

ADVISORY OPINION 2012-25

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**DRAFT E**

Dear Messrs. Torchinsky and Bayes:

We are responding to your advisory opinion request on behalf of American Future Fund (“AFF”) and American Future Fund Political Action (“AFFPA”), concerning the application of the Federal Election Campaign Act (the “Act”) and Commission regulations to your proposed joint fundraising efforts.<sup>1</sup>

The Commission concludes that the proposed joint fundraising committees may operate consistent with the Act and Commission regulations.

***Background***

The facts presented in this advisory opinion are based on letters received on April 11, 2012 and June 19, 2012, and emails received on July 24, 2012, September 17, 2012, and October 1, 2012.

AFF is an incorporated non-profit social welfare organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code. AFFPA is registered with the Commission as a multicandidate, nonconnected political committee. AFFPA plans to establish a non-contribution account that would solicit and receive unlimited contributions from individuals,

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<sup>1</sup> Your original request also inquired as to joint fundraising efforts between AFF, AFFPA, and a Federal candidate or officeholder’s authorized campaign committee. In response to a request from the Office of General Counsel to add a Federal candidate or authorized committee to the advisory opinion request, you added Mr. David McIntosh and David McIntosh For Indiana. Mr. McIntosh was a candidate in the primary election for U.S. House of Representatives for the 5th District of Indiana and David McIntosh For Indiana was his principal campaign committee. On October 1, 2012, you withdrew your original questions regarding joint fundraising activities involving a Federal candidate or officeholder’s authorized campaign committee.

corporations, and labor organizations for the purpose of financing its independent political activity.<sup>2</sup> AFF and AFFPA have some overlapping management, but AFFPA is not a separate segregated fund connected to AFF. The requestors represent that they operate separately and are not affiliated with each other under Commission regulations.

The proposed joint fundraising committees ("Joint Committees") may include one or more of the following participants: AFF, AFFPA, AFFPA's non-contribution account, and an independent expenditure only political committee ("IEOPC").<sup>3</sup>

The Joint Committees would be established as separate political committees that would act as the fundraising representative of all the participants. The Joint Committees would establish separate depository accounts. In one account, each Joint Committee would deposit funds raised for AFFPA. In another account, each Joint Committee would deposit funds raised for AFF, AFFPA's non-contribution account, and a participating IEOPC. Each participant would accept only funds that it may lawfully receive under the Act.

The participants plan to execute a written agreement that would specify how the expenses of and contributions received by each Joint Committee would be allocated among the participants, and propose two different combinations of participants in the Joint Committees.

*1. AFF and AFFPA*

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<sup>2</sup> See Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, Oct. 5, 2011, <http://www.fec.gov/press20111006postcarey.shtml>.

<sup>3</sup> Requestors represent that any IEOPC would accept funds consistent with Advisory Opinion 2010-11 (Commonsense Ten), in which the Commission stated that a nonconnected political committee may raise and spend funds outside the limitations of the Act from individuals, other political committees, corporations, and labor organizations for the purpose of financing independent expenditures. Requestors represent that any IEOPC that participates in a Joint Committee would (1) report to the Commission as an IEOPC, and (2) not be affiliated with AFFPA.

This proposed Joint Committee would allocate the first \$5,000 received from individuals to AFFPA, while contributions received from individuals in excess of \$5,000 would be allocated to AFF. All corporate and labor organization contributions would be allocated to AFF.

This Joint Committee's pre-event publicity and solicitations would specify that AFFPA is raising funds for use in connection with Federal elections, and that AFF is raising funds to be used in a manner consistent with its status as a section 501(c)(4) social welfare organization.

**2. AFF, AFFPA, AFFPA's non-contribution account and/or an IEOPC**

This proposed Joint Committee would allocate the first \$5,000 received from individuals to AFFPA. Any amounts in excess of \$5,000 received from individuals, as well as all corporate and labor organization contributions received, would be split evenly between AFF, AFFPA's non-contribution account, and/or an IEOPC.

Under both proposals, the Joint Committee participants would specify in a written agreement how the fundraising proceeds will be allocated. The Joint Committee would also keep records and file reports as required by 11 CFR 102.17(c)(4) and (8).

The joint fundraising expenses would be allocated to the participants in proportion to the funds raised and distributed to each participant. Each participant would pay its own fundraising expenses. To the extent that advanced funds are needed, the requestors have not determined with any specificity how, or by what method, those funds will be advanced.

Under both proposals, the Joint Committee would solicit funds in writing, and/or by telephone, or other forms of direct contact. They would also hold one or more fundraising events, although no funds would be solicited at the fundraising events. All solicitations for contributions would include a fundraising notice with the information required by 11 CFR 102.17.

Solicitations by the Joint Committee involving AFFPA's non-contribution account or an IEOPC would not indicate how AFFPA's non-contribution account or the IEOPC would use the funds received.

***Question Presented***

1. *May AFF and AFFPA serve as participants in a joint fundraising committee?*
2. *May AFF, AFFPA, AFFPA's non-contribution account, and/or an IEOPC serve as participants in a joint fundraising committee?*

***Legal Analysis and Conclusions***

***Question 1: May AFF and AFFPA serve as participants in a joint fundraising committee?***

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

Commission regulations allow a political committee to "engage in joint fundraising with other political committees or with unregistered committees or organizations." 11 CFR 102.17(a)(1)(i). The regulations further specify that participants may include political party committees (including non-Federal party committees), candidate committees, multicandidate committees, and unregistered organizations which do not qualify as collecting agents under 11 CFR 102.6(b).<sup>4</sup> 11 CFR 102.17(a)(2).

The participants in a joint fundraising effort must either select a participating committee to serve as their joint fundraising representative or establish a separate political committee.<sup>5</sup> 11 CFR 102.17(a)(1)(i). The joint fundraising representative must be a reporting political

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<sup>4</sup> A collecting agent collects and transmits contributions to a separate segregated fund ("SSF") that is related to the collecting agent, such as an affiliated committee or a connected organization. 11 CFR 102.6(b)(1), (2). As noted above, AFF and AFFPA represent that they are not affiliated and that AFF is not the connected organization for AFFPA. Thus, AFF is not a collecting agent of AFFPA (or another political committee) and is not, for that reason, prohibited from participating in joint fundraising.

<sup>5</sup> If the participants establish a separate political committee to serve as their fundraising representative, that committee must not participate in any other joint fundraising effort. It may, however, conduct more than one joint fundraising effort for the participants. 11 CFR 102.17(a)(1)(i).

committee and must also be an authorized committee of each participant who is a candidate for Federal office. *Id.* If the participants establish a separate political committee to act as a fundraising representative, that committee must “collect contributions, pay fundraising costs from gross proceeds and from funds advanced by participants, and disburse net proceeds to each participant.” 11 CFR 102.17(b)(1). Commission regulations also require the participants or the fundraising representative to establish a separate depository account to be used solely for the receipt and disbursement of the joint fundraising proceeds. 11 CFR 102.17(c)(3).

Joint fundraising participants must also enter into a written agreement, identifying the fundraising representative and stating a formula for the allocation of fundraising proceeds. 11 CFR 102.17(c)(1). Commission regulations require the fundraising representative to retain the written agreement for three years and make it available to the Commission upon request. *Id.* Finally, the fundraising representative must provide disclaimers on every solicitation for contributions,<sup>6</sup> as well as screen and report all contributions received.

It is clear that AFFPA and AFF may serve as participants in a joint fundraising committee. The regulations expressly contemplate that “unregistered . . . organizations,” which are distinct from “political party committees,” may participate in joint fundraising committees. 11 CFR 102.17(a)(1)(i). AFF is an unregistered organization. Therefore, there is nothing in the Act or Commission regulations which categorically prohibits incorporated entities such as AFF

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<sup>6</sup> In addition to the disclaimer requirements under 11 CFR 110.11, a joint fundraising notice must be included with every solicitation for contributions. This notice must include: the names of all participating committees in the joint fundraising activity; the allocation formula to be used for distributing the joint fundraising proceeds; a statement informing contributors that, notwithstanding the stated allocation formula, they may designate their contributions for a particular participant or participants; and a statement informing contributors that the allocation formula may change if a contributor makes a contribution exceeding the amount limitations under the Act and Commission regulations. See 11 CFR 102.17(c)(2)(i)(A)-(D).

from engaging in joint fundraising efforts, provided their participating is consistent with the other requirements of the Act.<sup>7</sup>

Based on the requestors' representations, a Joint Committee involving AFFPA and AFF would meet the requirements for establishing a lawful joint fundraising effort. First, they plan to create and register a new political committee to serve as their joint fundraising representative. This committee would be a "reporting political committee." 11 CFR 102.17(a)(1)(i). Second, they intend to enter into a written agreement naming the new political committee as their joint fundraising representative. Third, they have established a formula for allocating the joint fundraising proceeds and expenses. Fourth, they plan to provide joint fundraising disclaimers on every solicitation for contributions and follow all the recordkeeping and reporting requirements of section 102.17. Finally, the joint fundraising committee would establish separate bank accounts that would segregate contributions that are subject to the limitations and prohibitions of the Act from those that are not.

Accordingly, the Commission concludes that AFF and AFFPA may serve as participants in the proposed joint fundraising committee.<sup>8</sup>

*Question 2: May AFF, AFFPA, AFFPA's non-contribution Carey account and/or an IEOPC serve as participants in a joint fundraising committee?*

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<sup>7</sup> 11 CFR 102.17(a) states that "[n]othing in this section shall supersede 11 CFR part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring Federal funds for Federal election activities." 11 CFR 102.17(a). However, 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).

<sup>8</sup> AFF also asks whether its joint fundraising activity through the Joint Committee would be treated as "Federal campaign activity" for purposes of determining whether AFF has the requisite "major purpose" to be deemed a political committee by the Commission. See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (construing the term "political committee" to encompass only organizations that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate"). The Commission concludes that AFF's activity in the Joint Committee will not categorically be Federal campaign activity or, in itself, make AFF a political committee.

For the reasons given in Question 1, AFF and AFFPA, including its non-contribution account, and an IEOPC – may participate in a Joint Committee as described.<sup>9</sup>

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. The cited advisory opinions are available on the Commission's Web site at [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,

Caroline C. Hunter  
Chair

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<sup>9</sup> AFFPA asks about the participation of AFFPA's non-contribution account in the joint fundraising effort. AFFPA itself may participate in a joint fundraising committee regardless of the account it uses in this endeavor. A non-contribution account, however, is not a separate political committee but rather a separate account of AFFPA. *See Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (a nonconnected political committee that makes direct contributions to candidates may receive unlimited funds into a separate bank account for the purpose of financing independent expenditures); *see also* Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, Oct. 5, 2011, <http://www.fec.gov/press20111006postcarey.shtml>.