

AGENDA DOCUMENT NO. 10-18-A



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of 12-16-10

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *fch*
Acting General Counsel

Rosemary C. Smith *RCR for RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Esther D. Heiden *EDH by RMK*
Attorney

Subject: Draft AO 2010-30 (Citizens United) – Draft B

SUBMITTED LATE

Attached is proposed Draft B of the subject advisory opinion. We have been asked to place this draft on the agenda for December 16, 2010. We note that one or more additional drafts of this advisory opinion may be forthcoming.

Attachments

1 ADVISORY OPINION 2010-30

2

3 Michael Boos, Esq.
4 Vice President and General Counsel
5 Citizens United
6 1006 Pennsylvania Avenue, S.E.
7 Washington, DC 20003

DRAFT B

8

9 Dear Mr. Boos:

10 We are responding to your advisory opinion request on behalf of Citizens United,
11 concerning the application of the Federal Election Campaign Act of 1971, as amended
12 (the “Act”), and Commission regulations to the rental of email lists to Federal candidates,
13 political party committees, and political committees.

14 The Commission concludes that the rental of email lists by Citizens United to
15 Federal candidates, political party committees, and political committees as described in
16 the request would not result in either a coordinated expenditure or a coordinated
17 communication. The Commission further concludes, however, that the proposed rental of
18 email lists to Federal candidates, authorized committees, political party committees, or
19 other political committees for emails that solicit contributions or invite recipients to
20 fundraisers is prohibited, because it would constitute corporate facilitation of
21 contributions.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on
24 November 1, 2010.

25 Citizens United is an incorporated membership organization, is a nonprofit
26 organization pursuant to 26 U.S.C. 501(c)(4), and is exempt from taxation under
27 26 U.S.C. 501(a). Over several years, Citizens United has developed a list of email

1 subscribers. The list includes both Citizens United’s members and non-members, such as
2 individuals who have purchased DVDs from the organization. Thus, the email list
3 includes both persons within Citizens United’s restricted class and persons outside of the
4 restricted class.¹

5 Citizens United regularly rents its email subscribers list to other entities at fair
6 market value through a commercial list brokerage firm. Citizens United wishes to begin
7 renting its list to Federal candidates, authorized committees, political party committees,
8 and other political committees using the same procedures it currently uses to rent its list.
9 Thus, although Citizens United employees would review and approve all list rental
10 requests, the commercial list brokerage firm would handle all other aspects of the
11 transaction, including payment for the use of the list and the actual sending of the emails.
12 Under the brokerage firm’s standard practices instituted for security and legal compliance
13 purposes,² all communications on behalf of the list renter will appear to be from Citizens
14 United, because Citizens United will be listed in the “from” line of the communication.
15 Payment would be made by the Federal candidate or political committee to the list
16 brokerage firm, which in turn would remit the payment to Citizens United less the firm’s
17 fees. Although a commitment to pay would be made before any email messages are sent
18 to those on the rented list, the remittal of payment by the Federal candidate or political

¹ The restricted class of an incorporated membership organization consists of the organization’s members and its executives or administrative personnel, and their families. 11 CFR 114.1(j).

² Citizens United states that the list brokerage firm follows this practice “as a security measure to protect against unauthorized usage of the list and as a means of compliance with the opt-out provisions of the Federal CAN-SPAM Act of 2003.” See 15 U.S.C. 7704(a)(3)(A). This advisory opinion is not based on and should not be construed as validating, any particular interpretation of the Federal CAN-SPAM Act of 2003, which is beyond the Commission’s jurisdiction.

1 committee to the brokerage firm or the brokerage firm's remittal of payment to Citizens
2 United would not always occur before the emails are sent.

3 ***Questions Presented***

4 1. *Will the rental of Citizens United's email subscriber list to Federal candidates,*
5 *authorized committees, political party committees, or other political committees in the*
6 *manner described in the request violate the prohibition against corporations*

7 *coordinating expenditures with a Federal candidate, authorized committee, or political*
8 *party committee?*

9 2. *Will the rental of Citizens United's email subscriber list to Federal candidates,*
10 *authorized committees, political party committees, or other political committees in the*
11 *manner described in the request violate the prohibition banning corporations from*
12 *making coordinated communications?*

13 3. *Will the rental of the list to Federal candidates, authorized committees, political*
14 *party committees, or other political committees for emails that solicit contributions or*
15 *invite recipients to a fundraiser violate the prohibition against corporate facilitation of*
16 *contributions to candidates or political committees?*

17 4. *Will the answer to Question 3 be different if either (a) the brokerage firm does not*
18 *receive advance payment for the rental of the list or (b) the brokerage firm does not remit*
19 *payment to Citizens United in advance of the transmission of the email?*

20 ***Legal Analysis and Conclusions***

21 1. *Will the rental of Citizens United's email subscriber list to Federal candidates,*
22 *authorized committees, political party committees, or other political committees in the*
23 *manner described in the request violate the prohibition against corporations*

1 *coordinating expenditures with a Federal candidate, authorized committee, or political*
2 *party committee?*

3 No, the rental of Citizens United’s email subscriber list to Federal candidates and
4 political committees in the manner described in the request will not violate the
5 prohibition against corporations coordinating expenditures with a Federal candidate,
6 authorized committee, or political party committee because the list rental would not result
7 in a corporate expenditure by Citizens United so long as Citizens United is renting its
8 email list for the usual and normal charge.

9 “Expenditure” is defined in the Act and Commission regulations as any
10 “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of
11 value, made by any person for the purpose of influencing any election for Federal office.”
12 2 U.S.C. 431(9)(A); 11 CFR 100.111(a). Commission regulations state that “[u]nless
13 specifically exempted . . . the provision of any goods or services without charge or at a
14 charge that is less than the usual and normal charge for the goods or services is an
15 expenditure.” 11 CFR 100.111(e)(1). “Usual and normal charge” is defined as the price of
16 goods in the market from which they ordinarily would have been purchased at the time of the
17 contribution, or the commercially reasonable rate prevailing at the time the services were
18 rendered. *See* 11 CFR 100.52(d)(2).

19 Citizens United indicates that it currently rents its email subscribers list to other
20 organizations at “fair market prices” through a commercial list brokerage firm, and that it
21 wishes to rent its email list to Federal candidates, authorized committees, political party
22 committees, and other political committees using the same rental procedures and at fair
23 market value. Because fair market value is the price of the list in the market from which

1 lists are ordinarily rented at the time of the rental, fair market value is the usual and
2 normal charge for renting the list. So long as Citizens United does not rent its list to
3 Federal candidates, authorized committees, political party committees, or other political
4 committees for less than the usual and normal charge, the rental of the list will not
5 constitute a corporate expenditure by Citizens United. Because this proposed list rental
6 does not constitute an expenditure, the Commission does not need to address whether or
7 not Citizens United's contact with a Federal candidate or the candidate's authorized
8 committee or a political party committee would constitute "coordinated" activity. See 11
9 CFR 109.20(a).

10 2. *Will the rental of Citizens United's email subscriber list to Federal candidates,*
11 *authorized committees, political party committees, or other political committees in the*
12 *manner described in the request violate the prohibition banning corporations from*
13 *making coordinated communications?*

14 No, the rental of Citizens United's email subscriber list to Federal candidates,
15 authorized committees, political party committees, or other political committees in the
16 manner described in the request would not violate the prohibition against coordinated
17 communications by corporations, because the list rental will not result in a coordinated
18 communication.

19 To determine if a communication constitutes a "coordinated communication,"
20 Commission regulations apply a three-prong test. 11 CFR 109.21(a). First, the
21 communication must be paid for, in whole or in part, by a person other than the
22 candidate, the candidate's authorized committee, or the political party committee (the
23 "payment prong"). 11 CFR 109.21(a)(1). Second, the communication must satisfy one

1 of five content standards (the “content prong”). 11 CFR 109.21(a)(2) and (c). Finally,
2 the communication must satisfy one of five conduct standards (the “conduct prong”).³
3 11 CFR 109.21(a)(3) and (d)(1)-(5).

4 Because Citizens United will charge any Federal candidate, authorized
5 committee, or political party committee the usual and normal charge for rental of the
6 email list, Citizens United is not paying for the communications and therefore the
7 payment prong would not be met. Accordingly, the rental of the email subscriber list will
8 not result in a coordinated communication.

9 3. *Will the rental of the list to Federal candidates, authorized committees, political*
10 *party committees, or other political committees for emails that solicit contributions or*
11 *invite recipients to a fundraiser violate the prohibition against corporate facilitation of*
12 *contributions to candidates or political committees?*

13 Yes, the rental of the list to Federal candidates, authorized committees, political
14 party committees, or other political committees will violate the prohibition against
15 corporate facilitation of contributions to candidates or political committees, whether or
16 not Citizens United receives advance payment for the rental of its email subscriber list.

17 Separate from the prohibition against corporate coordinated expenditures and
18 communications, Commission regulations prohibit corporations from facilitating the
19 making of contributions to candidates or political committees, other than to a
20 corporation’s own separate segregated funds. 11 CFR 114.2(f)(1). Corporate facilitation
21 “means using corporate . . . resources or facilities to engage in fundraising activities in
22 connection with any Federal election . . .” *Id.* Corporations are, however, permitted to

³ A sixth conduct standard clarifies the application of the other five to the dissemination, distribution, or republication of campaign materials. See 11 CFR 109.21(d)(6).

1 solicit contributions to be sent directly to candidates and political committees so long as
2 the solicitations are made only to the corporation's restricted class. 2 U.S.C.
3 441b(b)(2)(A); 11 CFR 114.2(f)(4)(ii).

4 The Commission's regulations include a non-exhaustive list of specific examples
5 of activities that constitute facilitating the making of contributions. 11 CFR 114.2(f)(2).
6 Included in this list of activities that constitute a corporation impermissibly facilitating
7 the making of a contribution is:

8 Officials or employees of the corporation or labor organization
9 ordering or directing subordinates or support staff (who therefore
10 are not acting as volunteers) to plan, organize or carry out the
11 fundraising project as a part of their work responsibilities using
12 corporate or labor organization resources, unless the corporation or
13 labor organization receives advance payment for the fair market
14 value of such services.

15
16 11 CFR 114.2(f)(2)(i)(A). The list also includes:

17 Using a corporate or labor organization list of customers, clients,
18 vendors or others who are not in the restricted class to solicit
19 contributions or distribute invitations to the fundraiser, unless the
20 corporation or labor organization receives advance payment for the
21 fair market value of the list.

22
23 11 CFR 114.2(f)(2)(i)(C).

24 Both of these provisions contemplate certain permissible uses of corporate
25 resources with advance payment of the fair market value of those resources. However,
26 neither provision relieves corporations of the general restriction against corporations
27 making solicitations on their own for contributions to be sent directly to candidates and
28 political committees unless the solicitations are made only to members of a corporation's
29 restricted class. 2 U.S.C. 441b(b)(2)(A); 11 CFR 114.2(f)(4)(ii). Rather, both of these
30 provisions address only a corporation or labor organization providing assistance with a

1 fundraising effort conducted by a third party, as opposed to a corporation or labor
2 organization conducting its own fundraiser for the benefit of a candidate or political
3 committee.

4 Here, Citizen United's email subscriber list includes persons not in Citizens
5 United's restricted class. When a recipient receives one of the proposed emails, the email
6 will appear to be from Citizens United because Citizens United will be listed in the
7 "from" field of the email. Email addresses contained in Citizens United's email list
8 belong to recipients who have signed up to receive emails from Citizens United.

9 Therefore, even if the subject line and the text of an email itself explicitly indicates that
10 the solicitation is being made by the candidate or political committee, a recipient of an
11 email indicating Citizens United as the "sender" will likely and reasonably understand
12 both the email, and therefore the solicitation contained in the email to be from Citizens
13 United (or jointly from Citizens United and the candidate or political committee).

14 Because the email will appear to be sent by Citizens United, Citizens United will not
15 merely be assisting the candidate or political party in the candidate's or political
16 committee's fundraiser (which, under 11 CFR 114.2(f)(2)(i)(A) and (C), would be
17 permissible with advance payment of the fair market value of the resources). Instead,
18 Citizens United will effectively be conducting its own solicitation of contributions to the
19 candidate or political committee, which is prohibited by 11 CFR 114.2(f)(1).⁴ Cf. MUR
20 6127 (Obama for America, et al.) (invitation to fundraiser sent from email of
21 corporation's sole shareholder beyond the corporation's restricted class containing an

⁴ For the purposes of part 300 of the Commission's rules, implementing the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), the Commission has defined "to solicit" to mean "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." 11 CFR 300.2(m).

1 explicit disclaimer that the corporation itself was not making the solicitation constituted
2 corporate facilitation because advance payment was not received).

3 Because any emails sent under the plan proposed by Citizens United in its
4 advisory opinion request will likely appear to be coming from Citizens United itself and
5 thus constitute as a solicitation by Citizens United, any emails soliciting contributions or
6 email invitations to a fundraiser for a candidate or political party would constitute
7 prohibited corporate facilitation of contributions.

8 4. *Will the answer to Question 3 be different if either (a) the brokerage firm does not*
9 *receive advance payment for the rental of the list or (b) the brokerage firm does not remit*
10 *payment to Citizens United in advance of the transmission of the email?*

11 No, because Citizens United is prohibited from sending any email solicitations or
12 contributions or invitations for fundraisers for Federal candidates or political committees
13 under the plan described in its advisory opinion request, neither the failure of the list
14 renter to pay the list broker in advance, nor the failure of the list broker to remit payment
15 to Citizens United in advance would change the answer to Question 3.

16 The Commission expresses no opinion regarding the application of Federal tax
17 law, the Federal CAN-SPAM Act of 2003, or Federal Trade Commission regulations to
18 the proposed activities, because those questions are not within the Commission's
19 jurisdiction.

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

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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On behalf of the Commission,

Matthew S. Petersen
Chairman