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June 18, 2004

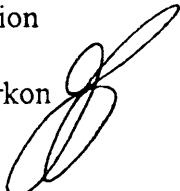
AGENDA ITEM


For Meeting of: 6-24-04


SUBMITTED LATE


MEMORANDUM

TO: The Commission


THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

James A. Kahl 
Deputy General Counsel

Rosemary C. Smith 
Associate General Counsel

Mai Dinh 
Assistant General Counsel

Michael Marinelli 
Staff Attorney

SUBJECT: Advisory Opinion 2004-15

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 24, 2004.

Attachment

1 ADVISORY OPINION 2004-15

2
3

4 Mr. David T. Hardy
5 Bill of Rights Educational Foundation
6 PMB 265
7 Tucson, AZ 85749

DRAFT

8

9 Dear Mr. Hardy:

10

11 This responds to your letters dated March 15, and April 21, 2004, and your
12 subsequent electronic mail message of May 3, 2004 requesting an advisory opinion
13 concerning the application of the Federal Election Campaign Act of 1971, as amended
14 (“the Act”), and Commission regulations to advertising you and the Bill of Rights
15 Educational Foundation (“the Foundation”) plan to undertake.

16 ***Background***

17 You state you are the president of the Foundation, which is an Arizona
18 corporation. You have stated that your organization qualifies as a nonprofit corporation
19 organized under Section 501(c)(4) of the Internal Revenue Code, 26 U.S.C. 501(c)(4).
20 This Advisory Opinion is contingent on these facts as you have presented them.

21 You explain that you are producing a documentary film, entitled “The Rights of
22 the People,” to focus on Bill of Rights issues. You state that you have completed
23 approximately half of the filming. For the remaining half, you state you will include
24 footage of some Congressional officeholders, some of whom are candidates for re-
25 election in 2004. You state that the film may also make reference to “members of the
26 current Administration” including President Bush. You explain that while you are
27 personally producing the documentary, both you and the Foundation would pay for the
28 marketing and would be involved in the distribution of the documentary. You plan to

1 distribute the documentary in non-broadcast form, but would use radio and perhaps
2 television commercials to promote its distribution. You ask whether these commercials
3 would constitute electioneering communications if they refer to a candidate for Federal
4 office and if they air within 60 days before a general election or 30 days before a primary
5 election. You indicate that if the commercials clearly identify a U.S. Congressional
6 candidate, you do not intend to “run” the commercials in that candidate’s district.¹
7 However, certain commercials could clearly identify at least one candidate for U.S.
8 President and would be received by 50,000 or more people within 30 days of a
9 presidential primary, a national nominating convention, and, in all likelihood, the general
10 election. You ask whether these proposed commercials would be electioneering
11 communications.

12 ***Question Presented***

13 *Would the proposed commercials that reference a clearly identified Presidential*
14 *candidate be electioneering communications within the meaning of the Act and*
15 *Commission regulations?*

16 ***Legal Analysis and Conclusions***

17 Yes, the proposed commercials would be electioneering communications. Subject
18 to certain exceptions, an electioneering communication is any broadcast, cable or satellite
19 communication that refers to a clearly identified candidate for Federal office, and is
20 publicly distributed for a fee within 60 days of a general, special or runoff election for the

¹ The Commission assumes from your statement that the commercials would not run in the Congressional districts of the Congressional candidates means that they would not be received in the Congressional districts. See 11 CFR 100.29(b)(6)(i) and (ii), and 11 CFR 100.29(b)(7). Therefore, this advisory opinion addresses only commercials that refer to a Presidential candidate.

1 office sought by the candidate, or within 30 days of a primary or preference election for
2 the office sought by the candidate. 2 U.S.C. 434(f)(3) and 11 CFR 100.29; *see also*
3 Advisory Opinion 2003-12. Elements of the definition turn on the type of Federal
4 candidate identified. For presidential and vice presidential candidates, “publicly
5 distributed” means that the electioneering communication can be received: (1) by 50,000
6 or more people in a State where a primary election or caucus is being held within 30 days;
7 or (2) by 50,000 or more people anywhere in the United States from 30 days prior to the
8 convention to the end of the convention; or (3) anywhere in the United States within 60
9 days prior to the general election. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(b)(3)(ii); *see*
10 *also* 2 U.S.C. 434(f)(3)(C).

11 The radio and television commercials that you describe in your request would be
12 electioneering communications because they meet all the elements of 2 U.S.C. 434(f)(3)
13 and 11 CFR 100.29. The proposed commercials would refer to at least one presidential
14 candidate who is a clearly identified candidate for Federal office. *See* 11 CFR
15 100.29(a)(1). They would also be publicly distributed because you intend to pay a radio
16 station and perhaps a television station to air or broadcast your commercials. *See* 11 CFR
17 100.29(a)(2) and (b)(3)(i). Finally, they would reach 50,000 or more people within 30
18 days of a national nominating convention and or the general election.²

19 Furthermore, none of the statutory or regulatory exemptions for electioneering
20 communications applies to the proposed commercials. *See* 2 U.S.C. 434(f)(3)(B)(i)

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² Your request does not specify if 50,000 or more people who would be able to receive the proposed commercials during a presidential primary are located in the particular State where a presidential primary is held. Thus, it is unclear whether the proposed commercials broadcast during the presidential primary would be considered electioneering communications.

1 through (iv), and 11 CFR 100.29(c)(1) through (6). The proposed commercials would not
2 be disseminated through means other than broadcast, cable or satellite communication.³
3 The commercials would not qualify as news stories, commentaries or editorials.⁴ They
4 would not constitute a reportable expenditure or independent expenditure.⁵ They would
5 not constitute a candidate debate or forum or promotion of such an event. They are not
6 communications by local or State candidates. Finally these communications would not be
7 made by entities organized under 26 U.S.C. 501(c)(3).

8 Because your radio and television commercials would be electioneering
9 communications, the statutory and regulatory requirements governing electioneering
10 communications apply. *See generally* 2 U.S.C. 434(f) and 441b(b), and 11 CFR 104.20
11 and 114.14(b). However, these legal requirements differ depending on whether you or
12 the Foundation pays for these commercials. If you, as an individual, pay for these
13 commercials, you must comply with the funding and reporting requirements described in
14 2 U.S.C. 434(f), 441b(b)(2) and 441(b)(3)(A), and 11 CFR 104.20 and 114.14(b).
15 Corporations and labor organizations are prohibited from making or financing
16 electioneering communications. 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(2)(iii); *see*
17 *also* 11 CFR 114.14(a) and (b). Qualified nonprofit corporations as described in 11 CFR

³ For example, commercials for the documentary using print media including newspaper or magazines or mailings, or commercials over the Internet including emails are not electioneering communications. *See* 11 CFR 100.29(c)(1); *see also* Advisory Opinion 2004-07.

⁴ You have not asserted that you are entitled to the media exemption and your request does not provide information to conclude that the media exemption would apply to the Foundation's activities. 2 U.S.C. 434(f)(3)(B)(i); *see also* 11 CFR 100.29 (c)(2). In *McConnell v FEC*, 124 S.Ct. 619 (2003) the Court described the media exemption as "narrow" and drew a distinction between "corporations that are part of the media industry" as opposed to "other corporations that are not involved in the regular business of imparting news to the public." *McConnell* at 697 (quoting *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 668 (1990)).

⁵ The Commission assumes that the proposed commercials do not expressly advocate the election or defeat of any candidate for Federal office.

1 114.10, however, are exempt from this prohibition.⁶ See 2 U.S.C. 441b(c)(2) and 11
2 CFR 114.2(b)(2). The Foundation does not meet the requirements of section 114.10,⁷ and
3 therefore, may not pay for the proposed commercials or provide you with the funds to pay
4 for them.⁸

5 The Commission expresses no opinion regarding qualification for tax treatment
6 under 26 U.S.C. 501(c)(3) or (4) or any other ramifications of the proposed activities
7 under the Internal Revenue Code because those questions are outside the Commission's
8 jurisdiction.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. See 2 U.S.C. § 437f. The Commission emphasizes that if there is a change in
12 any of the facts or assumptions presented, and such facts or assumptions are material to a
13

⁶ Nonprofit organizations organized under 26 U.S.C. 501(c)(3) may also pay for electioneering communications pursuant to the exemption in 11 CFR 100.29(c)(6). The Commission expresses no opinion regarding the qualifications for tax treatment under 26 U.S.C. 501(c)(3).

⁷ There are several requirements for Qualified Nonprofit Corporation status under 11 CFR 114.10, including that the entity be described in 26 U.S.C. 501(c)(4). See 11 CFR 114.10(c)(5). Although you represent that the Foundation is organized as a (c)(4) corporation, your request does not indicate that the Foundation has met any of the other requirements of 11 CFR 114.10. See 11 CFR 114.10(c)(1) through (4). Nor have you provided any information indicating that a court has determined that the Foundation is otherwise entitled to qualified nonprofit status. See 11 CFR 114.10(e)(1)(i)(B).

⁸ However, should the Foundation subsequently meet the requirements of section 114.10(c), it would be able to pay for the commercials subject to the restrictions in 11 CFR 114.14 and the reporting requirements in 11 CFR 104.20. With its first report, it would also be obligated to file certification of its status as a qualified nonprofit corporation. 11 CFR 114.10(e)(1)(ii).

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

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Sincerely,

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Bradley A. Smith
Chairman

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12 Enclosures (AOs 2004-07 and 2003-12)