



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

June 13, 2012

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-19

Jason Torchinsky, Esq.  
Michael Bayes, Esq.  
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Warrenton, VA 20186

Dear Messrs. Torchinsky and Bayes:

We are responding to your advisory opinion request on behalf of American Future Fund (“AFF”), concerning the application of the Federal Election Campaign Act, as amended (the “Act”), and Commission regulations to AFF’s proposed plan to produce and distribute a series of broadcast television advertisements within 30 days of upcoming primary elections and within 60 days of the November general election on both local broadcast television stations and national cable outlets.

The Commission concludes that two of AFF’s eight proposed advertisements would constitute electioneering communications, and one of the proposed advertisements would not constitute an electioneering communication. The Commission could not approve a response by the required four affirmative votes about the remaining proposed advertisements. *See* 2 U.S.C. 437c(c); 11 CFR 112.4(a).

### ***Background***

The facts presented in this advisory opinion are based on your letter received on April 19, 2012, including Exhibits 1-8, and your email received on April 26, 2012.

AFF plans to produce and distribute a series of broadcast television advertisements within 30 days of upcoming primary elections and within 60 days of the November general election, on both local broadcast television stations and national cable

outlets. According to AFF, these advertisements are “about American energy policy, the proposal to require religious institutions to pay for insurance policies that cover certain abortion-causing drugs (abortifacients), and the Patient Protection and Affordable Care Act in general.” AOR at 1. The complete scripts of proposed Advertisements 1-8 are attached to this advisory opinion.

AFF seeks to broadcast its proposed advertisements without making the disclosures or including the disclaimers that the Act requires by those who finance electioneering communications. AOR at 1; *see* 2 U.S.C. 434(f), 441d(a), 441d(d)(2).

### ***Question Presented***

*Do proposed Advertisements 1 through 8 contain any references to a clearly identified candidate?*

### ***Legal Analysis and Conclusions***

The Act and Commission regulations define “electioneering communication” as any broadcast, cable, or satellite communication that (1) refers to a clearly identified Federal candidate; (2) is publicly distributed within 30 days before a primary election or a convention or caucus of a political party or 60 days before a general election; and (3) is targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a). AFF’s request acknowledges that each of AFF’s proposed advertisements satisfies prongs two and three of this test. AFF asks whether any of the proposed advertisements refers to a clearly identified Federal candidate.

The term “[r]efers 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 an 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 CFR 100.29(b)(2). *See also* 2 U.S.C. 431(18); 11 CFR 100.17.

Two of AFF’s eight proposed advertisements refer to a clearly identified Federal candidate and thus would be electioneering communications under 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29. One of AFF’s proposed advertisements does not refer to a clearly identified Federal candidate and thus would not be an electioneering communication under the Act and Commission regulations.

### ***Advertisement 4***

Advertisement 4 discusses “a proposed requirement forcing ‘religious institutions to pay for abortion-causing drugs.’” AOR at 3 & Exh. 4. It concludes with an announcer instructing viewers to “[c]all Secretary Sebelius” and “tell her it’s wrong . . . to trample the most basic American right.” Advertisement 4 attributes the policy to Secretary

Sebelius and “the Government,” and includes “a visual depiction of the Health and Human Services Building in Washington, DC.”

Advertisement 4 does not contain any reference to a clearly identified candidate. It clearly identifies “Secretary Sebelius,” but she is not a candidate for Federal office. Advertisement 4 does not include any audio or visual reference to a Federal candidate, and it does not otherwise identify a Federal candidate through an unambiguous reference. 11 CFR 100.29(b)(2).

### ***Advertisement 7***

Advertisement 7 criticizes the Patient Protection and Affordable Care Act (“Affordable Care Act”), by, among other things, noting its second anniversary and using a metaphor of “The Terrible Twos.” The advertisement refers to the Affordable Care Act as “Obamacare,” with textual references such as “‘White House will not mark two-year anniversary of Obamacare’ (Washington Free Beacon, 3/19/12).” In total, Advertisement 7 includes four textual references and two audio, voice-over references to “Obamacare.” For the reasons explained below, the six proposed references in Advertisement 7 to “Obamacare”— a term that incorporates the name “Obama”— are references to President Obama, a clearly identified candidate for Federal office. 11 CFR 100.29(b)(2).

The fact that Advertisement 7 mentions President Obama’s name “only as part of a popular name of a bill” does not exempt the advertisement from the requirements for electioneering communications. The Commission considered and declined to adopt a regulatory exemption for “communications that mention a candidate’s name only as part of a popular name of a bill.” Explanation and Justification, Final Rules on Electioneering Communications, 67 FR 65190, 65201 (Oct. 23, 2002) (“Electioneering Communications E&J”). In rejecting the proposed exemption, the Commission noted that “this type of exemption is not necessary because communications can easily discuss proposed or pending legislation without including a Federal candidate’s name.” *Id.* Thus, under Commission regulations, the name of a candidate, even in the context of a bill or law, is nonetheless a reference to that candidate.

While the Commission concluded in Advisory Opinion 2004-31 (Darrow) that it retained the discretion to determine that “the specific facts and circumstances of a particular case indicate that certain advertisements do not refer to a clearly identified Federal candidate,” the Commission’s analysis in that opinion does not support such a determination here. In Advisory Opinion 2004-31 (Darrow), the Commission concluded that advertisements for a company’s car dealerships (including Russ Darrow Toyota, Russ Darrow Kia, and Russ Darrow Cadillac) referred to the candidate’s son, Russ Darrow III, or to actual names of the dealerships themselves, rather than to the Federal candidate, Russ Darrow, Jr. Here, by contrast, the term “Obamacare” is *not* the official name of the Affordable Care Act, and there is no contention that the reference to “Obama” in the term “Obamacare” refers to someone other than President Barack Obama. Therefore, the facts in this request are materially distinct from those in Advisory Opinion 2004-31 (Darrow).

In sum, Advertisement 7 includes multiple references to a clearly identified Federal candidate and, therefore, is an electioneering communication.<sup>1</sup> *See* 11 CFR 100.29(b)(2); Electioneering Communications E&J, 67 FR at 65201.

### ***Advertisement 8***

AFF's proposed Advertisement 8 compares the 2006 Massachusetts Act Providing Access to Affordable, Quality, Accountable Health Care and the Affordable Care Act, referring to each respectively as "Romneycare" and "the national healthcare law," and concluding by characterizing "National healthcare" as "Romneycare's evil twin." AOR, Exh. 8. In total, AFF's advertisement includes five references to "Romneycare."

For the reasons discussed above regarding the references to "Obamacare" in Advertisement 7, the five references to "Romneycare" in proposed Advertisement 8 are references to the name of the Republican presidential candidate, Governor Mitt Romney, who is a candidate for Federal office. *See* 11 CFR 100.29(b)(2); Electioneering Communications E&J, 67 FR at 65201. Therefore, Advertisement 8 is an electioneering communication.

The Commission could not approve a response by the required four affirmative votes about proposed Advertisements 1, 2, 3, 5, and 6. *See* 2 U.S.C. 437c(c); 11 CFR 112.4(a).

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

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<sup>1</sup> The Commission declines to address AFF's general questions regarding the Commission's interpretation and application of the Electioneering Communications E&J, *see* AOR at 9, because this advisory opinion is limited to addressing AFF's "specific transaction[s] or activit[ies]," 2 U.S.C. 437f(a)(1), and those general questions of interpretation "do not qualify as advisory opinion requests." 11 CFR 112.1(b).

The cited advisory opinion is available on the Commission's Web site, [www.fec.gov](http://www.fec.gov), or directly from the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)  
Caroline C. Hunter  
Chair