact supports Draft A, not Draft B.

From: Allen Dickerson
Sent: Wednesday, June 06, 2012 3:15 PM
To: 'pubrec@fec.gov'
Subject: Comments concerning AO 2012-19

Dear Sir or Madam:

I attach comments of the Center for Competitive Politics supporting Draft B for AO 2012-19.

Respectfully,

Allen Dickerson
Legal Director
Center for Competitive Politics

124 S. West Street, Suite 201
Alexandria, Virginia 22314
Direct: (703) 894-6846
Fax: (703) 894-6811
adickerson@campaignfreedom.org

Fw: Comments concerning AO 2012-19
FEC Public Records to: Commission Secretary Office

06/06/2012 03:32 PM

----- Forwarded by FEC Public Records/FEC/US on 06/06/2012 03:31 PM -----



Allen Dickerson
<adickerson@campaignfreedom.org>

06/06/2012 03:17 PM

To "pubrec@fec.gov" <pubrec@fec.gov>,
cc

Subject Comments concerning AO 2012-19

Dear Sir or Madam:

I attach comments of the Center for Competitive Politics supporting Draft B for AO 2012-19.

Respectfully,

Allen Dickerson
Legal Director
Center for Competitive Politics

124 S. West Street, Suite 201
Alexandria, Virginia 22314
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Comments of the Center for Competitive Politics – 2012-19.pdf



June 6, 2012

Via Electronic Mail

Federal Election Commission
Attn: Anthony Herman, General Counsel
999 E Street, NW
Washington, DC 20510

Re: Advisory Opinion 2012-19

To The Commission:

The Center for Competitive Politics urges you to consider favorably the General Counsel's Draft A in response to this request. Draft A is a straightforward application of the regulatory definition of "clearly identified candidate." If FEC regulations are to provide necessary guidance to candidates and committees, they must be consistently and predictably applied. We believe that Draft A is the proper application of a clear and specific definition.

To review, the law states:

"Refers to a clearly identified candidate" means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President", "your Congressman" or "the incumbent," or through unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

11 C.F.R. § 100.29(b)(2). Every example enumerated in this regulation includes explicit references to a particular individual candidate. The regulation is precise, among other reasons, because as a content-based regulation of speech it must be both clear and narrowly tailored to withstand constitutional scrutiny. That may mean that expressions similar to these nevertheless fall outside the definition. Such is a necessary characteristic of any definition, and accepting that characteristic is a necessary part of your duty to interpret the regulation consistent with its terms, the Act, and the Constitution.

The request asks whether a series of specific references refer to a clearly identified candidate under this definition. The first ad names "the Administration" and "the White House." The Administration is a part of government, and the White House is (literally) a building. Neither of these are references to a clearly-identified, specific

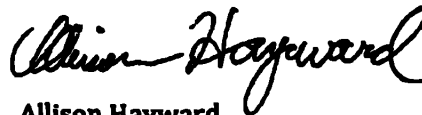
individual who is running for office, as Draft A correctly concludes. The second reference is even further from the definition – the reference is simply to the “government.” The audio for this message includes the voice of the present President. But nowhere is that voice identified as “the President” and nothing suggests that the person speaking is a candidate for anything. The other references – to the Administration, to Secretary Sebelius, and to “Obamacare” – should also be found to lack a “clearly identified candidate” as required in the Act and the FEC’s regulation. None of these nouns are a candidate.

In sharp contrast to Draft A’s straightforward application of the law, Draft B turns the rule on its head, by finding “clear” references where none exist. It insists that “the Administration” and “The White House” are both “commonly understood” to refer to President Barack Obama. This is incorrect. Obviously, the White House includes the President, his counsel, and a team of individuals who no doubt prefer that the President win reelection, but are not candidates. “The Administration” is even broader, and includes a slew of federal agencies, cabinet secretaries, “czars,” and more. Also consider that if the very same words were used in 2008 or 2015, they would not refer either to a clearly identified candidate or to Barack Obama. The whole purpose in having a clear definition is so speakers will not have to concern themselves with whatever outside context the FEC might choose to use to interpret the speaker’s message. Draft B falls this test and comes dangerously close to imposing an intention-based analysis in place of the Act’s clear emphasis on evaluating the communication itself.

Draft B’s treatment of the “Obamacare” reference is similarly unconvincing. As the requester admitted, the word “Obamacare” contains the last name of a candidate. This reference may present a closer question, but it nevertheless still falls outside the scope of the legal definition of “clearly identified candidate.” “Obamacare” is not a candidate for office. The reference is not to any person, but instead is the popular name for a recently enacted (and controversial) health care law. To find otherwise, and insist that the speaker must call “Obamacare” the “Affordable Care Act” or be found to have made an electioneering communication, denies this speaker the ability to communicate with the public using the most recognizable vocabulary. Moreover, because laws are now routinely given highly-complimentary official titles, such a rule would compel political speakers to adopt the rhetoric of their opponents. This cannot be the Act’s intention.

We urge the Commission to apply the definition of “clearly identified candidate” without resorting to creative interpretation or reference to context, motive, or style. As you are quite aware, the regulation speaks with specificity because, under the Constitution, it must.

Respectfully submitted,



Allison Hayward
Vice President of Policy