MEMORANDUM

TO: The Commission

FROM: Christopher Hughey
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Subject: Draft AO 2010-25

Attached are two alternative drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for October 7, 2010.

Attachment
Dear Mr. Goodman:

We are responding to your advisory opinion request on behalf of RG Entertainment, Ltd. ("RGE"), Star Parker, Star Parker for Congress, Motive Entertainment, Inc., engage4 LLC, and InService America, Inc., concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), to several proposed activities. You ask whether RGE's disbursements to produce, distribute, and advertise the documentary film I WANT YOUR MONEY (the "Film") are expenditures or electioneering communications; whether RGE's production and distribution of the Film would be a coordinated communication with Ms. Parker; whether a licensee's payment of the cost of screening the Film would be a contribution to Ms. Parker's authorized committee; and whether Ms. Parker's use of her personal funds to license a promotional screening of the Film would be an independent expenditure.

The Commission concludes that disbursements for the production, distribution, and advertising of the Film are not expenditures because they are for the bona fide commercial activity of a commercial entity. Therefore, RGE does not need to report its disbursements for the production, distribution, and advertising of the Film as expenditures. If, however, RGE's advertisements of the Film are electioneering communications, then RGE must report those disbursements as such, because (1) there is no exemption from the definition of "electioneering communication" for bona fide
commercial activity, and (2) RGE’s advertisements would not qualify for the media exception. Additionally, the Commission concludes that RGE’s production and distribution of the Film would not be a coordinated communication with Ms. Parker. The Commission further concludes that a licensee’s payment to screen the Film would be an in-kind contribution to Ms. Parker’s authorized committee if it is for the purpose of influencing Ms. Parker’s election. Lastly, the Commission concludes that Ms. Parker’s use of her personal funds to pay for a promotional screening of the Film would be an independent expenditure.

**Background**

The facts presented in this advisory opinion are based on your letters received on September 9 and 20, 2010, and your email dated September 27, 2010.

RGE is a for-profit film company incorporated and located in California. Since 2005, RGE has produced, either directly or through wholly owned production subsidiaries, three films: LUCIFER (2007), a short film depicting the struggle between good and evil; SUPER CAPERS (2009), a family and adventure feature film; and the Film, which is a political documentary expected to open in theaters on October 15, 2010, and the subject of this advisory opinion. RGE is also currently producing a feature film, THE WIND IN THE WILLOWS, based on the Kenneth Grahame novel. RGE intends to produce both dramatic films and political documentaries in the future, although no specific film or script has been prepared.

RGE is organized and maintained only for commercial purposes. RGE’s sole business is the production, distribution, and marketing of its films. No political party,
political committee, or candidate owns or controls RGE or has funded any of its film productions.

Ms. Parker is a candidate for Congress in California’s 37th Congressional District. Ms. Parker was interviewed during the production of the Film, and portions of that interview appear in the Film. Her appearances are limited to discussions of public policy. The Film does not refer to Ms. Parker as a candidate or mention her election, campaign, or political party affiliation.

The Film is a documentary about economic and fiscal policy, as portrayed through a fictional debate between President Barack Obama and former President Ronald Reagan. The Film features historical and original footage, interviews, and animated depictions of several historical and current public political figures, several of whom are currently candidates for Federal office: Representative Thaddeus McCotter, Speaker of the House of Representatives Nancy Pelosi, Senate Majority Leader Harry Reid, Representative Tom McClintock, and Ms. Star Parker.

RGE paid for the production of the Film and retains all ownership rights. RGE states that its sole purpose for producing and distributing the Film is commercial profit. Although investors will invest in the Film’s printing and advertising budget, none of the investors is a candidate, political committee or political party committee.

RGE has engaged four companies to market and distribute the Film. Three of them -- Motive Entertainment, Inc. (“Motive”), engage4 LLC (“engage4”) and InService America, Inc. (“InService America”) (collectively known as “MEISA”) – have joined in this advisory opinion request. Motive is a marketing corporation organized and located in California. It has marketed such feature films as THE PASSION OF THE CHRIST, ROCKY
1 BALBOA, THE POLAR EXPRESS, and UNITED 93. Engage4 is a communications and
2 marketing firm located in Virginia that specializes in direct marketing. It is currently
3 marketing feature films and documentaries, including THE BLIND SIDE, THE PERFECT
4 GAME, IN GOD WE TRUST, and A NECESSARY JOURNEY. InService America, a
5 corporation organized and located in Virginia, works with engage4 and provides
6 fulfillment and inventory management services, as well as event management services.
7 InService was involved in the marketing of THE PASSION OF THE CHRIST with Motive.
8 The fourth company, Freestyle Releasing, Inc. (“Freestyle”), is a distribution company
9 located in California.
10 MEISA and Freestyle are for-profit companies engaged in the business of
11 marketing, event management, and film promotion and distribution. None of the
12 financial arrangements between RGE and MEISA or Freestyle provides for any fees or
13 commissions to be paid to any candidate or political committee.
14 The Film is being distributed in three phases. During the first phase (September
15 through mid- to late-October, 2010), MEISA is actively marketing the Film via the
16 Internet, email, press releases, word-of-mouth campaigns, and licensed promotional
17 screenings hosted by individuals and organizations. The requestors represent that these
18 types of “grassroots/grasstops” activities are typical of film marketing campaigns.
19 The promotional screenings in the first phase are designed to generate public
20 interest in the Film and obtain audience feedback that may further inform marketing and
21 promotional decisions by RGE and MEISA before the Film’s formal theatrical release.
22 Each individual or organization wishing to host a promotional screening of the Film must
23 pay a fee of approximately $500 to $1,000 to cover the costs of theater rental, logistical
support, promotional materials, commissions for any subcontractors, and profits. The fee
may vary depending upon the venue, location, and timing of the screening. In addition to
offering logistical support to screeners, MEISA enters into licensing agreements on
RGE’s behalf that grant the screener a one-time exhibition right. MEISA then conveys a
watermarked DVD to each screener to protect against piracy. Following the screening,
the licensee must return the DVD to engage.

MEISA will license the Film to virtually any individual, business, or organization
that applies to screen it, including political and candidate committees, although it retains
the right to decline an application under certain circumstances. Each screener will
determine who to invite to the promotional screening and will retain discretion to sell
tickets or allow free attendance. Neither RGE nor MEISA will share in any ticket
revenues generated by these promotional screenings.

All license and event fees generated from the promotional screenings will be
divided between RGE and MEISA. MEISA will pay for their promotional expenses,
such as theater rentals, subcontractor costs, and printing and promotional material costs,
and keep the excess as profits, in addition to a service fee paid by RGE. No revenues
from license or event fees will be shared with any candidate, political committee, or
political party committee.

The second phase of the Film’s distribution will consist of a national theatrical
release by Freestyle beginning on October 15, 2010. In this second phase, RGE
anticipates that the Film will be shown in at least 500 theaters nationwide. Movie

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1 MEISA reserves the right to decline an application if it has reason to believe that the Film will be used
inappropriately or in a manner that might harm the Film’s reputation.
theaters that show the Film will charge moviegoers the usual and normal charge for
tickets and each movie theater will share a percentage of ticket sales with RGE and
Freestyle. MEISA may assist Freestyle with group ticket sales as part of the continuing
marketing efforts to promote the Film during its formal theatrical release.

As part of the second phase, RGE plans to advertise the Film in print media, as
well as on television and radio. Television and radio advertisements will consist of a film
trailer (the “Trailer”) that contains excerpts from the Film, including images and/or audio
of President Obama and at least three current candidates (Speaker Pelosi, Representative
McCotter, and Representative McClintock). These advertisements will be broadcast
nationally in October (and possibly November) 2010. RGE states that the advertisements
will not be coordinated with any candidate or political party committee. RGE and
MEISA intend to make advertising decisions based upon financial resources and optimal
commercial value for the Film.

The third phase of the Film’s distribution will begin after its run in theaters in the
second phase ends. RGE estimates that the Film’s theatrical release will last
approximately two to twelve weeks, depending on the Film’s success. RGE has not yet
determined the timing and details of the third phase, but anticipates that it may include
distribution via DVD, pay-per-view, premium channels, broadcast and cable television,
and promotional screenings similar to those occurring in the first phase. In any event,
the Film will not be broadcast on or before the November 2, 2010, general election.

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2 The Trailer is available for viewing at www.iwantyourmoney.net (last viewed September 27, 2010). The request does not indicate the extent to which the candidates appearing in the Trailer will be identifiable in a radio advertisement for the Film.
Ms. Parker has received inquiries from two promotional screeners of the Film regarding her availability to attend and speak at promotional screenings during the first phase of the Film's distribution. One inquiry is from an individual who is hosting an event at a public theater. The audience would consist of members of the public, principally friends of the individual host. The other inquiry is from a corporation that will be paying for the event with corporate funds. The promotional screening would take place in a public theater, and the audience would consist of members of the public invited by the corporation. The audience would not consist solely of the restricted class of the corporation or the corporation's employees and their families. Additionally, Ms. Parker intends to license the Film herself and to host a promotional screening.

Questions Presented

1. Are RGE's disbursements to produce, distribute, and advertise the Film for the "bona fide commercial activity" of a commercial entity, and thus not expenditures?

2. Are RGE's advertisements for the Film that are electioneering communications covered by the media exception?

3. Is the production and distribution of the Film by RGE a coordinated communication with Ms. Parker?

4. Must public theatrical exhibitions of the Film by RGE include disclaimers?

5. If an individual pays a license fee to host a promotional screening of the Film, may Ms. Parker attend the screening without receiving a campaign contribution in the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses her candidacy?

6. If a corporation pays a license fee to host a promotional screening of the Film, may Ms. Parker attend the screening without receiving a campaign contribution in the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses her candidacy?

7. If Ms. Parker uses her personal funds to pay a license fee to host a promotional screening of the Film, may she attend the screening without receiving a campaign
contribution in the amount of the license or exhibition fee if she (1) speaks about policy, (2) discusses her candidacy, including soliciting contributions to her campaign, or (3) advertises the screening as a campaign-related event?

8. Is Ms. Parker's payment of the license fee to host a promotional screening of the Film exempt from the definition of "expenditure" under the media exception or "bona fide commercial activity"? If not, must Ms. Parker file FEC Form 5 (Independent Expenditure report)?

Legal Analysis and Conclusions

Question 1. Are RGE's disbursements to produce, distribute, and advertise the Film for the "bona fide commercial activity" of a commercial entity, and thus not expenditures?

Yes, RGE's disbursements to produce, distribute, and advertise the Film are for the bona fide commercial activity of a commercial entity and thus are not "expenditures" under the Act and Commission regulations. Thus, RGE does not need to report as expenditures its disbursements for the production, distribution, and advertising of the Film. The Commission notes that RGE would nonetheless have to report its disbursements for any advertisements for the Film that are electioneering communications, because bona fide commercial activity is not exempt from electioneering communication reporting requirements.

An "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i); see also 11 CFR 100.111(a). The Commission has concluded that disbursements by a commercial entity

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3 RGE and MEISA also ask whether any individual or organization that pays the license fee to host a theater screening of the Film would be covered by the media exemption or constitute bona fide commercial activity. Because this question concerns only third party activities, it does not qualify as an advisory opinion request. See 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).
for bona fide commercial activity are not expenditures. See Advisory Opinion 2008-10 (VoterVoter.org).

The Commission evaluates several factors in determining whether the commercial sale of candidate-related merchandise would be bona fide commercial activity, including:

1. whether the vendor is engaging in the activity for genuinely commercial purposes and not for the purpose of influencing an election;
2. whether the sales of the merchandise involve fundraising activity for candidates or solicitations of political contributions;
3. whether the items are sold at the vendor’s usual and normal charge;
4. whether the purchases are made by individuals for their personal use;
5. whether the entity is owned, controlled, or affiliated with a candidate or political committee;
6. whether the entity is “in the business” of conducting the type of activity involved;
7. whether the entity follows usual and normal business practices and industry standards. See Advisory Opinions 2008-10 (VoterVoter.org), 1994-30 (Conservative Concepts/Pence) and 1989-21 (Create-a-Craft); MURs 5474 (Dog Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11), First General Counsel’s Report, dated May 25, 2005 (disbursements were for bona fide commercial activity where there was no information to suggest “that those who made disbursements related to the production and distribution of the film were motivated by anything other than making a profit”).

Applying these factors to the facts presented here indicates that RGE’s production, distribution, and advertising of the Film is the bona fide commercial activity

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4 While the Commission has noted the significance of conducting commercial activity on a non-partisan basis in determining whether the activity is engaged in for commercial purposes only, see Advisory Opinion 2008-10 (VoterVoter.org), partisanship by itself does not necessarily negate the otherwise commercial nature of an activity. See Advisory Opinion 1994-30 (Conservative Concepts/Pence).
of a commercial entity. First, RGE is a for-profit company organized and maintained
solely for commercial purposes, and its sole purpose for producing and distributing the
Film is to generate a commercial profit. Second, RGE’s licenses and ticket sales of the
Film will not involve fundraising activity for candidates or solicitations of political
contributions. Third, RGE’s licenses and sale of the Film will be “similar to all other
movie releases.” Fourth, tickets for the Film will be sold to individuals in the general
public for their personal use. Fifth, RGE is not owned or controlled by any political
party, political committee, or candidate. Sixth, RGE is “in the business” of producing,
distributing, and advertising films. Finally, RGE plans to follow usual and normal
business practices and industry standards with respect to the production, distribution, and
marketing of the Film. RGE has entered into arms-length commercial agreements with
MEISA and Freestyle to market and distribute the Film. RGE has represented that a
three-phase exhibition is customary in the Film industry and that MEISA’s marketing
strategy for the Film is typical of film marketing campaigns.

Under these circumstances, the production, distribution, and advertising of the
Film by RGE is the bona fide commercial activity of a commercial entity. Thus,

the requestors indicate that MEISA and Freestyle are not owned or controlled by any political party,
political committee, or candidate.
communication.” An electioneering communication is any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office, is publicly distributed within sixty days before a general, special, or runoff election (or thirty days before a primary) for the office sought by the candidate, and is targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A); 11 CFR 100.29(a). An electioneering communication “does not include...a communication which constitutes an expenditure or an independent expenditure.” 2 U.S.C. 434(f)(3)(B)(ii); see also 11 CFR 100.29(c)(3).

RGE plans to advertise the Film by broadcasting the Trailer nationally on radio and television within sixty days before the general election. The Trailer contains images and audio of at least three clearly identified candidates — Speaker Pelosi, Representative McCotter, and Representative McClintock — who are seeking election to Federal office in the November 2, 2010, general election. Any such broadcast of the Trailer that is “targeted to the relevant electorate” 6 would be an electioneering communication.

Although the Commission has the authority to promulgate regulations to exempt certain communications from the definition of “electioneering communication,” see 2 U.S.C. 434(f)(3)(B)(iv), it has not promulgated any regulations exempting communications made as part of a commercial entity’s bona fide commercial activity. 7

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6 In the case of candidates for the House of Representatives, a communication is “targeted to the relevant electorate” when the communication can be received by 50,000 or more persons in the district the candidate seeks to represent. See 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(3). The Commission lacks sufficient information to determine whether RGE’s planned broadcasts of the Trailer will be “targeted to the relevant electorate” with respect to the candidates identified in the Trailer, because RGE indicates only that its broadcasts will be “national” in scope.

7 While some commercial communications are not subject to the prohibition on corporate electioneering communications at 11 CFR 114.15—a regulation that the Commission intends to address in light of the Supreme Court’s opinion in Citizens United v. FEC, 130 S.Ct. 876, 78 USLW 4078 (U.S. Jan 21, 2010) — they nonetheless remain “electioneering communications.” The Commission previously considered and rejected an exception from the definition of “electioneering communication” for communications that refer
Therefore, any advertisements for the Film that meet the definition of “electioneering communication” will not be exempt from that definition, or from the applicable reporting requirements, merely because they are the *bona fide* commercial activity of a commercial entity. *See* 2 U.S.C. 434(f).

**Question 2.** Are RGE’s advertisements for the Film that are electioneering communications covered by the media exception?

No, RGE’s advertisements for the Film are not covered by the media exception. RGE’s advertisements that are electioneering communications may be exempt from regulation under the media exception, also known as the press exception, in either of two ways. First, if RGE’s production and distribution of the Film qualify for the media exception to the definition of expenditure, then RGE’s advertisements of the Film would also be exempt from regulation. *See* FEC v. Phillips Publ’g, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinion 2010-08 (Citizens United). Second, RGE’s advertisements would be exempt from regulation if they qualify for the media exception to the definition of “electioneering communication.”

**Media exception and expenditures**

“The term ‘expenditure’ does not include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, to a clearly identified candidate in the context of promoting a candidate’s business. *See* Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190, 65197, 65202 (Oct. 23, 2002). The Commission determined that it lacked the statutory authority to promulgate such an exception under 2 U.S.C. 434(f)(3)(B)(iv), because “it is likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they also serve a business purpose unrelated to the election.” *Id.*; see also Shays v. FEC, 414 F.3d at 109 (the Commission cannot create a blanket exemption for public service announcements by certain nonprofit corporations “given that such broadcasts could ‘associate a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate.’”).
magazine, or other periodical publication, unless such facilities are owned or controlled
by any political party, political committee, or candidate.” 2 U.S.C. 431(9)(B)(i).

The Commission conducts a two-step analysis to determine whether this
exception applies. The first question is whether the entity engaging in the activity is a
press entity. See Advisory Opinions 2010-08 (Citizens United), 2005-16 (Fired Up!),
1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission
applies the two-part analysis of Reader’s Digest Ass’n v. FEC, 509 F. Supp. 1210, 1215
(S.D.N.Y. 1981), which requires it to establish: (A) that the entity is not owned or
controlled by a political party, political committee, or candidate; and (B) that the entity is
acting as a press entity in conducting the activity at issue (i.e., that the press entity is
acting in its “legitimate press function”). See also Phillips Publ’g, 517 F.Supp. at 1312-
13; Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired
Up!), and 2004-07 (MTV).

When determining whether a particular entity is a press entity, the Commission
focuses on whether the entity produces on a regular basis a program that disseminates
news stories, commentary, and/or editorials. See, e.g., Advisory Opinions 2008-14
(Melothé, Inc.), 2007-20 (XM Radio), and 2005-19 (Inside Track). The term “news
story, commentary, or editorial” includes documentaries and educational programming.
See Advisory Opinion 2010-08 (Citizens United) (exempting documentaries from the
definition of expenditure); Explanation and Justification for Final Rules on
Electioneering Communications, 67 FR 65190, 65197 (Oct. 23, 2002) (exempting
documentaries from the electioneering communication definition in 11 CFR
100.29(c)(2)).
Not every company that produces documentaries, however, qualifies for the media exception. In Advisory Opinion 2004-30 (Citizens United), the Commission determined that the requestor was not a press entity because the requestor did not "regularly produce documentaries or pay to broadcast them on television." At that time, the requestor had produced only two documentaries since its founding. More recently, however, the Commission determined that the same requestor was a press entity for the purposes of its filmmaking activities, noting the substantial increase in the "volume and frequency" of the requestor's documentary production over the preceding six years (from two to fourteen films) and its consistent allocation of a substantial portion of its budget to documentary film production. Advisory Opinion 2010-08 (Citizens United).

In those instances in which the Commission has determined that an entity without a substantial history of media activity qualifies as a press entity, that determination has turned on the entity’s specific plans to produce, on a regular basis, a program that disseminates news, commentary, and editorials. For example, in determining that Melothé, Inc. was a press entity, the Commission relied on a detailed proposal for an Internet TV station that would, in its normal course, provide "interviews, daily news reports, roundtable discussions, coverage of campaign events, speeches and rallies, 'reports from the road,' and commentary related to particular political campaigns.” Advisory Opinion 2008-14 (Melothé, Inc.). Similarly, in Advisory Opinion 2010-08 (Citizens United), Citizens United had not only a history of media activity, but it also had specific plans to produce and distribute documentaries in the future, including two pending premieres, four additional documentaries in production, an anticipated documentary budget, and specific negotiations to broadcast several documentaries.
Here, by contrast, RGE has produced only one documentary to date and has only a general intention to produce both dramatic films and political documentaries in the future. RGE acknowledges that no specific film or script for any future documentary has been prepared. RGE offers only potential methods of distribution that it “may” use in the future for any such films. Nor is RGE’s current project, THE WIND IN THE WILLOWS, “news, commentary, or editorial.” Based on its track record and representations as to future activities, RGE is not, and does not appear to intend to engage in, producing documentaries on a regular basis. Thus, it is not a press entity. Because RGE is not a press entity, it is unnecessary to proceed to the media exception analysis set forth in Reader’s Digest. Accordingly, the costs of producing and distributing the Film are not exempt from the Act’s definition of “expenditure” under the media exception.

Media exception and electioneering communications

The Act and Commission regulations exempt from the definition of “electioneering communication” any communication that appears “in a news story, commentary, or editorial” distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. See 2 U.S.C. 434(f)(3)(B)(i); 11 CFR 100.29(c)(2). Because the Trailer will not appear in a news story, commentary, or editorial, it does not qualify for this exception. See Advisory Opinion 2004-30.

Moreover, RGE is not a press entity, as discussed above. Therefore, RGE will have to
report its disbursements for any advertisements of the Film that meet the definition of

Question 3. Is the production and distribution of the Film by RGE a coordinated
communication with Ms. Parker?

No, the production and distribution of the Film by RGE is not a coordinated
communication with Ms. Parker, because it does not meet the content prong of 11 CFR
109.21(a)(2).

Commission regulations set forth a three-prong test to determine whether a
payment for a communication is an in-kind contribution to a candidate as a result of
coordination between the person making the payment and the candidate. See 11 CFR
109.21(a); see also 2 U.S.C. 441a(a)(7)(B). Under the second prong of the test, a
communication must satisfy at least one of the four content standards in 11 CFR
109.21(c) to be a coordinated communication. 9

The first content standard, at 11 CFR 109.21(c)(1), covers “electioneering
communications,” as defined in 11 CFR 100.29. As noted above, an electioneering
communication must be a “broadcast, cable, or satellite communication.” 2 U.S.C.
434(f)(3); 11 CFR 100.29(a). RGE indicates that the Film will be shown only in theaters
during the time that Ms. Parker is a candidate – that is, before November 2, 2010. A
documentary film shown in a movie theater is not a “broadcast, cable, or satellite

8 Because the Film will not be broadcast on or before the November 2, 2010, general election, it will not be
an electioneering communication. Thus, the media exception from the definition of electioneering
communication is not relevant with respect to the Film. See 2 U.S.C. 434(f)(3)(B)(i); 11 CFR 100.29(c)(2).

9 The Commission recently adopted a fifth content standard, at 11 CFR 109.21(c)(5), for a public
communication that is the functional equivalent of express advocacy. This content standard is not effective
until December 1, 2010. See Final Rules on Coordinated Communications, 75 FR 55947 (Sept. 15, 2010).
communication” because it is not “publicly distributed by a television station, radio
station, cable television system, or satellite system.” 11 CFR 100.29(b)(1).

The remaining content standards, at 11 CFR 109.21(c)(2) through (4), cover only
“public communications” as defined in 11 CFR 100.26. A “public communication” is “a
communication by means of any broadcast, cable, or satellite communication, newspaper,
magazine, outdoor advertising facility, mass mailing, or telephone bank to the general
public, or any other form of general public political advertising.” 2 U.S.C. 431(22);
11 CFR 100.26. Because a communication by means of a movie theater is not one of the
forms of media specifically enumerated in either the statutory or regulatory definition of
“public communication,” RGE’s exhibition of the Film in a movie theater would be a
“public communication” only if it is a form of “general public political advertising,” as
that term is used in 2 U.S.C. 431(22) and 11 CFR 100.26. See Shays v. FEC, 337 F.

The Commission concludes that RGE’s exhibition of the Film in movie theaters is
not a form of “general public political advertising” and is not, therefore, a public
communication.10 The Commission has previously stated that, “[b]y definition, the word
‘advertising’ connotes a communication for which a payment is required, particularly in
the context of campaign messages.” Final Rules on Internet Communications, 71 FR
18589, 18594 (Apr. 12, 2006) (identifying several definitions and characteristics of
“advertising”). Thus, while a movie trailer or other advertisement placed for a fee before

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10 The Commission notes that a different conclusion would have implications far beyond the instant
advisory opinion. The terms “general public political advertising” and “public communication” appear
throughout the Act and Commission regulations. See, e.g., 2 U.S.C. 431(8)(B)(v), 431(9)(B)(iv),
431(20)(A)(iii), 441d(a); 11 CFR 100.24, 100.25, 100.72(b), 100.80, 100.131(b), 100.141, 106.6, 109.21,
109.37, 110.11, 300.33, 300.71, and 300.72.
a feature presentation in a movie theater, for example, might be considered general public
political advertising, RGE's showing of the Film under the circumstances presented here
would not be.

Because none of the content standards is met, the production and distribution of
the Film by RGE would not be a coordinated communication with Ms. Parker under
11 CFR 109.21. Consequently, the payments by RGE to produce and distribute the Film
would not be in-kind contributions to Ms. Parker's authorized committee. See Advisory
Opinion 2005-18 (Reyes).

**Question 4. Must public theatrical exhibitions of the Film by RGE include disclaimers?**

No, public theatrical exhibitions of the Film by RGE need not include
disclaimers.\(^{11}\)

The Act and Commission regulations require electioneering communications and
certain public communications to include disclaimers. See 2 U.S.C. 441d(a); 11 CFR
110.11(a). When required, disclaimers must clearly state the full name and permanent
street address, telephone number, or World Wide Web address of the person who paid for
the communication, and, if made independently of any candidate, indicate that the
communication is not authorized by any candidate or candidate's committee. See
2 U.S.C. 441d(a)(3); 11 CFR 110.11(b)(3). The disclaimer must be presented in a clear
and conspicuous manner to give the viewer adequate notice of the identity of the person
or political committee that paid for or authorized the communication. 11 CFR
110.11(c)(1).

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\(^{11}\) The requestors do not ask or provide any information about possible use of the Film in connection with
non-Federal fundraising activity. See 2 U.S.C. 441i(c); 11 CFR 300.64. Thus, the Commission does not
address disclaimers under 11 CFR 300.64.
The answer to Question 3, above, concludes that public theatrical exhibitions of
the Film by RGE will not be electioneering communications or public communications.
Therefore, no disclaimers will be required for its public theatrical exhibitions of the Film.

Question 5. If an individual pays a license fee to host a promotional screening of the
Film, may Ms. Parker attend the screening without receiving a campaign contribution in
the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses
her candidacy?

Question 6. If a corporation pays a license fee to host a promotional screening of the
Film, may Ms. Parker attend the screening without receiving a campaign contribution in
the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses
her candidacy?

Question 7. If Ms. Parker uses her personal funds to pay a license fee to host a
promotional screening of the Film, may she attend the screening without receiving a
campaign contribution in the amount of the license fee if she (1) speaks about policy, (2)
discusses her candidacy, including soliciting contributions to her campaign, or (3)
advertises the screening as a campaign-related event?

These questions are being answered together. Yes, Ms. Parker may attend a
screening of the Film – whether paid for by an individual other than Ms. Parker, by a
corporation, or by Ms. Parker herself from her personal funds – and discuss only public
policy issues without receiving an in-kind contribution. If, however, Ms. Parker
discusses at the screening her own campaign, any other candidate for the same office, or
the election, as described below, then the license fee paid by the screening host would be
an in-kind contribution to Ms. Parker’s authorized committee.

A “contribution” includes “anything of value” made for the purpose of
influencing a Federal election. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). “Anything of
value” includes all in-kind contributions. 11 CFR 100.52(d).

In prior advisory opinions, the Commission has determined that the financing of
activities in which a Federal candidate participates will result in a contribution to that
candidate if the activities involve (1) the solicitation, making or acceptance of
contributions to the candidate’s campaign, or (2) communications, including
communications by a candidate, expressly advocating the nomination, election or defeat
of the candidate or that candidate’s opponent. See Advisory Opinions 1999-11 (Byrum),
1994-15 (Byrne), 1992-37 (Terry), 1992-06 (Duke); see also Advisory Opinion 2009-26
(Coulson).

Although Ms. Parker appears several times in the Film, the request indicates that
she is identified in the Film only as “Author and Founder, Center for Urban Renewal &
Education”; her remarks are limited to discussions of public policy; and the Film does not
identify or discuss Ms. Parker’s party affiliation or candidacy. The requestor has asked
the Commission to assume, for purposes of this advisory opinion only, that the Film
expressly advocates the election or defeat of at least one Federal candidate and does not
expressly advocate the election or defeat of Ms. Parker. Nor is there any indication that
the Film expressly advocates the election or defeat of, or even refers to, any other clearly
identified candidate for the same Federal office as that sought by Ms. Parker.

Thus, if Ms. Parker attends a screening of the Film – whether paid for by an
individual, a corporation, or herself – and discusses only public policy issues, then the
payment of screening costs would not result in a contribution to Ms. Parker’s authorized
committee. If, however, Ms. Parker discusses her candidacy at the screening – such as by
advocating her own election, or by advocating the defeat of any other candidate for the
same office – or solicits or accepts contributions to her campaign, or advertises the
screening as a campaign event, then the license fees paid by the host of the screening
would be an in-kind contribution to Ms. Parker’s authorized committee. Similarly, if Ms.
Parker is identified as a candidate when she is introduced at the screening or in publicity for the screening, then her appearance at the screening would be campaign related and the license fee paid by the host of the screening would be a contribution to her authorized committee. Advisory Opinion 1986-37 (National Conservative Foundation).

These contributions would be subject to the limitations of the Act at 2 U.S.C. 441a(a) and the prohibitions at 2 U.S.C. 441b, 441c, 441e, and 441f. Thus, if the host of the screening is a corporation, then, under the circumstances described in the request, a prohibited in-kind contribution would result. A corporation may not use its general treasury funds to sponsor and finance Ms. Parker’s campaign appearance to audiences consisting of individuals outside of the corporation’s restricted class (or the corporation’s employees and their families) beyond the limited circumstances described in 11 CFR 114.3 and 114.4. See Advisory Opinion 1986-37 (National Conservative Foundation).

Similarly, Ms. Parker would make a contribution to her own campaign by using her personal funds to license the Film at a campaign event. Her authorized committee would have to report the receipt of that contribution, just as it would report the receipt of any other contribution. See 2 U.S.C. 434(a), 11 CFR 104.3(a)(3).

Question 8. Is Ms. Parker’s payment of the license fee to host a theater screening of the Film exempt from the definition of “expenditure” under the media exception or “bona fide commercial activity”? If not, must Ms. Parker file FEC Form 5 (Independent Expenditure report)?

Ms. Parker’s payment of the license fee to host a theater screening of the Film would not be exempt from the definition of “expenditure” under the media exception.

As a candidate, Ms. Parker is eligible for the media exception only under certain limited circumstances, none of which applies here. See 2 U.S.C. 431(9)(B)(i); 11 CFR
100.132; Reader’s Digest, 509 F. Supp. at 1215. When the media exception applies to a facility controlled by a candidate, it is limited to costs incurred to cover a bona fide news account communicated in a publication of general circulation or on a licensed broadcast facility as part of a general pattern of campaign-related news account that gives reasonably equal coverage to all opposing candidates in the circulation or listening area.

11 CFR 100.132. The media exception “do[es] not apply to commentaries and editorials that are distributed through facilities that are owned or controlled by a political party, political committee, or candidate.” Advisory Opinion 2005-07 (Mayberry); see also 2 U.S.C. 431(9)(B)(i); 11 CFR 100.73 and 100.132. Because RGE characterizes the Film as editorial in nature, Ms. Parker’s screening of the Film would not qualify for the media exception.

The Commission does not have sufficient information to determine whether Ms. Parker’s payment of the license fee would be bona fide commercial activity by Ms. Parker.

The Commission has been asked to assume for purposes of this advisory opinion only that the Film expressly advocates the election or defeat of at least one clearly identified Federal candidate but not Ms. Parker. As such, Ms. Parker’s use of her personal funds12 to license a promotional screening of the Film would be an independent expenditure – that is, a payment for a communication containing express advocacy that is

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12 If Ms. Parker pays the license fee to screen the Film at her campaign event, as discussed above, then her authorized committee would have to report it accordingly.
not coordinated with any candidate or political party. See 2 U.S.C. 431(17); 11 CFR 100.16. Ms. Parker would have to report the independent expenditure pursuant to 2 U.S.C. 434(c) and 11 CFR 109.10.

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 cited advisory opinions are available on the Commission’s website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Matthew S. Petersen
Chairman

13 Ms. Parker does not ask or provide any information about possible coordination between Ms. Parker and any other candidate or political party. Thus, the Commission does not address whether Ms. Parker’s payment of the license fee to screen the Film would be an in-kind contribution to any other candidate or political committee.
Dear Mr. Goodman:

We are responding to your advisory opinion request on behalf of RG Entertainment, Ltd. ("RGE"), Star Parker, Star Parker for Congress, Motive Entertainment, Inc., engage4 LLC, and InService America, Inc., concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), to several proposed activities. You ask whether RGE's disbursements to produce, distribute, and advertise the documentary film I WANT YOUR MONEY (the "Film") are expenditures or electioneering communications; whether licensees' payment of the cost of screening the Film are expenditures or electioneering communications; whether RGE's production and distribution of the Film would be a coordinated communication with Ms. Parker; and whether a licensee's payment of the cost of a screening of the Film at which Ms. Parker attends and speaks would be a contribution to Ms. Parker's authorized committee, and whether any licensee's payment to license a promotional screening of the Film would be an independent expenditure if the Film expressly advocates Federal candidates.

The Commission concludes that disbursements for the production, distribution, and advertising of the Film are covered by the press exemption from the Act's definitions of "expenditure." Additionally, the Commission concludes that RGE's production and distribution of the Film would not be a coordinated communication with Ms. Parker. The
Commission also concludes that public theatrical exhibitions of the Film are not required to include disclaimers. The Commission further concludes that a licensee’s payment for a screening of the Film at which Ms. Parker attends and speaks would not be an in-kind contribution to Ms. Parker’s authorized committee if Ms. Parker discusses only public policy issues. Lastly, the Commission concludes that a licensee’s payment to license a promotional screening of the Film would be an independent expenditure if the Film expressly advocates Federal candidates and the licensee does not qualify for either the media or bona fide commercial activities exemptions.

Background

The facts presented in this advisory opinion are based on your letters received on September 9 and 20, 2010, and your email dated September 27, 2010.

RGE is a for-profit film company incorporated and located in California. Since 2005, RGE has produced, either directly or through wholly owned production subsidiaries, three films: LUCIFER (2007), a short film depicting the struggle between good and evil; SUPER CAPERS (2009), a family and adventure feature film treating themes of heroes versus villains; and the Film, which is a political documentary expected to open in theaters on October 15, 2010, and the subject of this advisory opinion. RGE is also currently producing a feature film, THE WIND IN THE WILLOWS, based on the Kenneth Grahame novel. RGE intends to produce both dramatic films and political documentaries in the future, although no specific additional films or scripts have been prepared at this time.

RGE is organized and maintained only for commercial purposes. RGE’s sole business is the production, distribution, and marketing of its films. No political party,
political committee, or candidate owns or controls RGE or has funded any of its film productions.

Ms. Parker is a candidate for Congress in California's 37th Congressional District.

Ms. Parker was interviewed during the production of the Film, and portions of that interview appear in the Film. Her appearances are limited to discussions of public policy.

The Film does not refer to Ms. Parker as a candidate or mention her election, campaign, or political party affiliation.

The Film is a documentary about economic and fiscal policy, as portrayed through a fictional debate between President Barack Obama and former President Ronald Reagan. The Film features historical and original footage, interviews, and animated depictions of several historical and current public political figures, several of whom are currently candidates for Federal office: Representative Thaddeus McCotter, Speaker of the House of Representatives Nancy Pelosi, Senator Harry Reid, Representative Tom McClintock, and Ms. Star Parker.

RGE paid for the production of the Film and retains all ownership rights. RGE states that its sole purpose for producing and distributing the Film is commercial profit. Although investors will invest in the Film's printing and advertising budget, none of the investors is a candidate, political committee, or political party committee.

RGE has engaged four companies to market and distribute the Film. Three of them – Motive Entertainment, Inc. ("Motive"), engage4 LLC ("engage4"), and InService America, Inc. ("InService America") (collectively known as "MEISA") – have joined in this advisory opinion request. Motive is a marketing corporation organized and located in California. It has marketed such feature films as THE PASSION OF THE CHRIST, ROCKY
BALBOA, THE POLAR EXPRESS, and UNITED 93. Engage4 is a communications and marketing firm located in Virginia that specializes in direct marketing. It is currently marketing feature films and documentaries, including THE BLIND SIDE, THE PERFECT GAME, IN GOD WE TRUST, and A NECESSARY JOURNEY. InService America, a corporation organized and located in Virginia, works with engage4 and provides fulfillment and inventory management services, as well as event management services. InService was involved in the marketing of THE PASSION OF THE CHRIST with Motive. The fourth company, Freestyle Releasing, Inc. ("Freestyle"), is a distribution company located in California.

MEISA and Freestyle are for-profit companies engaged in the business of marketing, event management, and film promotion and distribution. None of the financial arrangements between RGE and MEISA or Freestyle provides for any fees or commissions to be paid to any candidate or political committee.

The Film is being distributed in three phases. During the first phase (September through mid- to late-October, 2010), MEISA is actively marketing the Film via the Internet, email, press releases, word-of-mouth campaigns, and licensed promotional screenings hosted by individuals and organizations. The requestors represent that these types of "grassroots/grasstops" activities are typical of film marketing campaigns.

The promotional screenings in the first phase are designed to generate public interest in the Film and obtain audience feedback that may further inform marketing and promotional decisions by RGE and MEISA before the Film’s formal theatrical release. Each individual or organization wishing to host a promotional screening of the Film must pay a fee of approximately $500 to $1,000 to cover the costs of theater rental, logistical
support, promotional materials, commissions for any subcontractors, and profits. The fee may vary depending upon the venue, location, and timing of the screening. In addition to offering logistical support to screeners, MEISA enters into licensing agreements on RGE’s behalf that grant the screener a one-time exhibition right. MEISA then conveys a watermarked DVD to each screener to protect against piracy. Following the screening, the licensee must return the DVD to engage.

MEISA will license the Film to virtually any individual, business, or organization that applies to screen it, including political and candidate committees, although it retains the right to decline an application under certain circumstances. Each screener will determine who to invite to the promotional screening and will retain discretion to sell tickets or allow free attendance. Neither RGE nor MEISA will share in any ticket revenues generated by these promotional screenings.

All license and event fees generated from the promotional screenings will be divided between RGE and MEISA. MEISA will pay for their promotional expenses, such as theater rentals, subcontractor costs, and printing and promotional material costs, and keep the excess as profits, in addition to a service fee paid by RGE. No revenues from license or event fees will be shared with any candidate, political committee, or political party committee.

The second phase of the Film’s distribution will consist of a national theatrical release by Freestyle beginning on October 15, 2010. In this second phase, RGE anticipates that the Film will be shown in at least 500 theaters nationwide. Movie

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1 MEISA reserves the right to decline an application if it has reason to believe that the Film will be used inappropriately or in a manner that might harm the Film’s reputation.
theaters that show the Film will charge moviegoers the usual and normal charge for
tickets and each movie theater will share a percentage of ticket sales with RGE and
Freestyle. MEISA may assist Freestyle with group ticket sales as part of the continuing
marketing efforts to promote the Film during its formal theatrical release.

As part of the second phase, RGE plans to advertise the Film in print media, as
well as on television and radio. Television and radio advertisements will consist of a film
 trailer (the “Trailer”) that contains excerpts from the Film, including images and/or audio
of President Obama and at least three current candidates (Speaker Pelosi, Representative
McCotter, and Representative McClintock). These advertisements will be broadcast
nationally in October (and possibly November) 2010. RGE states that the advertisements
will not be coordinated with any candidate or political party committee. RGE and
MEISA intend to make advertising decisions based upon financial resources and optimal
commercial value for the Film.

The third phase of the Film’s distribution will begin after its run in theaters in the
second phase ends. RGE estimates that the Film’s theatrical release will last
approximately two to twelve weeks, depending on the Film’s success. RGE has not yet
determined the timing and details of the third phase, but anticipates that it may include
distribution via DVD, pay-per-view, premium channels, broadcast and cable television,
and promotional screenings similar to those occurring in the first phase. In any event,
the Film will not be broadcast on or before November 2, 2010.

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2 The Trailer is available for viewing at www.iwantyourmoney.net (last viewed September 27, 2010).
The request does not indicate the extent to which the candidates appearing in the Trailer will be identifiable
in a radio advertisement for the Film.
Ms. Parker has received inquiries from two promotional screeners of the Film regarding her availability to attend and speak at promotional screenings during the first phase of the Film's distribution. One inquiry is from an individual who is hosting an event at a public theater. The audience would consist of members of the public, principally friends of the individual host. The other inquiry is from a corporation that will be paying for the event with corporate funds. The promotional screening would take place in a public theater, and the audience would consist of members of the public invited by the corporation. The audience would not consist solely of the restricted class of the corporation or the corporation's employees and their families. Additionally, Ms. Parker intends to license the Film herself and to host a promotional screening.

Questions Presented

1. Are RGE's disbursements to produce, distribute, and advertise the Film exempt from the Act's definitions of "expenditure" and "electioneering communication" under the media exemption?

2. Are RGE's disbursements to produce, distribute, and advertise the Film for the "bona fide commercial activity" of a commercial entity, and thus not expenditures?

3. Are licensees' payments to host a promotional screening of the Film exempt from the definitions of "expenditure" and "electioneering communication" under the media or commercial entity exemptions?

4. Is the production and distribution of the Film by RGE a coordinated communication with Ms. Parker?

5. Must public theatrical exhibitions of the Film by RGE include disclaimers?

6. If an individual pays a license fee to host a promotional screening of the Film, may Ms. Parker attend the screening without receiving a campaign contribution in the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses her candidacy?

7. If a corporation pays a license fee to host a promotional screening of the Film, may Ms. Parker attend the screening without receiving a campaign contribution in
the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses her candidacy?

8. If Ms. Parker uses her personal funds to pay a license fee to host a promotional screening of the Film, may she attend the screening without making an in-kind contribution to her campaign in the amount of the license fee if she (1) speaks about policy, (2) discusses her candidacy, including soliciting contributions to her campaign, or (3) advertises the screening as a campaign-related event?

9. Is a licensee’s payment of the license fee to host a theater screening of the Film exempt from the definition of “expenditure” under the media exemption or “bona fide commercial activity”? If not, must the licensee file FEC Form 5 (Independent Expenditure report)?

Legal Analysis and Conclusions

Question 1. Are RGE’s disbursements to produce, distribute, and advertise the Film exempt from the Act’s definitions of “expenditure” and “electioneering communication” under the media exemption?

Yes, RGE’s disbursements to produce, distribute, and advertise the Film are covered by the media exception.

Under the Act, “[t]he term ‘expenditure’ does not include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. 431(9)(B)(i). The Act and Commission regulations also include a similar exemption from the definition of “electioneering communication” for a communication that appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. See 2 U.S.C.
434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). Together, these exclusions are known as the “press exemption” or “media exemption.”

The legislative history of the press exemption indicates that Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.” H.R. REP. No. 93-1239 at 4 (1974) (emphasis added). While an earlier Commission advisory opinion narrowly concluded that a news story, commentary, or editorial distributed through facilities other than the enumerated media (i.e., a book) is generally not covered by the press exemption, later Commission actions have read the press exemption more broadly, consistent with the Act’s legislative history, to cover cable television, the Internet, satellite broadcasts, and rallies staged and broadcast by a radio talk show. In fact, “[t]he Commission has not limited the press exemption to traditional news outlets, but rather has applied it to ‘news stories, commentaries, and editorials no matter in what

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3 Advisory Opinion 1987-08 (AIG/U.S. News). This advisory opinion involved, among other things, applicability of the media exemption to a book. The Commission concluded, “[w]ith respect to AIG’s sponsorship of the Book, the Commission notes that the ‘news story’ exemption does not apply to distribution through facilities other than a broadcasting station, newspaper, magazine, or other periodical publication…. Because the Book does not fit within any of these categories, it would not qualify for the ‘news story’ exception.” Id. at 5. Although the question of whether a theatrical release of a film could qualify for the media exemption was raised by some respondents in MURs 5474 (Dog Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11), the Commission ultimately found no reason to believe respondents violated the Act because the documentary constituted bona fide commercial activity and was not an independent expenditure or electioneering communication.


5 Explanation and Justification for Final Rules on Internet Communications, 71 FR 18589 (Apr. 12, 2006).


7 See MUR 5569 (The John and Ken Show, et al.), First General Counsel’s Report at 9 (in a matter where a radio talk show expressly advocated the election and defeat of Federal candidates, and that also staged and broadcast public rallies outside the offices of Federal candidates, the Commission concluded that the media exemption applied to the rallies because they were “similar in form to other broadcast events featured on the Show” which was also covered by the media exemption.).
medium they are published….” Advisory Opinion 2008-14 (Melothé, Inc.) (citing the
Commission’s 2006 rulemaking, Explanation and Justification for Final Rules on Internet
Communications, 71 FR 18589, 18608 (Apr. 12, 2006), extending the press exemption to
websites and “any Internet or electronic publication”).

The Commission has historically conducted a two-step analysis to determine
whether the media exemption applies. First, the Commission asks whether the entity
engaging in the activity is a press or media entity. See Advisory Opinions 2005-16 (Fired
Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission
applies the two-part analysis presented in Reader’s Digest Ass’n v. FEC, 509 F. Supp.
1210, 1215 (S.D.N.Y. 1981), which requires it to establish:

(A) That the entity is not owned or controlled by a political party, political
committee, or candidate; and

(B) That the entity is acting as a press entity in conducting the activity at issue
(i.e., whether the press entity is acting in its “legitimate press function”).

See also FEC v. Phillips Publ’g, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981);
Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!),
and 2004-07 (MTV).

1) Press Entity Status

Neither the Act nor Commission regulations use or define the term “press entity.”
Nonetheless, when determining whether the term applies to a particular entity, the
Commission has focused on whether the entity in question produces on a regular basis a
program that disseminates news stories, commentary, and/or editorials. See, e.g.,
Advisory Opinions 2008-14 (Melothé, Inc.), 2007-20 (XM Radio), and 2005-19 (Inside
In the Explanation and Justification for the Final Rules on Electioneering Communications, the Commission stated that it will interpret "news story, commentary, or editorial" to include documentaries and educational programming within the context of the media exemption to the electioneering communication definition in 11 CFR 100.29(c)(2). See Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190, 65197 (Oct. 23, 2002). Whether an entity qualifies as a press entity does not necessarily turn on the presence or absence of any one particular fact. See Advisory Opinions 2007-20 (XM Radio) and 2005-19 (Inside Track).

Here, RGE has previously produced educational films (LUCIFER and SUPER CAPERS), has produced and currently is in the process of distributing and advertising a documentary (the Film), and represents that it intends to produce additional documentaries in the future. In light of these facts, the Commission concludes RGE is a press entity for the purposes of this advisory opinion.

2) Ownership Criteria and Legitimate Press Function

A) Ownership or Control

RGE represents that it is not owned or controlled by a political party, political committee, or candidate.

B) Legitimate Press Function

There are two considerations in determining whether an entity is engaging in its legitimate press function: (1) whether the entity’s materials are available to the general public; and (2) whether the entity’s activities are consistent with the entity’s legitimate press function. In this opinion, RGE meets both of these considerations.

The Commission has not explicitly determined that it will interpret "news story, commentary, or editorial" to include documentaries within the context of the media exemption from the definition of "expenditure." However, because the Commission uses the same analysis to determine the application of both the 2 U.S.C. 431(9)(B)(i) and 11 CFR 100.29(c)(2) media exemptions, it follows that the term "news story, commentary, or editorial" includes documentaries for the purposes of both media exemptions discussed herein.
public, and (2) whether they are comparable in form to those ordinarily issued by the
entity. Advisory Opinions 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life*
("MCFL"), 479 U.S. 238, 251 (1986)) and 2000-13 (iNEXTV) (concluding that a
website was “viewable by the general public and akin to a periodical or news program
distributed to the general public”). In *MCFL*, the Supreme Court held that a “Special
Edition” newsletter did not qualify for the press exemption on the basis that it deviated
from certain “considerations of form” relating to the production and distribution of its
regular newsletter. 479 U.S. at 250-51. Among those “considerations of form”
enumerated by the Supreme Court were the fact that the Special Edition was not
published through the facilities of the regular newsletter, but by a staff which prepared no
previous or subsequent newsletters, and the increase in distribution to a group far larger
than the newsletter’s regular audience. *Id.*

As to the first factor in the press function analysis, RGE has made its films
available to the general public via distribution in theaters nationwide and through DVD.9
Similarly, RGE intends to make the Film at issue in this request available to the general
public through promotional screenings, a national theatrical release, and perhaps via
DVD, pay-per-view, premium channels, and broadcast and cable television.

Accordingly, RGE satisfies the first prong in the press function analysis.

As to the second factor in the press function analysis, RGE’s activities consist
solely of producing and distributing films, and the Film at issue in the request is

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9 Although these forms of distribution are not free to the public, whether payment is required has not been a
determining factor in the Commission’s discussion of this consideration. See Advisory Opinions 2010-08
(Citizens United), 2007-20 (XM Radio), and 2004-07 (MTV). But see Advisory Opinion 2008-14
(Melothé, Inc.) (identifying free access as a relevant factor).
comparable in form to those previously produced. Accordingly, RGE satisfies the second
prong in the press function analysis because the proposed material at issue is
"comparable in form to those ordinarily issued by the entity."

With respect to RGE's Film-related broadcast advertisements, courts have held
that where the underlying product is covered by the press exemption, so are
advertisements to promote that underlying product. See Phillips Publ'g, 517 F. Supp. at
1313 (citing Reader's Digest, 509 F. Supp. at 1215). Accordingly, RGE's advertisements
will come within the press exemption to the extent that RGE is not "acting in a manner
unrelated to its [press] function" when it produces and distributes the advertisements
themselves. See Advisory Opinion 2004-07 (MTV). Advertisements promoting activities
that are not part of RGE's legitimate press function, however, may be considered
expenditures or electioneering communications. Advisory Opinion 2004-30 (Citizens
United) (citing Phillips Publ'g, 717 F. Supp. at 1313).

Because RGE is a press entity that is not owned or controlled by a political party,
political committee, or candidate, and its production, distribution, and related marketing
activities with respect to the Film constitute a legitimate press function, the Film falls
within the media exemption for "expenditures." Moreover, RGE's advertisements to
promote the Film will also come within the press exemption. See Phillips Publ'g, 517 F.
Supp. at 1313 (citing Reader's Digest, 509 F. Supp. at 1215). RGE's disbursements for
these costs are exempt from the Act's disclosure, disclaimer, and reporting requirements.

Question 2. Are RGE's disbursements to produce, distribute, and advertise the Film for
the "bona fide commercial activity" of a commercial entity, and thus not expenditures?

This question is moot given the answer to Question 1.
Question 3. Are licensees’ payments to host a promotional screening of the Film exempt from the definitions of “expenditure” and “electioneering communication” under the media or commercial entity exemptions?

The Commission does not have sufficient information about the licensees with respect to this question. Whether a licensee would qualify for the media exemption would depend on an application of the analysis set forth in Question 1 to the licensee’s individual circumstances. Similarly, whether a licensee would qualify for the commercial entity exemption would depend on an application of the factors that the Commission has considered relevant to this question to the licensee’s individual circumstances. See, e.g., Advisory Opinions 2008-10 (VoterVoter.org), 1994-30 (Conservative Concepts/Pence), and 1989-21 (Create-a-Craft). See also MURs 5474 (Dog Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11), First General Counsel’s Report, dated May 25, 2005.

Regardless, even if neither the media nor the commercial vendor exemptions applied, licensees of the Film would not be required to file electioneering communications reports or include disclaimers. As explained in the answer to Question 4 below, the Film is not an electioneering communication. Moreover, although the Act and Commission regulations require public communications to include disclaimers, this requirement applies only to communications “through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising.” See 2 U.S.C. 441d(a); 11 CFR 110.11(a). A screening of the Film does not fall under any of these enumerated means of communications, and neither the Act nor Commission regulations defines what constitutes “general public political advertising.” Thus, the disclaimer requirement in this context would be
predicated on a definition of the term “general public political advertising.” Since “[a]ny rule of law which is not stated in [the] Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of [the Act],” the Commission does not define the term for the purposes of this advisory opinion to impose a disclaimer requirement on Film licensees who do not qualify for the media or commercial activity exemptions. 2 U.S.C. 437f(b). However, a licensee may need to file FEC Form 5 (Independent Expenditure report) for the reasons discussed in the answer to Question 9, below.

Question 4. Is the production and distribution of the Film by RGE a coordinated communication with Ms. Parker?

No, the production and distribution of the Film by RGE is not a coordinated communication with Ms. Parker because it does not meet the content prong of 11 CFR 109.21(a)(2).

Commission regulations set forth a three-prong test to determine whether a payment for a communication is an in-kind contribution to a candidate as a result of coordination between the person making the payment and the candidate. See 11 CFR 109.21(a); see also 2 U.S.C. 441a(a)(7)(B). Under the second prong of the test, a communication must satisfy at least one of the four content standards in 11 CFR 109.21(c) to be a coordinated communication.10

The first content standard, at 11 CFR 109.21(c)(1), covers “electioneering communications,” as defined in 11 CFR 100.29. As noted above, an electioneering

10 The Commission recently adopted a fifth content standard, at 11 CFR 109.21(c)(5), for a public communication that is the functional equivalent of express advocacy. This content standard is not effective until December 1, 2010. See Final Rules on Coordinated Communications, 75 FR 55947 (Sept. 15, 2010).
communication must be a “broadcast, cable, or satellite communication.” 2 U.S.C. 434(f)(3); 11 CFR 100.29(a). ROE indicates that the Film will be shown only in theaters during the time that Ms. Parker is a candidate – that is, before November 2, 2010. A documentary film shown in a movie theater is not a “broadcast, cable, or satellite communication” because it is not “publicly distributed by a television station, radio station, cable television system, or satellite system.” 11 CFR 100.29(b)(1).

The remaining content standards, at 11 CFR 109.21 (c)(2) through (4), cover only “public communications” as defined in 11 CFR 100.26. A “public communication” is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 2 U.S.C. 431(22); 11 CFR 100.26. Because a communication by means of a movie theater is not one of the forms of media specifically enumerated in either the statutory or regulatory definition of “public communication,” RGE’s exhibition of the Film in a movie theater would be a “public communication” only if it is a form of “general public political advertising,” as that term is used in 2 U.S.C. 431(22) and 11 CFR 100.26. See Shays v. FEC, 337 F. Supp.2d 28, 70 (D. D. C. 2004).

The Commission concludes that RGE’s exhibition of the Film in movie theaters is not a form of “general public political advertising” and is not, therefore, a public communication. The Commission has previously stated that, “[b]y definition, the word ‘advertising’ connotes a communication for which a payment is required, particularly in the context of campaign messages.” Final Rules on Internet Communications, 71 FR 18589, 18594 (Apr. 12, 2006) (identifying several definitions and characteristics of
“advertising”). Thus, while a movie trailer or other advertisement placed for a fee before a feature presentation in a movie theater, for example, might be considered general public political advertising, RGE’s showing of the Film under the circumstances presented here would not be.

Because none of the content standards is met, the production and distribution of the Film by RGE would not be a coordinated communication with Ms. Parker under 11 CFR 109.21. Consequently, the payments by RGE to produce and distribute the Film would not be in-kind contributions to Ms. Parker’s authorized committee. See Advisory Opinion 2005-18 (Reyes).

Question 5. Must public theatrical exhibitions of the Film by RGE include disclaimers?

No, public theatrical exhibitions of the Film by RGE need not include disclaimers. The Act and Commission regulations require electioneering communications and certain public communications to include disclaimers. See 2 U.S.C. 441d(a); 11 CFR 110.11(a). The answer to Question 4, above, concludes that public theatrical exhibitions of the Film by RGE will not be electioneering communications or public communications. Therefore, no disclaimers will be required for its public theatrical exhibitions of the Film.

Question 6. If an individual pays a license fee to host a promotional screening of the Film, may Ms. Parker attend the screening without receiving a campaign contribution in the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses her candidacy?

Question 7. If a corporation pays a license fee to host a promotional screening of the Film, may Ms. Parker attend the screening without receiving a campaign contribution in the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses her candidacy?
Question 8. If Ms. Parker uses her personal funds to pay a license fee to host a promotional screening of the Film, may she attend the screening without making an in-kind contribution to her campaign in the amount of the license fee if she (1) speaks about policy, (2) discusses her candidacy, including soliciting contributions to her campaign, or (3) advertises the screening as a campaign-related event?

These questions are being answered together. Yes, Ms. Parker may attend a screening of the Film — whether paid for by an individual other than Ms. Parker, by a corporation, or by Ms. Parker herself from her personal funds — and discuss only public policy issues without receiving an in-kind contribution. If, however, Ms. Parker discusses at the screening her own campaign, any other candidate for the same office, or the election, as described below, then the license fee paid by the screening host would be an in-kind contribution to Ms. Parker’s authorized committee.

A “contribution” includes “anything of value” made for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). “Anything of value” includes all in-kind contributions. 11 CFR 100.52(d).

In prior advisory opinions, the Commission has determined that the financing of activities in which a Federal candidate participates will result in a contribution to that candidate if the activities involve (1) the solicitation, making or acceptance of contributions to the candidate’s campaign, (2) communications, including communications by a candidate, expressly advocating the nomination, election or defeat of the candidate or that candidate’s opponent, or (3) the identification of the candidate as such. See Advisory Opinions 1999-11 (Byrum), 1994-15 (Byrne), 1992-37 (Terry), 1992-06 (Duke), 1986-37 (National Conservative Foundation); see also Advisory Opinion 2009-26 (Coulson).
Although Ms. Parker appears several times in the Film, the request indicates that she is identified in the Film only as “Author and Founder, Center for Urban Renewal & Education”; her remarks are limited to discussions of public policy; and the Film does not identify or discuss Ms. Parker’s party affiliation or candidacy. The requestor has directed the Commission to assume, for purposes of this advisory opinion only, that the Film expressly advocates the election or defeat of at least one Federal candidate and does not expressly advocate the election or defeat of Ms. Parker. Nor is there any indication that the Film expressly advocates the election or defeat of, or even refers to, any other clearly identified candidate for the same Federal office as that sought by Ms. Parker.

Thus, if Ms. Parker attends a screening of the Film – whether paid for by an individual, a corporation, or herself – and discusses only public policy issues, then the payment of screening costs would not result in a contribution to Ms. Parker’s authorized committee. If, however, Ms. Parker discusses her candidacy at the screening – such as by advocating her own election, or by advocating the defeat of any other candidate for the same office – or solicits or accepts contributions to her campaign, or advertises the screening as a campaign event, then the license fees paid by the host of the screening would be an in-kind contribution to Ms. Parker’s authorized committee. Similarly, if Ms. Parker is identified as a candidate when she is introduced at the screening or in publicity for the screening, then her appearance at the screening would be campaign-related and the license fee paid by the host of the screening would be a contribution to her authorized committee. Advisory Opinion 1986-37 (National Conservative Foundation).

These contributions would be subject to the limitations of the Act at 2 U.S.C. 441a(a) and the prohibitions at 2 U.S.C. 441b, 441c, 441e, and 441f. Thus, if the host of
the screening is a corporation, then, under the circumstances described in the request, a
prohibited in-kind contribution would result. A corporation may not use its general
treasury funds to sponsor and finance Ms. Parker’s campaign appearance to audiences
consisting of individuals outside of the corporation’s restricted class (or the corporation’s
employees and their families) beyond the limited circumstances described in 11 CFR
114.3 and 114.4. See Advisory Opinion 1986-37 (National Conservative Foundation).

Similarly, Ms. Parker would make a contribution to her own campaign by using
her personal funds to license the Film at a campaign event. Her authorized committee
would have to report the receipt of that contribution, just as it would report the receipt of
any other contribution. See 2 U.S.C. 434(a), 11 CFR 104.3(a)(3).

Question 9. Is a licensee’s payment of the license fee to host a theater screening of the
Film exempt from the definition of “expenditure” under the media exemption or “bona
fide commercial activity”? If not, must the licensee file FEC Form 5 (Independent
Expenditure report)?

As discussed in the answer to Question 3, above, the Commission does not have
sufficient information to determine whether prospective licensees, including Ms. Parker,
qualify for the media or commercial activity exemptions discussed in the answers to
Questions 1 and 2, above.

The Commission has been asked to assume for purposes of this advisory opinion
only that the Film expressly advocates the election or defeat of at least one clearly
identified Federal candidate, but not Ms. Parker. Assuming a prospective licensee,
including Ms. Parker, does not qualify for either the media or commercial activity
exemptions, a payment made to license a promotional screening of the Film would be an
independent expenditure – that is, a payment for a communication containing express
advocacy that is not coordinated with any candidate or political party. See 2 U.S.C. 431(17); 11 CFR 100.16. The licensee would have to report the independent expenditure pursuant to 2 U.S.C. 434(c) and 11 CFR 109.10.

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.


On behalf of the Commission,

Matthew S. Petersen
Chairman

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11 Ms. Parker does not ask or provide any information about possible coordination between Ms. Parker and any other candidate or political party. Thus, the Commission does not address whether Ms. Parker's payment of the license fee to screen the Film would be an in-kind contribution to any other candidate or political committee.