FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office

DATE: November 20, 2012

SUBJECT: Comments on Draft AO 2012-25 (American Future Fund and American Future Fund Political Action)

Attached is a timely submitted comment from Jason Torchinksy and Michael Bayes, counsel, on behalf of the requestors.

Attachment

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November 20, 2012

Chair Caroline Hunter
Vice Chair Ellen Weintraub
Commissioner Cynthia Bauerly
Commissioner Donald McGahn
Commissioner Matthew Petersen
Commissioner Steven Walther
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2012-25 and Agenda Document No. 12-69-D

Dear Commissioners,

We continue to be grateful for your consideration of this matter and the attention you have given it. We apologize for not being able to attend the Open Meeting of November 15, but have reviewed the audio recording of that session. These comments are submitted in response to questions raised and concerns noted on November 15.

At the outset, we wish to note that we are not so much confused by what has transpired as we are frustrated. From the outside looking in, it appears that the Commission cannot agree that it agrees on this matter. To provide some perspective, with respect to Question 1 (*May AFF and AFFPA serve as participants in a joint fundraising committee?*), the various drafts considered in this matter conclude as follows:

Draft A: Yes, AFF and AFFPA may serve as participants in the Joint Committee as described.

Draft B: Yes, AFF and AFFPA may serve as participants in the Joint Committee as described.

Draft C: Yes, AFF and AFFPA may serve as participants in the Joint Committee as described.

Draft D: Yes, AFF and AFFPA may serve as participants in the Joint Committee as described.

Draft E: Yes, AFF and AFFPA may serve as participants in the Joint Committee as described.

(On October 12, the Commission voted on Drafts D and E. All five drafts, however, concluded that the answer to Question #2 was "yes" in light of, and subject to, the response to Question #1.)

Given that all five drafts considered reached – quite literally – the same basic conclusion, we hope the Commission understands our reluctance to accept the close-out letter of October 12 as an accurate description of the Commission's views following the tally votes taken that day.

Procedural Issues

During the Commission's discussion of this matter on November 15, several Commissioners and the General Counsel expressed differing views on certain procedural issues surrounding this matter.

We disagree with the General Counsel's assessment that a "motion to reconsider" is "out of order." The Commission's regulations at 11 C.F.R. § 112.6 apply only in cases where "an advisory opinion [was] previously issued." According to the close-out letter we received, "the Commission was unable to render an opinion in this matter." Thus, no advisory opinion has been issued in this matter, and 11 C.F.R. § 112.6 is inapplicable by its own perfectly clear terms.

The inapplicability of Section 112.6 is reinforced by other language in Part 112 that establishes that a close-out letter indicating that the Commission cannot issue an opinion is something altogether different from an "advisory opinion." Section 112.4(g) states that "[w]hen issued by the Commission, each advisory opinion *or other response* under 11 CFR 112.4(a) shall be made public and sent by mail, or personally delivered to the person who requested the opinion." The "other response under 11 CFR 112.4(a)" is "a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members." 11 C.F.R. § 112.4(a). Thus, Part 112 expressly distinguishes between advisory opinions and close-out letters, and Section 112.6 applies only in cases where an "advisory opinion" was issued.

The regulations pertaining to reconsideration at 11 C.F.R. § 112.6 do not apply to the situation at hand. Thus, if a motion were made by a Commissioner to "reconsider" this matter, that motion would not be made pursuant to Section 112.6, Commission regulations do not bar it, and that motion should not be ruled out of order.

Nevertheless, our letter of October 15, 2012, requesting reconsideration was **not** a request for the Commission to reconsider the substance or merits of Advisory Opinion Request 2012-25 under 11 C.F.R. § 112.6, and we are not asking any Commissioner to change his or her position. Rather, we requested that the Commission reconsider and withdraw language contained in the close-out letter that was issued. As we noted in our letter of October 15, the close-out letter issued does not accurately reflect the views of the six Commissioners insofar as it indicates that "the Commission was unable to render an opinion in this matter." We disagree. The Commission *was* able to render an opinion; and that opinion was "Yes, AFF and AFFPA may serve as participants in the Joint Committee as described." What the Commission was unable to do was render a written response to the Requestor that captured and reflected this basic agreement.

We agree with Commissioner Walther's characterization of Agenda Document No. 12-69-D as an effort to more accurately present the Commission's thinking on Advisory Opinion 2012-25 without reconsidering any of the merits of the Advisory Opinion Request. Commissioner Walther's document is a welcome response to our letter of October 15. If the Commission were able to approve something substantially similar to Agenda Document No. 12-69-D as a clarification of the close-out letter issued on October 12, the Requestors would be satisfied. (We offer four specific comments to the Agenda Document, below, in the final section of this letter.)

Commissioner Weintraub's statement that "the first request is concluded" is not inconsistent with our view. We are not asking the Commission to reconsider the substance or merits of the Request, but only to reconsider whether it was accurate to inform the Requestor that "the Commission was unable to render an opinion in this matter." As stated above and in our letter of October 15, we believe the two tally votes of October 12 demonstrate that the Commission was, in fact, able to render an opinion in this matter, but was simply unable to craft a document that expressed that opinion.

Commissioner Bauerly noted that 11 C.F.R. § 112.4(f) requires that "[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with 11 CFR part 112." The adoption of Agenda Document No. 12-69-D, or something substantially similar, would not violate this requirement. Agenda Document No. 12-69-D is not a new or different advisory opinion, or even an advisory opinion at all. Rather, it is an effort to better explain the Commission's previous consideration of Advisory Opinion Request 2012-25.

Finally, Commissioner Weintraub also noted that we were perhaps under the misperception that all six Commissioners agreed that the answer was "yes," although for different reasons. She explained that she answered the Advisory Opinion Request in the affirmative, but only under certain circumstances, and that under different circumstances she might (or would) answer in the negative. This is a limitation that exists inherently in all Advisory Opinions, and we understand perfectly well that Commissioner Weintraub's approval of the Request was contingent on certain factual representations made.

The Commission notes in every Advisory Opinion it issues that:

> 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 requestor 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 that 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.

The Requestor also understands that when the Commission issues an Advisory Opinion in which all six Commissioners agree that the answer is "yes," but two sets of three Commissioners would write the Response differently, the narrower or more restrictive of the two responses effectively controls. As explained below, however, we are not convinced that Draft D is actually "narrower" than Draft E or that Draft D imposes any restrictions that are not present and/or assumed in Draft E.

Corporate Facilitation Issues

The most significant difference between Drafts D and E is the discussion of corporate contributions and facilitation of contributions that appears in Draft D.[1] We presume[2] that it is this issue that forms the basis of the Commissioners' disagreement(s). As explained below, we

[1] Draft E addresses only whether the Requestors satisfy the statutory and regulatory requirements for establishing a joint fundraising effort. Draft D, through its discussion of corporate contribution and facilitation issues, includes a limited discussion of operational issues.

[2] The Commissioners have not discussed publicly what issue or issues separate them, so to some extent, we are attempting to read between the lines of Draft D, Draft E, and the tally vote certifications. Agenda Document No. 12-69-D seems to confirm our presumptions though.

believe there is considerably less disagreement than the close-out letter indicates and the Commission is not, in fact, hopelessly deadlocked.

As we understand the matter, certain Commissioners prefer that the issue of corporate contributions and corporations facilitating the making of contributions to a political committee be addressed directly in the Commission's Response to the Request. Other Commissioners would omit this discussion.

When preparing the Request, we indicated that each of the joint fundraising participants would pay its own proportional expenses and no participant would impermissibly advance funds to pay another's expenses, or provide the use of any materials that would benefit another participant so as to create an impermissible in-kind contribution.[3] We did not characterize these arrangements in terms of avoiding corporate contributions or facilitation because the joint fundraising regulations at 11 C.F.R. § 102.17 do not speak in those terms. Nevertheless, to the extent that corporate contribution and facilitation issues are raised by certain joint fundraising arrangements, if the joint fundraising participants adhere to the proportional expenses guidelines (Section 102.17(c)(7)(i)(A)), avoid advances of funds (Section 102.17(b)(3)), and comply with applicable contribution limits (Section 102.17(c)(7)(i)(B)), concerns about corporate contributions and facilitation are effectively eliminated. In other words, and without using the Part 114 terminology, the Requestors represented that AFF would not make a corporate contribution to, or facilitate contributions to, AFFPA. Draft D casts this representation in terms of Section 114.2(f), and concludes that the proposed activity is consistent with Section 114.2. Draft E, on the other hand, incorporates these representations into the specific facts of the request. Under both formulations, avoidance of corporate contributions and facilitation of contributions are part of the equation.

Given the representations already made in the Request, we have no objection to the Commission's conclusion that the proposed activities do not result in any participant making, or facilitating the making, of a contribution to a political committee, as contemplated in 11 C.F.R. §114.2(f).

[3] In our Request of April 10, 2012, we noted that the participants would allocate proceeds as required, citing 11 C.F.R. § 102.17(c)(6), and pay expenses as required, citing 11 C.F.R. § 102.17(c)(7). Separately, we confirmed to the Office of General Counsel that "the participants intend to allocate joint fundraising expenses in proportion to funds raised and distributed to each participant. Each party will pay their [sic] own fundraising expenses. The joint fundraising representative will adhere to the Commission's three step guidance appearing in the most recent Congressional Candidates and Committees Guide (2011 ed.) at pp. 135-137." Regarding advances, we confirmed that "If funds are required to be advanced, however, the requestors will advance those funds in a manner that does not result in any impermissible in-kind contributions."

We also have no objection to Commissioners noting that the joint fundraising regulations do not specifically raise those issues, nor do past advisory opinions or enforcement matters. In our view, this is not because the corporate contribution and facilitation restrictions do not apply or are irrelevant, but because adhering to the rules regarding allocation of expenses and distribution of net proceeds set forth at 11 C.F.R. § 102.17(c)(7) ensures that no corporate contributions result and no corporate facilitation occurs. Or, as Agenda Document No. 12-69-D puts it, "the Commission's joint fundraising regulations themselves provide a mechanism for raising funds without violating those prohibitions. Agenda Document No. 12-9-D at p. 6.

Under Section 102.17(c)(7), expenses must be paid proportionally by the participants and "a participant may only pay expenses on behalf of another participant subject to the contribution limits of 11 CFR part 110." This language prohibits AFF from assuming AFFPA's expenses because a corporation may not make a contribution – whether monetary or in-kind – to a traditional political committee. In short, there will be no corporate contribution or facilitation where the participants comply with the existing joint fundraising regulations. We appreciate that some Commissioners may prefer to emphasize the restrictions set forth at Section 114.2(f), and do not necessarily object to it, but respectfully suggest that the joint fundraising regulations already deal with this matter in their own way.

During the Commission's discussion on November 15, Commissioner Weintraub suggested that the Requestor might indicate to the Commission that it was satisfied with the more limited answer. We take this to mean that Commissioner Weintraub views Draft D as providing a "more limited" response than Draft E. For the reasons set forth above, we do not believe this is necessarily the case. The additional "limitations" of Draft D were expressly agreed to when the Request was submitted, and both Drafts D and E assume those factual representations as the basis of the Request *and* Response. In other words, Draft D does not place any restrictions on the Requestors that the Requestors were not already prepared to assume, voluntarily, based on their understanding of the legal requirements imposed by the joint fundraising regulations.

While we believe it is unnecessary to include a specific discussion of the corporate facilitation regulations – not because they are irrelevant, but because adhering to them is ensured through the joint fundraising regulatory scheme – we also do not view that discussion as in any way harmful or objectionable. Referencing the corporate contribution and facilitation regulations simply makes explicit what the joint fundraising regulations address implicitly.

Specific Comments on Agenda Document No. 12-69-D

(a) Representation Regarding Advanced Funds

Consistent with the discussion above, the Commission could clarify Agenda Document No. 12-69-D by noting on page 4 at line 10 that the Requestors have represented that if funds are required to be advanced, the Requestors will advance those funds in a manner that does not result in any impermissible in-kind contributions. This may help alleviate some of the concerns raised regarding 11 C.F.R. § 114.2.

(b) Reference to Part 300

On page 5 of Agenda Document No. 12-69-D, footnote 5 indicates that "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)." This footnote implies that organizations whose activities are covered by Part 300 are restricted by the reference to Part 300 in 11 CFR 102.17(a). As you know, the Requestors withdrew two questions from its original request that specifically involved persons subject to the restrictions imposed by Part 300. Given that withdrawal, it is not necessary to include references to such persons.

The remaining questions presented are adequately addressed by indicating simply that "AFF's proposed joint fundraising activities are not restricted by the reference to Part 300 in 11 CFR 102.17(a)." This more direct statement would address the two questions presented without offering comment on questions no longer before the Commission.

(c) Major Purpose and Political Committee Implications

Footnote 6 on page 6 of Agenda Document No. 12-69-D addresses an important issue for the Requestors, and presumably for others who might seek to rely on this matter. Footnote 11 of Draft D and footnote 8 of Draft E are not so different that the Commission must conclude that "the Commission was unable to approve a response by the required four affirmative votes."

Draft D concluded that "AFF's activity in the Joint Committee may, but will not necessarily in all instances, constitute Federal campaign activity or, in itself, make AFF a political committee. Whether the joint fundraising constitutes 'Federal campaign activity' will depend on its content." Draft D fn. 11. Draft E, on the other hand, concluded that "AFF's activity in the Joint Committee will not categorically be Federal campaign activity, or, in itself, make AFF a political committee." Draft E fn. 8.

Both drafts agree that AFF's proposed activity in the Joint Committee will not, "in itself, make AFF a political committee." This conclusion should be incorporated into the Commission's clarifying document. This agreement, in turn, suggests that all Commissioners could also agree that whether the joint fundraising activity constitutes "Federal campaign activity" for "major purpose" considerations depends on the specific content of the joint fundraising activity, namely whether the activity or public communications are intended to influence the nomination or election of a candidate. Any possible clarification on this issue would be helpful.

(d) Discussion of Corporate Contributions and Facilitation of Contributions

Commissioner Weintraub indicated a reluctance to support a document that referred to the views of "three Commissioners" on any particular subject. If those references are accurate, we are unsure why they would be considered problematic. We would suggest, however, that the Commission could attempt to clarify its views on the subject of corporate contributions and corporate facilitation of contributions by taking into consideration the discussion above regarding the regulatory requirements and restrictions inherent in the joint fundraising regulations that effectively function to prevent corporate contributions and corporate facilitation of contributions. In fact, and as noted above, the basis for such a clarification is already present in Agenda Document No. 12-69-D.

The characterization of Draft E on page 6, at lines 11-12 of Agenda Document No. 12-69-D includes a description of the joint fundraising regulations that is consistent with our understanding of those regulations, namely "that the Commission's joint fundraising regulations themselves provide a mechanism for raising funds without violating those prohibitions." Agenda Document No. 12-69-D further explains that "Draft E sets forth the conclusion supported by three Commissioners that the regulations expressly permit this [proposed] activity and joint fundraising efforts complying with [the joint fundraising] regulations would not violate restrictions on corporate contributions or corporate facilitation." Language along these lines could easily serve as a basis for the Commission to explain that Draft D and Draft E say essentially the same thing in different ways.

Thank you again for your continued consideration of this matter. Please feel free to contact us if you have any more questions or wish for us to address any additional matters.

Sincerely,

Jason Torchinksy Michael Bayes

cc: Anthony Herman, General Counsel