August 3, 2012

By Electronic Mail

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2012-25 (AFF & AFFPA)

Dear Mr. Herman:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2012-25, a request submitted by American Future Fund (AFF), a section 501(c)(4) organization, and American Future Fund Political Action (AFFPA), a federal multicandidate, nonconnected political committee, asking whether the requestors may engage in joint fundraising efforts together and with several other entities—including a federal candidate's authorized campaign committee, AFFPA's non-contribution *Carey* account, and an independent expenditure-only political committee—in four different combinations. AOR 2012-25 at 1. Specifically, requestors seek guidance on the legality of the following four combinations:

(1) AFF and AFFPA;
(2) AFF, AFFPA, and a federal candidate's authorized campaign committee;
(3) AFF, AFFPA, and AFFPA's non-contribution *Carey* account and/or a registered independent expenditure-only committee; and
(4) AFF, AFFPA, AFFPA's non-contribution *Carey* account, a FEC-registered independent expenditure-only committee, and a federal candidate's authorized campaign committee.

The "soft money" ban enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA) provides that a federal candidate or officeholder, "or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not . . . solicit, receive, direct, transfer, or spend funds in connection with" any election unless the funds are subject to the contribution limitations and prohibitions of the Federal Election Campaign Act (FECA). 2 U.S.C. § 441i(e)(1)(A)-(B).

Commission regulations make clear that the "fundraising representative" for joint fundraising activities of the sort proposed by requestors "shall be a reporting political committee

and an authorized committee of each candidate for federal office participating in the joint fundraising activity." 11 C.F.R. § 102.17(a)(1)(i) (emphasis added). Commission regulations further provide that the "name of each authorized committee shall include the name of the candidate who authorized such committee." 11 C.F.R. § 102.14(a).

Any joint fundraising committee that includes a federal candidate campaign committee as a participant (*i.e.*, a candidate-authorized joint fundraising committee) is by definition "an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office" that will include that candidate's name in the committee's name. Section 441i(e)(1)(A) prohibits any such joint fundraising committee from soliciting or receiving funds that are not subject to federal law "limitations, prohibitions, and reporting requirements."

Consequently, we urge the Commission to make clear that requestors' proposed combinations #2 and #4, which would both include a federal candidate's campaign committee, would be prohibited from soliciting or receiving corporate and labor union contributions in any amount, *see* 2 U.S.C. § 441b, and would be prohibited from soliciting or receiving contributions from permissible sources in excess of the amount limits established by 2 U.S.C. § 441a(a)(1).[1]

An opinion by the Commission permitting proposed combinations #2 and #4 to solicit and receive unlimited contributions would facilitate evasion of and thereby eviscerate BCRA's soft money prohibition and FECA's candidate contribution limits. Such an opinion would permit candidate-authorized joint fundraising committees such as the Obama Victory Fund 2012 and Romney Victory Inc. to add independent expenditure-only committees (*e.g.*, Priorities USA Action, American Crossroads) and section 501(c)(4) organizations (*e.g.*, Priorities USA, Crossroads GPS) to their rosters and solicit $1 million, $10 million or larger contributions from their supporters—every penny of which could be spent advocating the election or defeat of President Obama and Mitt Romney. Contributions to such joint fundraising committees would be understood by all to inure to the benefit of the candidate authorizing the joint fundraising committee—and would pose precisely the threat of real and apparent corruption that FECA's contribution limits and BCRA's soft money prohibitions were enacted to prevent.

I. BCRA's legislative history, structure and purpose make clear that section 441(i) prohibits covered officials from soliciting unlimited contributions.

Under BCRA, a federal candidate or officeholder shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of [the] Act." 2 U.S.C. § 441i(e)(1)(A). Similarly, federal candidates and officeholders are prohibited from soliciting or directing funds in connection with a non-federal election unless such funds are not in excess of amounts permitted by the contribution limits of the Act, and are not from sources prohibited by the Act. 2 U.S.C. § 441i(e)(1)(B).

[1] Although 2 U.S.C. § 441i(e)(4) permits covered officials to make certain solicitations for certain Section 501(c) organizations, AFF does not state in AOR 2012-25 that it is eligible for this solicitation exception. Based on AFF's silence on this issue, these comments presume AFF does not meet the criteria of 2 U.S.C. § 441i(e)(4).

According to BCRA's sponsors, this ban on the solicitation or use of unlimited funds by covered officials was the heart of the legislation. Senator McCain stated: "The soft money ban is the centerpiece of this bill. Our legislation shuts down the soft money system, prohibiting all soft money contributions to the national political parties from corporations, labor unions, and wealthy individuals." 147 Cong. Rec. S2446 (daily ed. Mar. 19, 2001). Senator McCain later explained:

> We are prohibiting Federal officeholders, candidates, and their agents from soliciting funds in connection with an election, unless such funds are from sources and in amounts permitted under Federal law. The reason is to deter any possibility that solicitations of large sums from corporations, unions, and wealthy private interests will corrupt or appear to corrupt our Federal Government or undermine our political system with the taint of impropriety.

148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (emphasis added). Congressman Shays echoed this sentiment:

> The basic rule in the bill is that federal candidates and officials cannot raise non-federal (or soft) money donations . . . . Thus, the rule for solicitations by federal officeholders or candidates for party committees is simple: federal candidates and officeholders cannot solicit soft money funds for any party committee—national, state, or local.

148 Cong. Rec. H408 (daily ed. Feb. 13, 2002).

Likewise, Senator Feingold made Congressional intent clear, stating: "The bottom line of our legislation is, we have to get rid of this party soft money that is growing exponentially." 147 Cong. Rec. S2611 (daily ed. Mar. 21, 2001). Additionally, Senator Levin described at length the corrupting effect of soft money contributions and the need to prohibit solicitation of such funds. 147 Cong. Rec. S3246–49 (daily ed. Apr.2, 2001). Senator Levin announced:

> Passage of McCain-Feingold will bring an end to solicitations and contributions of hundreds of thousands of dollars in exchange for access to people in power—"lunch with the committee chairman of our choice for $50,000," "time with the President for $100,000," "participation in a foreign trade mission with Government officials for $50,000."

Id. at S3246 (emphasis added).

Opponents of BCRA likewise recognized that the law's solicitation restrictions as a core provision of the legislation. Senator Hatch acknowledged: "The primary provision of McCain-Feingold essentially bans soft money by making it unlawful for national political party committees and federal candidates to solicit or receive any funds not subject the hard money limitations of the Federal Election Campaign Act." 147 Cong. Rec. S3240 (daily ed. Apr. 2, 2001) (emphasis added).

Congress understood that the longstanding limits on contributions received by federal officeholders had proven to be an ineffective means of preventing real and apparent corruption. Federal candidates and officeholders circumvented the contribution limits by soliciting unlimited contributions for their political parties. For this reason, through adoption of BCRA, Congress imposed restrictions on the solicitation and direction of contributions by candidates, officeholders and party committees, unless those contributions were subject to the limits and source prohibitions of the law.

II. Section 441i(e) applies to solicitations by a candidate-authorized joint fundraising committee.

As requestors acknowledge, the Commission indicated that longstanding joint fundraising regulations at section 102.17 were affected by BCRA. AOR 2012-25 at 3. In the process of implementing BCRA's soft money prohibition, the Commission amended section 102.17, adding an introductory section that reads: "Nothing in this section shall supersede 11 CFR part 300, which prohibits any [covered] person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring Federal funds for Federal election activities." 11 C.F.R. § 102.17(a).

The Commission's clarifying regulation makes good sense. Prior to the enactment of BCRA, federal candidates and officeholders were free to solicit unlimited contributions for fellow participants in joint fundraising committees, political parties and others. BCRA changed this. BCRA's "soft money" ban states:

> A candidate, individual holding Federal office . . . or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not . . . solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act[.]

2 U.S.C. § 441i(e)(1)(A) (emphasis added).

A joint fundraising committee that includes a federal candidate campaign committee as a participant is "an authorized committee of each candidate for federal office participating in the joint fundraising activity." 11 C.F.R. § 102.17(a)(1)(i). FECA defines "authorized committee" to include any "political committee authorized by a candidate . . . to receive contributions or make expenditures on behalf of such candidate." 2 U.S.C. § 431(6) (emphasis added). Any such joint fundraising committee must also include the candidate's name in the joint fundraising committee's name. *See* 11 C.F.R. § 102.14(a).[2]

[2] The Commission further explains the committee naming requirements of Section 102.14(a), with respect to joint fundraising committees, in *FEC Campaign Guide: Congressional Candidates and Committees (August 2011)*, 131-32:

Any candidate-authorized (and candidate named) joint fundraising committee is clearly "directly or indirectly established . . . by or acting on behalf of" that candidate and is therefore prohibited by section 441i(e)(1)(A) from soliciting or receiving funds not subject to federal law "limitations, prohibitions, and reporting requirements."

The fact that some participants in a joint fundraising committee may be permitted to solicit and receive unlimited contributions (*e.g.*, independent expenditure-only committees, *Carey* accounts, or section 501(c)(4) organizations) is immaterial to whether a joint fundraising committee that is authorized by a candidate, acting on behalf of that candidate, and named after that candidate, may solicit and receive unlimited contributions. Under BCRA, it may not.

The Commission made clear in Advisory Opinion 2011-12 (Majority PAC) that federal candidates and officeholders "may not solicit unlimited contributions from individuals, corporations, or labor organizations on behalf of independent expenditure-only political committees[.]" AO 2011-12 at 3.

Just as federal candidates are prohibited from soliciting unlimited contributions for independent expenditure-only political committees, so too are such candidates' authorized committees—including joint fundraising committees that the candidate participates in—prohibited from soliciting unlimited contributions for independent expenditure-only committees, *Carey* accounts and other entities that do not meet the exception to the soft money solicitation prohibition at section 441i(e)(4)(A).

Requestors question whether a solicitation by a candidate-authorized joint fundraising committee, which is required by law to have the candidate's name in the committee's name, is subject to the solicitation prohibition of section 441i(e)(1) if the solicitation is "not signed by the federal candidate/officeholder." AOR 2012-25 at 6, 8. Whether or not a candidate signs the solicitations sent out by a candidate's authorized committee is irrelevant to the application of section 441i(e)(1). The soft money solicitation prohibition applies to any and all solicitations by

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> A new political committee established for the joint fundraiser . . . must include the name of each participating federal candidate in the new committee's name. 102.14. (An existing committee would be required to amend its Statement of Organization.) Thus, for example, a joint fundraising committee established to raise funds for a candidate and a party could not be called "Victory '12," but might be called the "John Doe Victory '12" committee.

Notwithstanding the clear legal requirement that any joint fundraising committee that includes a candidate as a participant must include the candidate's name in the joint fundraising committee's name, it appears many joint fundraising committees that include candidate committees are currently in violation of this requirement. *See*, *e.g.*, North Dakota Grassroots Victory Fund 2012 (Committee ID #C00520924) (Lists "Heidi for Senate" as a participating committee); Minnesota Senate Victory 2014 (Committee ID #C00519884) (Lists "Al Franken for Senate 2014" as a participating committee); Women for Freedom (Committee ID # C00520106) (Lists "Sandy Adams for Congress" and "Karen Harrington for Congress, Inc." as participating candidate committees); Trucking for Freedom (Committee ID #C00522052) (Listing "Latham for Congress" and "King for Congress" as participating candidate committees).

the candidate and by "an entity directly or indirectly established . . . by or acting on behalf of" a federal candidate, including candidate-authorized joint fundraising committees.

Similarly, requestors ask whether an unlimited contribution solicitation by a candidate-authorized joint fundraising committee, which is required by law to have the candidate's name in the committee's name, is permissible if the "committee include[s] a notice, pursuant to 11 C.F.R. § 300.64, indicating that the Federal candidate/officeholder is not soliciting funds in excess of the federal source and amount limitations?" AOR 2012-25 at 9.

Put differently, requestors ask whether a candidate-authorized committee with the candidate's name in the committee's name can solicit unlimited contributions so long as it claims somewhere in the solicitation that the candidate personally is not soliciting unlimited contributions. This is nonsense. Such a disclaimer cannot cure a blatant violation of the BCRA soft money solicitation prohibition. Section 300.64, the provision cited by requestors, pertains to "participation by federal candidates and officeholders at nonfederal fundraising events." Solicitations by federal candidate-authorized joint fundraising committees are <u>not</u> nonfederal fundraising events. Unlike nonfederal fundraising events, where the funds raised are not spent to directly benefit federal candidates and officeholders, fundraising activities by requestors' proposed joint fundraising committees are <u>federal</u> fundraising events and the funds raised will benefit federal candidates and officeholders—indeed, they are likely to benefit the federal candidates who are participating in the joint fundraising committees. Section 300.64 and its disclaimer provisions are inapplicable to fundraising activities of federal candidate-authorized joint fundraising committees.

For all of these reasons, we urge the Commission to make clear that requestors' proposed joint fundraising committee combinations #2 and #4, which would include a federal candidate's campaign committee, would be prohibited from soliciting or receiving corporate and labor union contributions in any amount, *see* 2 U.S.C. § 441b, and would be prohibited from soliciting or receiving contributions from permissible sources in excess of the amount limits established by 2 U.S.C. § 441a(a)(1).

III. The Supreme Court in *McConnell* upheld BCRA's solicitation restrictions as necessary to reinforce and prevent circumvention of limits on contributions directly to candidates and parties.

The Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), considered the constitutionality of nearly every aspect of section 441i and, based on the evidentiary record compiled by the district court, upheld it against First Amendment challenge. *See id.* at 142-54, 181-84. The *McConnell* Court emphasized the corruptive threat of unlimited "soft money" contributions solicited by federal candidates and officeholders, noting:

> Not only were . . . soft-money contributions often designed to gain access to federal candidates, but they were in many cases solicited by the candidates themselves. <u>Candidates often directed potential donors to party committees and tax-exempt organizations that could legally accept soft money</u>. For example, a federal legislator running for reelection solicited soft money from a supporter by

> advising him that even though he had already "'contributed the legal maximum'" to the campaign committee, he could still make an additional contribution to a joint program supporting federal, state, and local candidates of his party. Such solicitations were not uncommon.
>
> The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections.

Id. at 125-26 (footnotes omitted) (emphasis added).

The *McConnell* Court examined the solicitation restrictions in section 441i(e) and found the "restrictions on solicitations are justified as valid anticircumvention measures." *Id.* at 182. The Court explained:

> Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

Id. at 182 (emphasis added). Given "the substantial threat of corruption or its appearance posed by donations to or at the behest of federal candidates and officeholders," the Court held that section 441i(e) is "clearly constitutional." *Id*. at 183-84.

Although the evidence in *McConnell* related to section 441i principally involved the corrupting influence of solicitations of unlimited contributions by covered officials for political party committees, the Supreme Court upheld the statute's application to all funds raised by covered officials in connection with elections. The Court recognized that absent solicitation restrictions applied broadly to all funds raised in connection with elections, covered officials would simply "mobilize their formidable fundraising apparatuses" through "like-minded tax-exempt organizations that conduct activities benefiting their candidates." *Id.* at 175.

Candidate-authorized joint fundraising committees present precisely this type of scheme—an attempt to mobilize the "formidable fundraising apparatuses" of covered officials to raise funds outside federal contribution restrictions to conduct activities directly benefiting those candidates. Congress anticipated this kind of charade and enacted section 441i to prohibit it. The Supreme Court recognized the wisdom of Congress in doing so, and declared section 441i constitutional with respect to all fundraising by covered officials in connection with elections.

IV. Conclusion

Requestors here propose nothing less than reinvention of the corrupting pre-BCRA soft money system. If the Commission permits proposed combinations #2 and #4, nothing will stop the party committees themselves from forming similar joint fundraising committees to once again raise soft money. Federal law does not allow it. The Commission should advise

requestors that section 441i(e)(1) prohibits candidate-authorized joint fundraising committees from soliciting and receiving funds "unless the funds are subject to the limitations, prohibitions, and reporting requirements" of FECA.

We appreciate the opportunity to submit these comments.

Sincerely,

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