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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
JUL 30 A 11: 18

VIA FACSIMILE AND HAND DELIVERY

Ms. Rosemary Smith
Associate General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

AOR 2004-31

Re: Advisory Opinion Request of Russ Darrow Group, Inc.

Dear Ms. Smith:

This is in response to your letter dated July 27, 2004 regarding the Advisory Opinion Request ("AOR") submitted by Russ Darrow Group, Inc.

The following is provided in answer to the questions posed by the Commission in your letter:

1. A copy of the Russ Darrow Group logo is attached to this response.
2. There is no 'jingle' as such. There is a 'trailer' at the end of each ad which is set to music and simply says, "Russ Darrow". This is the 'trailer' that has been used by the Company in its advertising for many years.
3. The scripts provided are representative of the scripts that are currently used by the Russ Darrow Group and which will be used in coming months. The only differences would be regarding specific dealerships, specific automobile models being promoted, special pricing or events related to car sales unique to the fall auto selling/buying season. The advertising time was purchased in 2003 and early 2004 for all radio and television advertisements, but the scripts have not yet been specifically developed. Russ Darrow Group represents to the Commission that no advertisements will reference the campaign of Russ Darrow for Senate either directly or indirectly.
4. Russ Darrow, Jr., the candidate for the United States Senate, was not involved in any way in the formation of the television / radio advertising contracts of the company for 2004. He has not been involved, directly or indirectly, in the advertising plans or decisions of the Company for several years.

Finally, we note the decision of the Commission not to expedite consideration of this Advisory Opinion Request. After due consideration of the negative impact on the Company and its employees should its advertising cease on August 14, 2004, Russ Darrow Group has decided that it will continue its advertising while its Advisory Opinion Request is pending before the Commission.

BRUSSELS
CHICAGO
DETROIT
JACKSONVILLE

LOS ANGELES
MADISON
MILWAUKEE
NEW YORK

ORLANDO
SACRAMENTO
SAN DIEGO
SAN DIEGO/DEL MAR

SAN FRANCISCO
SILICON VALLEY
TALLAHASSEE
TAMPA

TOKYO
WASHINGTON, D.C.
WEST PALM BEACH

002.1240524.1



Ms. Rosemary Smith
July 30, 2004
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Should it become necessary to seek protection from any potential enforcement action resulting from the Company's advertising from and after August 14, 2004, the Company certainly will not hesitate to take such steps as it deems necessary to protect the Company from allegations of violation of FECA. Russ Darrow Group has made every effort to protect its ongoing advertising activities from inclusion within the definition of the Act and urges the Commission's prompt review of its AOR.

We believe this is sufficient to respond to the questions contained in your letter. However, please do not hesitate to contact me at (202) 295-4081 should you require further information.

Thank you for your assistance and consideration.

Sincerely,

A handwritten signature in cursive script that reads "Clela Mitchell".

Clela Mitchell, Esq.
Counsel to Russ Darrow Group, Inc.

Enclosures

cc: Mr. Russ Darrow III, President
Russ Darrow Group, Inc.

Russ

Darrow
GROUP



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 27, 2004

Cleta Mitchell, Esq.
Foley & Lardner LLP
Washington Harbour
3000 K Street, NW, Suite 500
Washington, DC 20007

Dear Ms. Mitchell:

This refers to your letter dated July 21, 2004 on behalf of Russ Darrow Group, Inc. ("RDG"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to certain advertisements that RDG is planning to run.

You state that RDG, a Wisconsin corporation, is in the commercial business of selling to the general public in Wisconsin a variety of products and services, including new and used automobiles, vehicle repair and maintenance services, leasing owner/operator trucks and trailers, auto fleet leasing and maintenance tracking, and vendor equipment leasing. You indicate that RDG owns and operates 22 vehicle franchise dealerships, all of which include "Russ Darrow" as part of the dealership's name (*e.g.*, Russ Darrow West Bend, Russ Darrow Appleton Chrysler). Russ Darrow, Jr., a candidate for the U.S. Senate in Wisconsin and the founder of RDG, is the Chief Executive Officer and Chairman of the Board of RDG. His son and namesake, Russ Darrow III, serves as RDG's President and Chief Operating Officer. You represent that Russ Darrow III is primarily responsible for all day-to-day operations, plans, and business activities of RDG, including the oversight and ultimate decision-making authority regarding discretionary advertising by RDG.

You state that RDG has continually utilized electronic media, including television and radio, to advertise its products and services for 38 years. You also indicate that RDG plans to continue to air such advertisements for the foreseeable future. The Act prohibits corporations from using their general treasury funds to air certain communications that reference a clearly identified Federal candidate within 30 days of a primary election and within 60 days of a general election. *See* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(2)(iii). The Wisconsin primary election is Tuesday, September 14, 2004 and you inquire as to whether, given that the name "Russ Darrow" is part of the business name of RDG's car dealerships, RDG would be prohibited from running its planned electronic media

advertisements within 30 days of that election and within 60 days of the November 2, 2004 general election (*i.e.*, August 14, 2004 through November 2, 2004).

The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. 437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests. 11 CFR 112.1(b). The regulations further explain that the Office of the General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. 11 CFR 112.1(d).¹

In view of the above requirements, please provide the following:

1. A copy of the RDG logo, as it would appear in any television advertisements that RDG or any of its subsidiaries or franchisees would air between August 14, 2004 and November 2, 2004;
2. Lyrics to any jingles that would be included in any radio or television advertisements that RDG or any of its subsidiaries or franchisees would air between August 14, 2004 and November 2, 2004;
3. Any other information regarding the content of the advertisements that RDG or any of its subsidiaries or franchisees would air between August 14, 2004 and November 2, 2004 that is not already captured by the scripts you provided; and
4. Information as to whether Russ Darrow, Jr. had any material involvement in the formation of the multi-year advertising contracts under which the advertisements that RDG or any of its subsidiaries or franchisees plan to air between August 14, 2004 and November 2, 2004 would run.

Upon receipt of your responses, this office will give further consideration to your inquiry. We note that you requested an expedited response to your inquiry. The Commission, however, only issues advisory opinions on an expedited basis in response to requests submitted by candidates or their authorized committees within 60 calendar days of an election for Federal office in which the candidate is seeking nomination or election that present a specific transaction or activity related to the election. 11 CFR 112.4(b). All other requests are issued within 60 calendar days of the date on which this office concludes that the advisory opinion request is complete. 11 CFR 112.4(c) and 112.1(d).

¹ We note that you submitted a separate letter on July 21, 2004 seeking an advisory opinion on behalf of Russ Darrow for Senate, Inc. Because the activities about which that request inquires are those of a third party, RDG, this Office concludes that it does not qualify as a proper advisory opinion request.

If you have any questions about the advisory opinion process or this letter, please contact Robert Knop, an attorney in this office, at 202-694-1650.

Sincerely,

A handwritten signature in black ink that reads "Rosemary C. Smith". The signature is written in a cursive style with a large, prominent "R" and "S".

Rosemary C. Smith
Associate General Counsel



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July 21, 2004

VIA HAND DELIVERY

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 ctmitchell@foley.com EMAIL

CLIENT/MATTER NUMBER
 036533-0101

Mr. Lawrence Norton
 General Counsel
 Federal Election Commission
 999 E Street, NW
 Washington, DC 20463

Re: Advisory Opinion Request – Russ Darrow Group, Inc.

Dear Mr. Norton:

This firm serves as counsel to Russ Darrow Group, Inc. ("Requester") which hereby submits this request for an Advisory Opinion from the Federal Election Commission ("the Commission" or "the FEC") pursuant to 2 U.S.C. §437f and 11 C.F.R. §112.1. Further, because of the time sensitivity and applicability of Commission's response, Requester seeks the Commission's expedited review of this advisory opinion request.

Requester is a Wisconsin corporation, established in 1965 which has been continually since that time in the commercial business of selling to the general public in the state of Wisconsin a variety of products and services, including new and used automobiles, vehicle repair and maintenance services, leasing owner/operator trucks and trailers, auto fleet leasing and maintenance tracking, as well as vendor equipment leasing. Requester has continually utilized electronic media including television and radio to advertise its products and services for 38 years.

Russ Darrow, Jr. ("Candidate") is the founder of Russ Darrow Group, Inc. He is now a candidate for the Republican nomination for the United States Senate from Wisconsin which will be decided by the Wisconsin primary to be held on September 14, 2004. Should Candidate be successful in the primary election, his name will appear on the November 2, 2004 general election ballot for the United States Senate from Wisconsin.

Candidate formerly served as both President and Chief Executive Officer ("CEO") of the Company but now serves as its CEO and Chairman of the Board. Russ Darrow III, son of Candidate, has assumed the positions of President and Chief Operating Officer of the Company and has responsibility for managing and directing all day to day operations and business decisions, including oversight of all advertising, for the Company.

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 MADISON
 MILWAUKEE
 NEW YORK

ORLANDO
 SACRAMENTO
 SAN DIEGO
 SAN DIEGO/DEL MAR

SAN FRANCISCO
 SILICON VALLEY
 TALLAHASSEE
 TAMPA

TOKYO
 WASHINGTON, D.C.
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002.1235783.2

Requester seeks the Commission's opinion on the following:

Question

Because Requester's Company name is used in its advertising and includes the same name as a federal candidate but does not refer to the Candidate, the candidacy, the election or any issues or policies involving a candidate or election either directly or indirectly, are the provisions of 2 U.S.C. §434(f)(3) and 11 C.F.R. §100.29 applicable to Requester's Company advertisements on radio and television during the period from August 14, 2004 through November 2, 2004¹, even though:

- Candidate does not appear in the advertisements;
- another individual with the same name (Russ Darrow III) appears in the advertisements and has for over a decade served as the public face of the Company in the advertisements;
- the advertisements are not for the purpose of influencing a federal election; and
- all advertising decisions are made without regard to or in coordination with the Candidate or any campaign for federal office.

Specifically, Requester seeks the Commission's authorization to continue, without interruption its normal and customary radio and television advertising in which the Company's name is mentioned and for which advertising Requester is legally obligated to continue pursuant to numerous advertising and franchise agreements.

Background Information

Russ Darrow Group is one of the top one hundred automotive groups in the country and is comprised of three separate divisions employing more than 1,000 individuals Company-wide in the state of Wisconsin.² The Company divisions include: 1) the auto group which owns and operates eighteen dealerships; 2) J.D. Byrider which owns and operates four locations offering used automobiles; and 3) Russ Darrow Leasing.

Candidate Russ Darrow founded the Russ Darrow Group in 1965 when he purchased Requester's first Chrysler-Plymouth dealership in West Bend, Wisconsin. Candidate is no longer the President of the Company, and, in recent years, his involvement with the day-to-day operations of the Company has been transferred. Candidate's son, Russ Darrow III, has held the position of President and Chief Operating Officer since 1997 and is primarily responsible for all day-to-day

¹ The 30-day pre-primary 'blackout' period under 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29 would begin on August 14, 2004 and the 60-day pre-general blackout period would begin on September 2, 2004 through November 2, 2004.

² See Attachment A for employee breakdown by location.

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operations, plans and business activities of Requester, including the oversight and ultimate decision-making authority regarding discretionary advertising by Requester.

After purchasing its first dealership in 1965, Requester has added new franchises and dealerships over the years, the most recent of which were the acquisitions in late 2003 of two new Kia dealerships, Chrysler, Jeep and Cadillac dealerships, and a new Chevrolet dealership in 2004³ As a result of these recent acquisitions, Requester currently owns and operates a total of eighteen (18) vehicle franchise locations and four (4) J.D. Byrider locations for a total of twenty-two (22) vehicle dealerships in the Southeastern and East Central region of Wisconsin. Requester has signed a letter of intent to acquire its twenty-third dealership before the beginning of 2005.

Requester holds twenty (20) franchise agreements with car manufacturers to sell vehicles in the State of Wisconsin.

Since 1965, Requester has advertised its Company and products through the use of a variety of media, including radio, television, newspapers, direct mail, print, and, more recently, electronic and e-mail formats. The advertising is for the purpose of selling and leasing cars and trucks in the geographic regions where the dealerships are located, as well as to promote to the general public Russ Darrow Group servicing programs. Over the years, the Company has built a valuable brand name and Requester's advertising has always included the name of the Company, "Russ Darrow," along with the specific dealership and products to which the particular advertisement refers.⁴

Candidate has not appeared personally in Requester's television or radio ads in more than a decade. In the late 1980's, and prior to becoming President, Russ Darrow III replaced Candidate as the Company spokesman and began appearing in Requester advertisements. At no time during 2004 has Candidate appeared in any Company advertising nor will he appear in any Company advertising at any time. Conversely, Russ Darrow III, has not appeared in any Candidate campaign ads or public appearances as a spokesman for Candidate or his campaign. Candidate and Requester are two distinct and separate legal entities operating and advertising separately and without consultation or coordination with one another.

During the past decade, Requester has focused on developing "Russ Darrow" as a brand name for its dealerships. The change in advertising approach coincided with the expansion of the business from a single dealership to a multi-faceted corporation which is separate and distinct from any one individual. As demonstrated in the copy and scripts in Attachment C, "Russ Darrow" is used as the brand name for all dealerships and refers to the Company, its cars, and locations, rather than to Candidate.

Requester is dependent on advertising to increase the flow of potential customers to its dealerships. The sales revenue for each dealership is directly related to and contingent upon the

³ See Attachment B for a list of dealerships and dates acquired.

⁴ See Attachment C for scripts of recent advertisements for Requester, its services and products.

Mr. Lawrence Norton
July 21, 2004
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volume of potential buyers visiting each dealership. In turn, the flow of potential customers to each dealership directly correlates to the level of investment Requester makes in broadcast media. Requester averages an investment of \$218.00 dollars in electronic media advertising and a total advertising amount of \$484.00 dollars investment for each car sold. A moratorium on electronic broadcast media of any extended period would have a demonstrable and devastating negative effect on Requester's sales. Requester spends almost \$500,000 per month in advertising which generates significant traffic to its dealerships and is directly and substantially related to Company profitability.

As an example of the convoluted result of applying the provisions of the Federal Election Campaign Act of 1971, as amended, ("FECA") to Requester's business advertising, Russ Darrow III and his brother Mike Darrow closed a transaction earlier this month acquiring a Chevrolet dealership in Madison, Wisconsin. While the new entity is part of the Russ Darrow Group of dealerships, it is owned entirely by Russ Darrow III and his brother in a separate company. Broadcast advertising to launch the 'grand opening of the Russ Darrow Chevrolet in Madison' is key to the success of the venture and is scheduled to begin in September, 2004. The very financial viability of the project is at stake should the Commission determine that these advertisements are 'electioneering communications' that cannot be broadcast.

Requester spends substantial sums on all types of advertising, but for purposes of this Advisory Opinion Request, Requester will focus on its electronic advertising expenditures. Over the past seven years, Requester has made significant investments in radio and television advertising as follows:

Expenditures by Broadcast Media Type:

Year	TV	Radio	Total
1998	\$533,902	\$331,259	\$865,161
1999	\$691,338	\$335,242	\$1,026,580
2000	\$353,546	\$349,371	\$702,917
2001	\$1,241,617	\$215,156	\$1,456,773
2002	\$1,648,625	\$444,178	\$2,092,803
2003	\$1,543,672	\$891,563	\$2,435,235
2004	\$986,744	\$2,434,586	\$3,421,330

As the above chart demonstrates, Requester has recently reduced its expenditures on television advertising in favor of increasing the resources spent on radio. The broadcast mix was decided, not by Requester, but by reason of provisions in one of Respondent's franchise agreements offering incentives to Requester for expenditures on radio advertising. The emphasis on radio advertising proved to be successful and Requester in turn shifted more advertising dollars from television to radio. The change in the allocation of advertising dollars was a business decision, driven by factors wholly independent of any campaign for federal office.

Requester has its own independent media buyer who negotiates the media purchases for and on behalf of the Company on a multi-year basis. Consistent with industry practice, Requester enters

Mr. Lawrence Norton
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into valuable multi-year advertising contracts with broadcast stations in order to obtain the lowest commercial rates possible for its advertising. Additionally, many of the franchise and dealership agreements entered into between Requester and the manufacturers include mandatory provisions requiring Requester's participation in regional advertising associations utilizing Requester's brand name, "Russ Darrow." These programs include various financial and merchandise incentives as well as programs for earned media.

Requester is dependent on broadcast media to meet its year end sales goals, sustain its inventory allocation and to insure revenue from various manufacturers' sales driven, financial incentives. In the event Requester is required to cease its advertising, the Company would suffer significant, long-term consequences resulting in financial damages, penalties and loss of position within its industry.

Requester has developed and will continue to create, produce and distribute all radio and television advertising in 2004 in the same manner as is customary and in the best interests of the Company, using its own employees and independent vendors to create, produce, distribute and purchase broadcast time. Requester and Candidate have no common media vendors of any kind and each makes wholly separate and independent decisions regarding the creation, production and distribution of any and all advertising and other promotions.

Specific Damages and Concerns

In addition to the issues and concerns discussed above, Requester has identified a number of specific additional areas of financial damages and consequences to the Company, its employees, vendors, AND the State of Wisconsin should the Commission determine that Requester's advertisements are 'electioneering communications'. Those concerns are enumerated below:

1) Breach of Annual Advertising Contracts. Requester historically enters into annual media advertising contracts in order to obtain tremendous savings on the purchase of advertising and preferred advertising placement. The timeline for development and finalizing of the 2004 media purchase and placement contracts for television and radio advertising was developed as follows:

<u>Date</u>	<u>Calendar</u> <u>or</u> <u>2004 media buys</u>
Oct. 2003	Determined 2004 media budget
Nov 2003	Solicited television and radio availabilities
Dec 2003	Finalized 2004 advertising plan
Dec 2003	Began negotiations with broadcast stations
Dec 2003	Purchased 2004 radio and 1 st quarter 2004 television
Early 2004	Purchased balance of 2004 television ⁵

⁵ The final purchase of 2004 television broadcast time was not made until the Nielsen ratings winter report became available.

Requester made each of these advertising decisions without regard to any election, any candidate, or any campaign for federal office.

A moratorium on broadcast media in contravention of the contracts already signed by Requester with the broadcast stations would cause Requester to incur "short rate" penalties because its television and radio purchases are made on an annual basis and the advertising rates during 2004 are contingent upon continuation for the entire calendar year. In addition, the broadcast stations themselves will suffer financial harm as a result of the loss of revenues from a major advertiser.

All advertising decisions and contracts entered into by Requester were, and remain, totally independent from Candidate and Candidate's campaign.

2) Legally Binding Advertising Agreements. For each dealership, Requester obligates itself in legally binding agreements with the manufacturer to represent the automobile manufacturer in certain ways, including but not limited to requirements regarding sales volume, site appearance and management, and advertising expenditures and participation.⁶

Certain of Requester's franchise agreements contain provisions requiring participation in advertising through the Local Area Marketing Group ("LAMG"). LAMG advertising decisions are not made by Requester. Rather, franchisees (such as Requester) are required to participate in the LAMG advertisements and are mentioned and otherwise referenced in advertisements over which Requester has no control. Such advertising will continue in 2004 notwithstanding any actions or decisions by Requester, and Requester is legally bound to be referenced in the LAMG advertising, which includes both radio and television advertisements.

Requester has agreements with multiple manufacturers, which require participation in advertising cooperatives and which establish certain volumes of advertising in specific media markets where dealerships are located.

Further, each of the franchise agreements binds Requester to meet certain pre-established sales volume goals. Advertising is a key to achieving the sales volume for each dealership, line of cars and to meet the legal requirements of the franchise agreements.

3) Financial Payments Based on Advertising and Sales Volume. Requester derives revenues from manufacturers as rebates and other incentive payments for Requester's advertising expenditures. In 2002, such payments exceeded several million dollars and Requester is currently on pace to exceed its 2002 revenues from this source if Requester's advertising is allowed to continue uninterrupted during the balance of 2004. Requester relies on these revenues as a key component of

⁶ The referenced agreements are proprietary in nature. However, Requester will make available to the Commission *in camera* copies of the various binding agreements and the provisions thereof containing advertising expenditures and participation requirements.

its financial well-being during a calendar year and will be severely and adversely impacted if the revenues are not received by virtue of an interruption in advertising by Requester.

Requester is held legally and financially responsible for adhering to certain advertising compliance requirements for the automobile industry and the respective individual manufacturers with which it has agreements. Requester's future growth and business opportunities with each manufacturer are contingent upon meeting certain sales volume targets.

4) Impact from Reduction in Sales Volume Due to Failure to Advertise. Requester's performance and its ability to meet the sales volume targets ultimately determines Requester's ability to secure additional franchises and to obtain its desired allocation of choice lines of automobile products. A decrease in sales volume will cost Requester its position as a highly desirable franchisee to which preferred products are allocated in an industry where franchisees compete for superior positions *vis a vis* availability and allocations of the top-selling cars, franchise locations, financing costs, advertising rebates, etc. Requester's future business opportunities are determined by its current performance and radio/television advertising is a key component of Requester's ability to perform in a manner enabling Requester to continue to grow its business.

Requester's gross advertising expenditures for the most recent twelve (12) months were \$6,908,790 dollars. Requester anticipates spending about \$757,848 dollars on advertising for its new Chevrolet dealership for a total anticipated gross advertising expenditure of \$7,666,638 dollars. Requester currently spends 44.98% or \$3,448,814 of its total advertising dollars on electronic media.

The table below demonstrates the negative impact that a moratorium on electronic media advertising during the 'blackout period' under BCRA would have on Requester's volume of new and used car sales. To demonstrate the magnitude of the lost revenue, the anticipated decline in sales volume has been translated into an anticipated monetary loss using a factor of 44.98% which represents the percentage of advertising which will be lost to Requester.

Impact on Car Sales of Reduced Advertising	- 44.98%
Total Car Sales Lost 12 Month Period	7,127
Total Car Sales Lost Aug. 14 - Nov. 2 ⁷	1,582
Revenue Lost from New Car Sales ⁸ Aug. 14 - Nov. 2	\$37,960,598
Revenue Lost from Used Car Sales ⁹ Aug. 14 - Nov. 2	\$20,561,991
Potential Total Lost Revenue for Aug. 14 - Nov. 2	\$58,522,598

⁷ This time period represents the 81 days during which Requester would be prohibited from advertising using electronic media.

⁸ This figure assumes 2/3 of the car sales lost are new car sales at an industry average of \$24,000 per car.

⁹ This figure assumes 1/3 of the car sales lost are used cars at an industry average of \$13,000 per car.

Mr. Lawrence Norton
July 21, 2004
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The above figures only represent the anticipated loss of revenue due to a reduction in the volume of new and used car sales. These figures do not include any lost revenue resulting in reduced automobile service sales or a reduction in the sales of other products offered by Requester. Requester anticipates that any moratorium on electronic media advertising would also have a similar, negative impact on the revenue derived from these other sources of income.

5) Importance of New Model Rollout in Fall Months. Requester's ability to advertise as usual during the unveiling period for the 2005 models is crucial to its ongoing business success. The 2005 models will be available for purchase during October 2004 and Requester has historically advertised in September and October to encourage sales of new vehicles and trade-ins of used cars. The success of the fall sales period is of vital importance to Requester's annual sales volumes.

6) Seasonality of Auto Sales Business in Wisconsin. Selling automobiles in Wisconsin is a particularly seasonal business due to Wisconsin's very cold and lengthy winters. Thus, in addition to the new model rollout, the fall is a particularly important season for car sales in Wisconsin because of the abbreviated sales year. A blackout of television and radio advertising in the all important fall season will result in a multi-month supply of unsold inventory – which would take at least six (6) months and possibly as long as twelve (12) to eighteen (18) months to overcome. To be banned from television and radio advertising for a three month period going into the three slowest months of the year (December, January and February) is to impose a serious financial penalty and hardship on the Company.

7) Capital Construction Obligations. Requester recently executed an agreement with one manufacturer which legally obligates Requester to spend substantial Company funds for capital construction to remake an existing multi-product dealership into an exclusive image facility for a particular line of cars. The contract has already been consummated and the Company is already legally obligated to spend the construction funds pursuant to the contract. Advertising revenues to offset the capital construction costs are tied to sales volumes specified in the contract. Without the capacity to advertise at the very time when the remodeled dealership is opened substantially limits Requester's opportunity for sales success and the ability to recover its already committed capital costs. Such abrogation of the contract subjects Requester not only to serious financial consequences and loss but also exposes Requester to legal liability and damages for breach of contract, through no fault of Requester.

8) Existing Sponsorships. Requester has historically been a sponsor of community activities such as the State Fair of Wisconsin and, as part of the sponsorship, has provided transportation for the event. Advertisements, including radio and television, are included in the sponsorship package which contains language such as "Transportation services provided by Russ Darrow Group". Requester will continue to be referenced in such advertisements which is the benefit to Requester of providing such sponsorships. Decisions regarding and agreements governing sponsorships were made long ago and without reference to any campaign for federal office.

9) E-commerce Initiative Scheduled to be Unveiled in September. Requester has spent nearly \$2 million developing an entire e-commerce initiative for www.russdarrow.com, scheduled to

be unveiled during August, September and October, to coincide with the new model year and the top sales season in Wisconsin. Radio and television marketing of the e-commerce program is vital to its success. New employees to manage and operate the e-commerce component of the Company are being hired and trained at this time to coincide with the rollout and launch. The inability to advertise the e-commerce initiative significantly hampers its opportunity to succeed and will necessitate laying off those newly hired for this division of the Company and suspending additional hiring scheduled for this endeavor.

10) Financial loss to Company employees; potential loss of jobs. The inability to advertise in the all-important fall auto season will have a devastating impact on Requester's employees. The vast majority of Company employees have a performance based pay plan in which they are paid on a commission basis tied to sales and lease volume. A decrease in sales and/or lease volume will necessarily impose a direct financial penalty on each of those employees by decreasing their income due to lost sales. Should the decrease in sales be sufficiently sharp, Requester will have no choice but to terminate and/or lay off employees due to its inability to sustain payroll when sales volume declines.

11) Lost revenues to the state of Wisconsin. Not only will Requester and its employees suffer from a loss in sales due to an advertising moratorium, but the State of Wisconsin will also suffer a direct loss of tax revenues paid for each car sold. The chart below illustrates the potential lost revenue from sales taxes and license and title charges collected by the State of Wisconsin on every vehicle sold in the state.

Total Car Sales Lost Aug. 14- Nov.2 ¹⁰	1,582
Requester's Potential Total Lost Revenue for Aug. 14-Nov. 2	\$58,522,598 ¹¹
Assumed Sales Tax Rate	5.60%
Potential Lost Sales Tax Revenue	\$3,277,265
Assumed License and Title State Revenue	\$82.00
Potential Lost License and Title State Revenue	\$130,490

In sum, the inability to fulfill the legally binding advertising contracts to which Requester is a party will seriously jeopardize the Company, its employees, its vendors, the manufacturers whose products it sells, the state of Wisconsin and all who depend on this vibrant and dynamic Company to continue to succeed financially. Advertising on radio and television is a key component of that financial success.

¹⁰ This time period represents the 81 days during which Requester would be prohibited from advertising using electronic media.

¹¹ This figure is derived from the previous table demonstrating Requester's anticipated drop in sales volume.

Legal Issues

Requester's electronic advertising is separate, distinct and unrelated to Candidate and should not be deemed to be "electioneering communications" for purposes of the Federal Election Campaign Act of 1971.

Applicable Statutory Provisions: Definition of 'Electioneering Communications'

The Bipartisan Campaign Reform Act of 2002 ("BCRA") added new provisions to the Federal Election Campaign Act of 1971 ("the Act" or "FECA") regarding television and radio advertising within a set period preceding a primary election, a nominating caucus or convention and a general election. That advertising is now known as "electioneering communications." 2 U.S.C. §434(f)(3). Under the provisions of BCRA, corporations are prohibited from making or financing electioneering communications. 2 U.S.C. §441b(b)(2), 11 C.F.R. §114.2(b)(2)(iii), *Electioneering Communications; Final Rules*, 67 Fed. Reg. 65,190 (October 23, 2002). The applicable statutes and regulations define "electioneering communications" as "broadcast, cable or satellite" communication that refers to a clearly identified candidate, that is publicly distributed for a fee within 60 days of a general election or 30 days of a primary or preference election or nominating convention or caucus, and that is, in the case of a communication that refers to a Congressional candidate, "targeted to the relevant electorate." 2 U.S.C. §434(f)(3)(A)(i); 11 C.F.R. §100.29.

For the reasons discussed below, the Commission should determine that Requester's broadcast advertising does not fall within the scope of the definition of 'electioneering communications' and the Commission's regulations governing such advertising. Alternatively, the Commission should determine that, based on the facts presented, Requester's broadcast advertising is *exempt* from the regulations.

Intent of Bipartisan Campaign Reform Act of 2002

The legislative intent of the BCRA provisions regarding electioneering communications was to address the circumvention of FECA's prohibition on labor and corporate contributions to federal candidates through the use of "putative issue ads." *Electioneering Communications; Final Rules*, 67 Fed. Reg. 65,190 (October 23, 2002) citing to 148 Cong. Re. . §2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

"BCRA's central provisions are designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections." McConnell v. FEC, 540 U.S. ___, 21 (2003). "The records developed in this litigation and by the Senate Committee adequately explain the reasons for this legislative choice. Congress found that corporations and unions used soft money to finance a virtual torrent of televised *election-related ads* during the periods immediately preceding federal elections, and that remedial legislation was needed to stanch that flow of money." McConnell at 101, citing to 251 F.Supp.2d at 569-573 (Kollar-Kotelly, Jr.); *id.* at 799 (Leon, J.); 31998 Senate Report 4465, 4474-4481; 5 *id.* at 7521-7525. (emphasis added).

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Requester's commercials advertising car dealerships, created, produced, and disseminated in the ordinary course of its business, clearly do not fall within the intent of the statute.

As the legislative history demonstrates, BCRA was designed to address the proliferation of "issue ads." In the Senate debate on BCRA, Senator Snowe stated that the restrictions on electioneering communications would apply to "so called issue ads run on television and radio." 140 Cong. Rec. §2135 (daily ed. March 20, 2002).

There is no evidence in the legislative history that Congress in enacting BCRA intended to regulate legitimate commercial speech.

BCRA's principal sponsors cited numerous studies and investigations in support of their argument that the express advocacy test did not distinguish 'genuine issue ads' from 'campaign ads'. 148 Cong. Reg. at §2140-2141 (statement of Senator McCain). Nowhere in the record is there a discussion of advertisements whose purpose is to sell cars and which are *neither* issue or campaign advertisements.

As Requester's advertising scripts in Attachment C demonstrate, the regulations do not and should not apply to this set of facts and this result was surely not intended by Congress or the Commission. An interpretation of 'electioneering communications' which includes advertisements for a car dealership carries the concept of 'electioneering communications' to a wholly illogical conclusion.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." 8 Davis v. Mich. Dep't of Treas., 489 U.S. 803, 809, 109 S.Ct. 1500, 1504, 103 L.Ed.2d 891 (1989). The Requester's advertisements do not meet the definition of electioneering communications when read within the context of the statute, the regulations and the facts presented to Congress in enacting BCRA and the McConnell court in construing its validity. Simply put, the facts here demonstrate that these are advertisements to sell cars and are not the type of communications the statute was intended to regulate.

BCRA was enacted to regulate references to a candidate even if the *candidate's* name isn't mentioned specifically – by referencing 'the incumbent' or 'your congressman.', but always in an electoral rather than a commercial or business context.

However, BCRA is silent on the subject of prohibiting advertising where the reference in an ad is *not* to a candidate or an issue, but rather to communications pre-dating a campaign for federal office and which are not created, produced, distributed or aired in conjunction with or for any election-related purpose.

Surely, it was not the intent of Congress to penalize an ongoing commercial entity that engages in broadcast advertising for commercial purposes in the period of time prior to an election merely by virtue of their sharing a name with a candidate for federal office. If that is the case, Kohl's Corporation, a prominent retail company in Wisconsin will similarly be forced from the

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airwaves when Wisconsin's other senator, Senator Herb Kohl (D-WI) seeks reelection, even though Sen. Kohl is no longer an owner of the company. The National Grape Cooperative Association, which owns the company which distributes Welch's grape juice and jelly will be forced to cease any broadcast advertising of Welch's grape juice or jelly in Wisconsin after August 14, 2004, since that product shares the name of *one* of Candidate's primary opponents and Michael's Stores, Inc, a national chain of craft supply stores with eight locations in Wisconsin, will not be able to advertise on radio or television in Wisconsin effective August 14, 2004 because that company shares the name of Candidate's *other* primary opponent. The list of absurdities continues to grow if BCRA is to be applied to all normal business advertising.

Requester's Advertisements do not Contain an 'Unambiguous' Reference to a "Clearly Identified Candidate"

The phrase "Russ Darrow" does not refer to a "clearly identified candidate" as defined by the statute and Commission regulations. Rather, the term "Russ Darrow" refers to a valuable "brand name," the Russ Darrow Group, Inc. The Commission's regulations define "clearly identified candidate" as the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia'. 11 C.F.R. §100.29. As demonstrated by the advertising copy and other materials provided in Attachment C, the brand name "Russ Darrow," as used by the Requester, does not in any way refer to the Candidate or the election, any political or public policy issues or any other clear or 'unambiguous' reference to the Candidate.

While the Commission has noted that the definition of "clearly identified candidate" should not be based on the intent or purpose of the person making the communication, Requester submits that the brand name "Russ Darrow" is unrelated to Candidate in his campaign capacity, or any issue involving a campaign for elective office. *Electioneering Communications; Final Rules*, 67 Fed. Reg. 65,192 (October 23, 2002). The Commission's regulation requires an "unambiguous" reference. Here, any reference to the Candidate can only be deemed 'ambiguous' in that Requester clearly does not intend the reference to be to an individual, but rather to the dealerships.

Such advertising which references a group of car dealerships in no way meets the standard of an "unambiguous" reference to a federal candidate. To find otherwise would stretch the intent of the rule to such a degree as to result in a finding not in keeping with the intent of the law.

The Advertisements are not Publicly Distributed to a Relevant 'Electorate'

The definition of electioneering communications requires that the communication be "publicly distributed to the relevant electorate."¹² A communication is considered to be publicly distributed if it is disseminated for a fee by television stations, radio stations, cable television systems or satellite systems 11 C.F.R. §100.29(b)(3)(i).

In this instance, the Company's radio and television advertisements are regularly broadcast by stations serving the geographic markets in which the Requester owns and operates dealerships and the decisions regarding ad placement are driven by dealership locations, *not* voting populations.¹³ As discussed above, Requester has historically entered into multi-year contracts to purchase electronic media in areas of geographic significance to the company. Although the geographic areas in which the Company advertises overlap with Candidate's targeted electorate, Requester's advertising plan was not designed to target a "politically significant electorate." Requester developed its advertisement plan for broadcast markets based on expectations for the greatest financial return to the company. Requester targeted more than a year ago its fall 2004 advertising markets based on car sales, not votes.

These advertisements would run, with the same scripts, targeting the same customers, regardless of *any* candidacy for federal office and the media purchases for several years preceding 2004 demonstrate that fact. Requester is unable to alter its advertising to avoid the "relevant electorate" because its dealerships are the key determinant of the advertising placement.

Importantly, the Commission should be aware that Requester does not control all of the broadcast advertising in the target area which utilizes the brand name, "Russ Darrow." Many of the franchise agreements entered into between the Requester and car manufacturers require Requester to participate in regional advertising programs based on dealership location. Requester has no control over the distribution or content of these ads. It is unreasonable for the Commission to require Requester to breach existing contracts and incur significant financial penalties merely because it advertises geographic areas where voters capable of voting for or against Candidate reside.

Commission Advisory Opinions: Post- BCRA

A0 2004-15, "Bill of Rights Foundation"

Recently, the Commission reviewed its definition of electioneering communications. In Advisory Opinion ("AO") Number 2004-15, the Commission responded to a question concerning advertisements for a documentary film regarding federal candidates and officeholders produced by a non-profit corporation. The Bill of Rights Foundation sought to broadcast radio and television

¹² 11 C.F.R. §100.29(b)(5) defines relevant electorate as a communication received by 50,000 or more people in the state the senate candidate seeks to represent.

¹³ See Attachment D for a list of addresses for Requester's Wisconsin dealerships.

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commercials for a documentary film which included footage of Congressional office holders some of whom are candidates for re-election in 2004. Additionally, the proposed commercials would have referred to at least one presidential candidate who is clearly an identified candidate for public office. The Commission determined that the proposed radio and television commercials fulfilled the definition of electioneering communications because the ads met all of the elements of 2 U.S.C. §434(f)(3) and 11 C.F.R. §100.29. The Commission found that 1) the proposed advertisements would refer to a presidential candidate who is a clearly identified candidate for federal office;¹⁴ 2) the commercials would be publicly distributed by paying a radio or television station to broadcast the advertisements¹⁵ and 3) the advertisements would reach 50,000 or more people within 30 days of a national nominating convention or the general election. These three sets of facts each fulfill one of the three requirements identified in the definition of "electioneering communication" found in 11 C.F.R. §100.29. Therefore, after applying the facts to the applicable law, the Commission determined that none of the statutory or regulatory exemptions from the application of the electioneering communications regulations applied to the proposed advertisements. Specifically, the Commission determined that the Bill of Rights Foundation did not meet the requirements of the "qualified nonprofit corporation" exception provided for by 2 U.S.C. §441b(c)(2) and 11 C.F.R. §114.2(b)(2). The Commission made no finding as to whether the Foundation qualified for an exemption as a media organization or regarding qualifications for tax treatment.

The facts presented by the Bill of Rights Foundation are clearly distinguishable from the facts presented here. There, the request involved broadcast of advertisements involving candidates in their capacity as candidates. Here, Requester is a company whose advertisements use its business brand name and communicate to the general public in commercials to sell cars and advertise its car dealerships. These communications are totally unrelated to any federal election, candidate or officeholder. The facts if AO 2004-15 differ significantly from the facts presented by Requester in this instance.

AO 2004-14 The Honorable Tom Davis (R-VA)

The Commission recently considered whether Representative Davis's appearance in a public service announcement constituted a "coordinated communication" triggering payment or reporting requirements by the entity sponsoring the advertisements. The Commission concluded that Representative Davis's appearance in the public service announcements did not constitute a coordinated public communication because the appearance failed to meet the Commission's three part test. The regulations at 11 C.F.R. §109.21 sets out the requirements to determine whether an expenditure for a communication becomes an in-kind contribution as a result of coordination between a person making an expenditure and a candidate. First, the communication must be paid for by a person other than a Federal candidate; the candidate's authorized committee or political party committee, or any agent of the foregoing. 11 C.F.R. §109.21. Second, one or more of the four content standards set forth in 11 C.F.R. §109.21(c) must be satisfied. Third, one or more of the five

¹⁴ 11 C.F.R., §100.29(a)(1).

¹⁵ 11 C.F.R., §100.29(a)(2) and 11 C.F.R., §100.29(b)(3)(i).

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conduct standards set forth in 11 C.F.R. §109.21(d) must be satisfied. As stated by the Commission, when a payment is made satisfying all three prongs, for the purpose of influencing a Federal election, such payment is considered an in-kind contribution. AO 2004-14 citing to *Final Rules and Explanation and Justification for Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 426 (Jan. 30, 2003). If one or more of the prongs is not met, the payment does not constitute a coordinated communication. The Commission concluded that Representative Davis failed to meet the first prong of the test and therefore the public service announcements did not constitute a coordinated communication.

Similarly, Requester's advertisements are not coordinated public communications and do not constitute an in-kind contribution to Candidate's campaign. Requester's advertisements do not meet any of the conduct standards required for 'coordination' and the reference to a clearly identified candidate is also not present here, because the reference to Russ Darrow is a reference to the business entity, not the Candidate.

As in AO 2004-14, Requester's advertisements should not be considered coordinated communications for the purpose of triggering reporting or payment obligations.

It would be ironic and wholly unjust for the Commission to allow an actual federal officeholder / candidate to appear in broadcast advertising within the 'blackout' period and deem such communications *not* to fall within the definition of 'electioneering communications' but to deem Requester's business ads in which no candidate appears as falling within the scope of the regulations.

Commission Advisory Opinions / Enforcement Actions: Pre-BCRA

MUR 3918 – Hyatt Legal Services

Prior to BCRA's enactment, the Commission decided a factually analogous matter under the provisions of FECA, which is both distinguishable and instructive here.

In MUR 3918 the FEC considered whether radio ads broadcast by a firm owned by a candidate for the United States Senate should be considered contributions to the candidate's campaign. The candidate, Joel Hyatt, was a principle in a firm, Hyatt Legal Service. The firm coordinated its advertising on radio and in other media with the candidate and his principal authorized campaign committee, Hyatt for Senate and its agents. The Commission found that a paid media advisor to Hyatt's Senate campaign drafted and revised radio ads for Hyatt's firm and that Hyatt retained ultimate editorial control over the ads. In fact, in her deposition, the media advisor stated, "I certainly wasn't going to write anything that I thought would hurt his candidacy . . . my primary job was to help get him elected." MUR 3918, at 4 General Counsel's Report. The FEC determined that the ads were contributions to the Hyatt campaign and the firm, Hyatt Legal Services, paid the government a fine of \$11,000 for violation of the Act.

In making its decision concerning the actions of Hyatt's campaign and his firm, the Commission determined that the facts in Hyatt were sufficiently consistent enough with the facts in

AO 1990-5 to support a conclusion consistent with the earlier decision. In AO 1990-5, the Commission had found that any communication, the content of which is under the control of a candidate for federal office, is "for the purpose of influencing" the candidate's election if: (1) the communication makes direct or indirect reference to the candidacy, campaign, or qualifications for public office of the candidate or the candidate's opponent; (2) the communication makes reference to the candidate's views on public policy issues, or those the candidate's opponent; or (3) if distribution of the communication is significantly expanded beyond its usual audience, or in any other manner that indicates utilization of the communication as a campaign communication. AO 1990-5, at 6.

The facts in Hyatt are wholly dissimilar to the facts presented by Requester and underscore why Requester's advertisements should not be swept within the framework of BCRA. Unlike Requester, Hyatt used his commercial firm to advertise for his candidacy. The tag line on the firm's ads was, "Hyatt Legal Services - Serving the People of Ohio". The firm's ads indirectly referred to the candidate, his qualifications, and several issues that were raised during the campaign. Hyatt was the spokesperson for his firm in the ads and was actively involved in the creation of the firm's advertisements.

None of these facts are analogous to the facts concerning Requester. Here, Candidate has not appeared in ads for "Russ Darrow" dealerships for more than a decade, Candidate and his campaign are uninvolved in the development of advertising or the day-to-day operations of the company, the spokesperson for the company has the same name but is a different person from Candidate and he (Russ Darrow III) has not at any time been a public spokesperson for the Candidate. There is no coordination of any kind between the Requester and the Candidate concerning the broadcast media advertising at issue here.

AO 1982-15 - Sprik and Andersen

The facts presented in AO 1982-15, are more closely aligned with Requester's fact situation, albeit still distinguishable. In that opinion, the FEC was asked by a law firm in which a senior partner was considering running for Congress asked whether an increase in the firm's TV and radio ads would be considered a contribution from the firm to the campaign.

The FEC found that the ads did not constitute a contribution to the partner's campaign because: (1) the ads would have been aired whether or not the partner ran for Congress; (2) the partner running for Congress was not identified in the ads; and (3) there was no acceleration of the ads in close proximity to the primary or general election. The Commission concluded that, "since the ads will not identify Mr. Sprik as a candidate for Congress, or any other public office and since the frequency of such ads will not be accelerated immediately preceding any 1982 primary or general election, no purpose to influence an election would arise in those circumstances. Therefore, no contribution from the law firm would be made to Mr. Sprik's candidacy as a result of the firm's expenses for the desired advertising."

The Commission determined that because the law firm's advertisements would be aired, televised, and written "irrespective of any possibility of candidacy" the Act was not implicated. That decision embodies a reasoned application of FECA and is analogous to the Requester's situation.

BCRA's amendments to the law were intended to halt abuses of the law involving advertising with the purpose of influencing a federal election, not to impede the livelihood of non-candidates and entities whose goals have nothing to do with influencing an election.

Constitutional Concerns Apart from BCRA and the Act

Application of BCRA to Requester's Advertising Would Constitute a Government Abrogation of Requester's Private Contracts

The Takings Clause of the Fifth Amendment to the United States Constitution provides, "Nor shall private property be taken for public use, without just compensation." As stated by the United States Supreme Court, the purpose of the Clause is to prevent the government, "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). The provisions of BCRA that govern electioneering communications, as applied to the facts presented by Requester, do precisely what the Takings Clause of the Fifth Amendment precludes: Requester unfairly and unjustly is bearing a burden which should be born by the public as a whole.

Should the Commission determine that Requester is prohibited from broadcasting its advertisements under the provisions of BCRA, the government should compensate Requester for lost profits and the lost use of its property. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

The Supreme Court has determined that an "economic regulation such as the [Coal] Act may nonetheless effect a taking." Eastern Enterprises v. Commissioner of Social Security, 524 U.S. 498, 522 (1998) citing to United States v. Security Industrial Bank, 459 U.S. 70, 78 (1982). Similarly, BCRA, through its economic regulation of commercial speech, has effected a regulatory taking if applied to the facts presented by Requester.

In performing the fact intensive investigation which evaluates the fairness and justness of a governmental action, the Courts have identified several factors which are of particular significance. These factors include: 1) the economic impact of the regulation; 2) the interference with reasonable investment backed expectations; and 3) the character of the governmental action. Eastern Enterprises v. Commissioner of Social Security, 524 U.S. 498, 523-24 (1998). Applying each of these factors to the facts presented by Requester illustrates the unjustness and unfairness of BCRA.

Economic Impact Analysis

Requester will experience a significant economic impact as a result of the Commission's regulation of electioneering communications. As discussed above, if Requester is forced to impose a moratorium on broadcast advertising, Requester stands to lose millions of dollars in revenues in lost advertising rebates and loss of sales. Requester will be forcibly in breach of its annual media advertising contracts which were entered into without regard to any election, any candidate, or any

campaign for federal office. In addition the broadcast stations themselves will suffer financial losses as a result of the loss of revenues from a major advertiser such as Requester.

An additional economic impact will come as a result of the breach of legally binding advertising agreements with national car manufacturers. As discussed on pages 5-9, failure to meet the sales volume target for each dealership will jeopardize its ongoing business relationship with the manufacturers.

As in Eastern, BCRA would impose a considerable financial burden on Requester if the Commission applies its provisions to Requester. Its inability to fulfill its advertising contracts will seriously harm the company, its employees, its vendors, the manufacturers whose products it sells, the state of Wisconsin and all who depend on this vibrant and dynamic company to continue to succeed financially. Advertising on radio and television is a key component of that financial success. As demonstrated by each of the above examples, the provisions of BCRA and its implementing regulations will have a significant and direct economic impact on Requester, permanently depriving it of revenue, reputation and economic opportunity, for which Requester should be compensated should the government interrupt Requester's business in the manner outlined above.

Analysis of Interference with Reasonable Investment Backed Expectation

BCRA interferes with Requester's reasonable investment-backed expectations. Requester entered into its advertising and franchise agreements without regard to any election, any candidate, or any campaign for federal office. Requester reasonably should have been able to invest in its company in this way, advertising its corporate "brand name", without fear that the government would interfere in its investments and mandate such economic regulation as to deprive Requester of its property, reputation and economic opportunity.

Analysis of Nature of Governmental Action

The impact of the governmental action by the Commission's application of BCRA to the Requester's advertising results in unfair and unjust consequences. These consequences were not intended by Congress and should not be enforced in this instance to Requester. The provisions of the Act applied to Requester would single out Requester, which is not working in coordination or concert with any federal campaigns or candidates, and deprive it of its property solely for the reason that the company shares a name with a federal candidate. The Act's definition of electioneering communications is unrelated to Requester and its ordinary business advertising and its application to Requester places an unfair and undue burden on the company.

Requester is not broadcasting advertisements which were in any way designed to promote a federal candidate or issue or influence voters in a campaign but by virtue of sharing a name with Candidate, Requester would incur significant economic loss in contravention of the Fifth Amendment.

Requester's Advertising is Commercial Speech Protected by the First Amendment

Requester's advertisements constitute commercial speech and as such are protected by the First Amendment. Commercial speech is "speech which proposes a transaction." Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 565 (U.S., 1980). The Supreme Court has defined "commercial speech" using a three-prong test which considers whether 1) the speech is an advertisement; 2) the speech refers to a specific product; and 3) the speaker has an economic motivation for speaking. Bolger v. Youngs Drug Product Corp., 463 U.S. 60, 65 (1983). "[No single factor] must necessarily be present in order for speech to be commercial." Central Hudson at 565. Although the combination of all these factors provides "strong support" that any given statement should be classified as commercial speech, *any* combination of the preceding elements presents a good case that a statement is commercial. Id.

Requester's advertisements meet all three requirements for commercial speech as defined by the Supreme Court: first, the issue here is indeed advertising (see sample scripts, Attachment A); second, the advertisements all refer to a specific product and third, the Requester has an economic motivation for speaking, namely selling and leasing cars and trucks for a profit. As commercial speech, Requester's advertisements enjoy the protections of the First Amendment afforded such speech.

Government regulation of commercial speech will not be sustained if it provides only ineffective or remote support for the government's purpose. Edenfield v. Fane, 507 U.S. 761, 767, (1993). See also Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 572 (U.S., 1980) (First Amendment require[s] that the restriction be no more extensive than is necessary to serve the state interest.) BCRA's restraints on electioneering communications regarding Federal candidates reach far beyond that objective in this instance if the regulations are applied to Requester's business advertisements. The regulation of Requester's advertisements is wholly unrelated to the purposes of Congress in enacting BCRA. As discussed above, the intent of the law was to stop the proliferation of issue advertising which some legislators suggested was indistinguishable from campaign advertising. *Electioneering Communications; Final Rules*, 67 Fed. Reg. 65,190 (October 23, 2002). Requester's advertisements are neither campaign advertisements nor issue advertisements and cannot be confused as either. Further, Requester's advertisements were contracted for and would be broadcast regardless of Candidate's decision to run for office. These advertisements are totally unrelated to any federal campaign or campaign issue.

These are business advertisements and must be afforded the protections of the First Amendment as commercial speech. The decision by the U.S. Supreme Court in McConnell focused on the constitutionality of BCRA's provisions defining electioneering communications within the context of political speech. The Court presumed that the speech subject to regulation under BCRA is limited to political speech. In considering the 30 and 60 day limitations on broadcasting electioneering communications, the Court stated, "[t]he justifications for the regulation of express advocacy apply equally to ads aimed during those periods *if the ads are intended to influence the voter's decisions and have that effect.*" McConnell at 100. Requester's ads are not designed to be

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express or issue advocacy communications. These are commercial advertisements that do not fall within the type of speech intended to be regulated by BCRA.

Conclusion

The FEC has the Authority to Exempt Requester's Advertisements

The FEC has the authority to exempt communications that do not promote, support, attack, or oppose Federal candidates. 2 U.S.C. §434(f)(3)(B)(iv), see also *Electioneering Communications: Final Rules*, 67 Fed. Reg. 65,196 (October 23, 2002). The authority to promulgate such exemption regulations are reiterated by BCRA which provides that "the Commission may exempt only communications that do not promote, support, attack or oppose a Federal candidate." *Id.* citing to 2 U.S.C. §434(f)(3)(B)(iv). Four of the six current exemptions recognized by the Commission are based on the express language of BCRA. 11 C.F.R. §100.29(c)(1)-(4).

The Commission used the discretion granted to it by Congress to formally identify two additional exemptions, one for state and local candidates and a second for certain §501(c)(3) non-profit organizations. 11 C.F.R. §100.29(c)(5).

When promulgating its regulations regarding electioneering communications, the Commission did consider an exemption for business advertisements. *FEC Explanation and Justification* §5202 Fed. Reg. 67, 205 (October 23, 2002). The Commission concluded that "a narrow exemption for such ads cannot be promulgated consistent with the Commission's authority under 2 U.S.C. 434(f)(3)(B)(iv)." *Id.* However, Requester submits that is not the case here. Requester's facts demonstrate that the absence of such an exemption results in unfair, unjust and unintended consequences.

The Commission should utilize its authority under BCRA and exempt commercial advertisements from the definition of electioneering communication for the simple reason that these communications do not promote, support, attack, or oppose a federal candidate.

For the reasons discussed herein, Requester's advertising falls within the ordinary course of its business, is commercial rather than political speech, does not reference or depict a clearly identified candidate for federal office and therefore should not be deemed to be an 'electioneering communication' within the meaning of the Act.

The fact that a company has the same name as a candidate for federal office should not be the determining factor to preclude the company from advertising its business in the same manner as it has for many years preceding the election and, presumably, will continue to do for many years thereafter. As long as the company makes no reference to the existence of the Candidate, his campaign, the election or any political or public policy issue but merely uses its own *company* name in its advertising, such references to the company should not automatically be deemed to be references to a candidate by the same name.



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Inasmuch as the primary election in Wisconsin is on September 14, 2004 and the thirty (30) day pre-primary blackout period for electioneering communications commences on August 14, 2004, Requester seeks the Commission's expedited review of this Advisory Opinion Request.

Please direct any additional questions or inquiries to the undersigned at the address on this letter or feel free to contact me by calling (202) 295-4081.

Thank you for your prompt consideration.

Sincerely,

A handwritten signature in cursive script that reads "Clea Mitchell".

Clea Mitchell, Esq.
Counsel for Russ Darrow Group, Inc.

Attachments

cc: Russ Darrow III, President
Russ Darrow Group, Inc.

CMI/sxc

A

**RUSS DARROW GROUP EMPLOYEES BY LOCATION
AS OF JULY 14, 2004**

Vehicle Stores	Number of Employees
Milwaukee Kia	48
Greenfield	67
West Bend	63
Appleton	106
Madison	101
Madison Chevy	17
Waukesha	83
Leasing	19
Cedarburg	54
Isuzu	29
Brown Door	132
Alpha	92
Byrider	<u>110</u>
	921
Mad-Chevy	50
RD Group	<u>30</u>
	1001

B

RUSS DARROW GROUP DEALERSHIP HISTORY

- 1965** Purchased first Chrysler-Plymouth dealership in West Bend, Wis.
- 1967** Purchased second Chrysler-Plymouth dealership in Appleton, Wis.
- 1970** Purchased third Chrysler-Plymouth dealership in Waukesha, Wis.
- 1972** Purchased fourth Chrysler-Plymouth dealership in Madison, as well as a Madison Nissan dealership.
- 1977** Purchased Gordie Boucher Lincoln-Mercury (sold 51% interest in Gordie Boucher Lincoln-Mercury to Mr. Boucher in 1981).
- 1985** Purchased import dealership in Racine, Wis., featuring Mercedes-Benz, BMW, Volvo, and Subaru (sold import dealership in 1989)
- 1988** Purchased Honda dealership in Mequon, Wis., and a Pontiac dealership in Cedarburg, Wis.
- 1990** Purchased Toyota dealership in West Bend, Washington County's first import dealership.
Purchased a Jeep/Eagle franchise, moving it to Chrysler-Plymouth Dodge dealership in West Bend.
- 1992** Purchased second Jeep/Eagle franchise, moving it to Pontiac and Chrysler-Plymouth dealership in Cedarburg.
- 1996** Purchased North Shore Dodge in Milwaukee and renamed it Darrow Dodge.
Opened new Toyota dealership facility in West Bend.
- 1997** Purchased Phil Tolkan Pontiac Nissan Isuzu.
Purchased Glenview Dodge in Glenview, Illinois.
Started CarNow Acceptance (CNAC) finance company.
Opened first JD Byrider/CNAC sales facility on North 76th St. in Milwaukee.
- 1998** Opened second JR Byrider/CNAC sales facility on South 27th St., in Milwaukee.
Russ Darrow Group had annual sales of \$645 million, was ranked 7th in the States "Top 100 Companies"; and was named Wisconsin's largest automobile dealer for the 11th year by Arthur Andersen & Co.
Russ Darrow Group ranks 20th in the country among mega dealers by Ward's Dealer Business Magazine.
Russ Darrow Group is included in Forbes magazine's annual list as number 284 of the "Top 50" largest privately held companies in the country.
Russ Darrow Group adds Kia franchises to its Appleton Chrysler-Plymouth and Milwaukee Pontiac, Nissan, Isuzu dealerships.
- 2000** Russ Darrow Group adds Kia franchise to Madison Chrysler-Plymouth-Jeep dealership

- 2001** New Corporate Office in Menomonee Falls, Wis.
JD Byrider franchises 5 & 6; Appleton & Oshkosh, Wis.
Suzuki franchise purchased Milwaukee, Wis.
New Nissan dealership – Milwaukee, Wis.
New Honda facility – Milwaukee, Wis.
Daewoo franchise Waukesha, Wis.
- 2002** New Mazda dealership – Greenfield, Wis.
Kia franchise, Oshkosh, Wis.
Suzuki franchise added – Greenfield, Wis.
- 2003** New Cadillac dealership – Waukesha, Wis.
Kia franchise, Waukesha, Wis.
- 2004** New Kia facility – Madison, Wis.
New Kia facility – Appleton, Wis.
Purchased Hub North Chrysler-Jeep – Milwaukee, Wis.
Purchased Lancaster Chevrolet – Madison, Wis.

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RUSS DARROW TOYOTA
:30 TV "Toyota Clearance"
Air Dates: July 2002
Spot #RDWBTV-019

<u>VIDEO</u>	<u>AUDIO</u>
<p>RD III On Camera CG: Russ Darrow, III</p> <p>CG: Toyota's Cost Less in West Bend</p> <p>CG: Russ Darrow Toyota Clearance '02 Toyota Camry Footage CG: 2002 Toyota Camry \$189 a month Due at start: \$3,690 Disclaimer A CG: Clearance Priced</p> <p>CG: Wisconsin's All-Time Sales Leader Disclaimer B</p> <p>Toyota Building Footage CG: Toyotas Cost Less In West Bend</p> <p>RD III On-Camera.</p>	<p>(RD III) Russ Darrow Toyota's '02 Clearance is the sale you've been waiting for! (:05)</p> <p>Toyota's cost less in West Bend – we'll prove it.</p> <p>Right now, lease the all-new 2002 Toyota Camry for just \$189 a month.</p> <p>This is the first time this Camry has been clearance-priced.</p> <p>Wisconsin's all-time sales leader has a special allocation of Toyotas, so hurry in for your best selection.</p> <p>We'll prove to you that Toyotas cost less in West Bend at Russ Darrow. (:17)</p> <p>(On-Camera) Only at Russ Darrow Toyota. (:03)</p>
<p>Logo Fly-In CG: Russ Darrow Toyota West Bend 262-334-9411 or 1-877-888-0777</p>	<p>(:03 Singout)</p>

Disclaimer A: \$3,000 down. Tax, title & license extra. 60 mo. lease \$3690 due at start. To approved credit. Not valid in conjunction with any other advertised offer.

Disclaimer B: Based on total automotive sales.

Russ Darrow Appleton/Oshkosh

"Job & \$99" (Full Line)

:30

DATV-052 Appleton/Oshkosh Version

Air Date: November, 2003

Video	Audio
<p>Appleton/Oshkosh Kia footage</p> <p>Quick cuts of Kia's</p> <p>CG: Job + \$99 down= Brand New Kia Disclaimer: \$99 down payment, 9.5% APR, 72 mos. Tax, title, license & service fee extra.</p> <p>Russ Darrow Logo CG: Wisconsin's #1 Kia Dealer Disclaimer A</p> <p>Rio Footage CG: \$7,676 Disclaimer B</p> <p>CG: Job + \$99 down = Brand New Kia CG: 10-year, 100,000 mile warranty Disclaimer: Limited powertrain warranty – see salesperson for details</p> <p>CG: 1-866-4-new-kia now</p> <p>ADD 'Make Every Mile Count' TO EACH TAG Russ Darrow Kia (Appleton/Oshkosh) College Avenue; Appleton Oshkosh Kia Outlet Center 2625 S. Washburn Street CG: 1-866-4newkia</p>	<p>(Tracy) Are you looking for a used car?</p> <p>Do you have a job? Do you have \$99? Then why buy a used car, when you can get a brand new Kia at Wisconsin's #1 Kia dealer, Russ Darrow Kia.</p> <p>Get a brand new Kia Rio starting at just \$7,676.</p> <p>All you need is a job and \$99. Call 1-866-4-new-kia to get a new Kia with a 10-year 100,000 mile factory warranty.</p> <p>A job & 99 dollars is all you need. Call 1-866-4-new-kia today!</p> <p>(:27)</p> <p>(Russ Darrow :03 singout)</p>

Disclaimer A: Based on '02 sales for all Russ Darrow Kia stores in Wisconsin.

Disclaimer B: All rebates applied. Not valid with other advertised offers. Tax, title, service fee & license extra. For qualified credit.

Russ Darrow Cadillac
:60 "Generic Version"
December 2003
RDC-004

RDIII	<p>Cadillac. Style luxury Hi, I'm Russ Darrow inviting you to visit Russ Darrow Cadillac in Waukesha. Where we uphold the Cadillac legacy of style, luxury and performance everyday. At Russ Darrow Cadillac, you'll find a huge selection of Cadillacs and receive award-winning service every time you bring your Cadillac in. Whether you're in the market for a classic sedan or SUV, you can be sure Russ Darrow Cadillac has it. And while shopping for your Cadillac, a single detail won't be missed. We know the importance of taking care of our customers. That's why you'll always find incredible service specials to help to maintain your Cadillac. When it comes to care for your Cadillac, you shouldn't settle for anything less than the best. We're Wisconsin's all-time sales leader and we want to be your Cadillac dealership. Stop into Russ Darrow Cadillac, on Highway 18 in Waukesha, and see what Cadillac style really is all about.</p>
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Russ Darrow Group
:30 "Minivan Madness"
Air Dates: July, 2004
RDCJDTV-004

Video	Audio
<p>RDIII on camera CG: RD Logo throughout spot CG: Russ Darrow, III (footage from 6/04 shoot)</p> <p>CG: Minivan Madness Sale '04 T&C/Caravan CG: 2004 Chrysler Town & Country 2004 Dodge Caravan CG: Closeout Priced</p> <p>CG: 2004 Dodge Grand Caravan \$6,000 Below Factory Invoice Disc.: Factory invoice may not reflect actual dealer cost due to holdbacks and incentives.</p> <p>2005 Chrysler Town & Country and Dodge Caravan Footage CG: 2005 Chrysler Town & Country CG: 2005 Dodge Caravan CG: Introductory Sale Priced Plus Factory Rebates Up to \$2000</p> <p>CG: Minivan Madness</p>	<p>(RDIII on camera:) <i>It's Minivan Madness at Russ Darrow.</i> (:03)</p> <p>(RDIII off camera):</p> <p>Right now, choose from hundreds of Town and Countrys or Caravans - closeout priced to move.</p> <p>Every remaining '04 Dodge Grand Caravan will be sold at \$6,000 below factory invoice.</p> <p>Every '05 minivan will be introductory sale priced to move – plus get factory rebates up to \$2,000.</p> <p><i>It's Minivan Madness.</i> (:21)</p> <p>(RDIII on camera): <i>Only at Russ Darrow Chrysler-Jeep-Dodge.</i> (:03)</p>
<p><u>CG: Russ Darrow Group Logo</u> CG: Chrysler Jeep Dodge 7676 North 76th Street Minutes From Anywhere</p>	<p>(:03 RD Sing-Out)</p>

**RUSS DARROW CHRYSLER :60 RADIO "TWO GIRLS REV 2" AIRS WEEK
OF 3/29
JOANNE/MITCH - FAST SALE - DCJTG329**

SFX: CAR WON'T TURN OVER, FRUSTRATED WOMAN SAYS, "OHhh", SHE GETS OUT OF CAR, SLAMS DOOR

SFX: TELEPHONE RINGS

GIRL 2: HI, I HATE TO ASK YOU AGAIN BUT, CAN YOU PLEASE PICK ME UP TODAY?

GIRL 1: LET ME GUESS, YOUR CAR WOULDN'T START AGAIN!

GIRL 2: YEAH!

GIRL 1: HOW LONG ARE YOU GOING TO WAIT UNTIL YOU GET A NEW CAR?

GIRL 2: WELL, I'VE BEEN SHOPPING AROUND BUT I HAVEN'T FOUND A GREAT DEAL.

GIRL 1: YOU HAVEN'T BEEN TO RUSS DARROW CHRYSLER-JEEP-DODGE

MALE ANNOUNCER IN:

MUSIC IN: FAST SALE

DON'T MISS THE 2004 SPRING CLEARANCE EVENT! AT WISCONSIN'S ALL-TIME SALES LEADER RUSS DARROW CHRYSLER JEEP DODGE WE PURCHASED ANOTHER DEALERS INVENTORY JUST FOR THIS EVENT! NOW The largest Chrysler-Jeep-Dodge inventory in Wisconsin IS BIGGER & BETTER THAN EVER! CHOOSE FROM OVER 1,000 NEW CHRYSLERS, JEEPS AND DODGES HUNDREDS OF '04 JEEP grand cherokees & LIBERTIES HUNDREDS OF '04 CHRYSLER AND DODGE MINIVANS! ALL AT THE LOWEST ADVERTISED PRICE ...GUARANTEED!SFX: ANVIL OR WE'LL GIVE YOU THE CAR FREE! plus, Get 0% long term financing PLUS the rebate! AT RUSS DARROW CHRYSLER JEEP DODGE 7676 N. 76th STREET IN BEAUTIFUL MILWAUKEE CALL 1-888-455-3000

DISCLAIMER: OFFERS WITH APPROVED CREDIT. YOU MUST PRESENT COMPETITOR'S AD FOR EXACT SAME VEHICLE AT TIME OF PURCHASE. NOT VALID WITH ANY OTHER OFFER.

**RUSS DARROW HONDA :60 RADIO "VEHICLE UPGRADE NOTICE" AIRS
WEEK OF 7/12**

PROPULSION - HONDA MUSIC - RDHVU712

**SFX: NEWS TELETYPE, WITH A SERIOUS SOUND EFFECT UNDER
ATTENTION LISTENERS IN MILWAUKEE AN OFFICIAL HONDA UPGRADE
NOTICE HAS BEEN ISSUED IN YOUR AREA: IF YOU'RE INTERESTED IN
GETTING OUT OF YOUR OLD CAR AND INTO A BRAND NEW HONDA PLEASE
BRING YOUR VEHICLE AND PAYMENT BOOK DIRECTLY TO RUSS SFX
DARROW SFX HONDA! SFX**

MUSIC IN:

**RUSS DARROW HONDA WILL TERMINATE YOUR CURRENT LEASE OR LOAN
ON THE SPOT, EVEN IF YOU OWE \$5,000 MORE THAN IT'S WORTH! AND GET
YOU INTO A BRAND NEW HONDA EVEN IF YOUR CREDIT IS LESS THAN
PERFECT! OR MAKE ABSOLUTELY NO PAYMENTS 'TIL JULY 2005! CHOOSE
FROM OVER 1,000 NEW AND PRE-OWNED HONDAS! AND RIP UP THE
STICKER! (PRONOUNCE CLEARLY) BECAUSE YOU NEVER, (SFX) PAY
(SFX) RETAIL (SFX) (PRONOUNCE CLEARLY) AT RUSS SFX DARROW SFX
HONDA! SFX BRAND NEW HONDA CIVICS JUST 99 A MONTH! BRAND NEW
HONDA ACCORDS JUST 149 A MONTH!**

MUSIC OUT:

HONDA UPGRADE EVENT! HUGE ECHO

MUSIC IN:

**WE'LL TERMINATE YOUR CURRENT LEASE OR LOAN EVEN IF YOU OWE
\$5,000 MORE THAN IT'S WORTH! AND GET YOU INTO A BRAND NEW
HONDA EVEN IF YOUR CREDIT IS LESS THAN PERFECT! OR MAKE
ABSOLUTELY NO PAYMENTS 'TIL JULY 2005! THIS WEEK ONLY AT RUSS
SFX DARROW SFX HONDA! SFX
ON BROWN DEER ROAD AT 91ST STREET,
CALL 866-260-4926**

**DISCLAIMER: TO QUALIFIED BUYERS, 36-MONTH LEASE, 2700 DOWN,
PLUS, FIRST MONTH, TAX, TITLE LICENSE & SERVICE FEE. CIVIC MODEL
ES1634W, ACCORD MODEL CM5514PLW, MANY TO CHOOSE.**

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RUSS DARROW GROUP, INC. DEALERSHIPS AND LOCATIONS

Dealers	Dealers
Russ Darrow Chrysler, Inc. d/b/a Russ Darrow Appleton Chrysler 2801 W. College Avenue Appleton, WI 54914	Russ Darrow Waukesha, Inc. d/b/a Russ Darrow Cadillac, Kia 2141/2145 E. Moreland Blvd. Waukesha, WI 53186
Russ Darrow Chrysler, Inc. d/b/a Russ Darrow Appleton Kia 2801 W. College Avenue Appleton, WI 54914	Russ Darrow Madison, Inc. 6525/6509 Odana Road Madison, WI 53719
Russ Darrow Inc. d/b/a Russ Darrow West Bend 2700 W. Washington St. West Bend, WI 53095	Russ Darrow 76 th Street Superstore, LLC d/b/a Russ Darrow Milwaukee Kia 8380 N. 76 th Street Milwaukee, WI 53224
Russ Darrow Colonial, Inc. d/b/a Russ Darrow Cedarburg W62 N190 Washington Avenue Cedarburg, WI 53012	Russ Darrow Colonial, Inc. d/b/a Russ Darrow Honda, Nissan, Suzuki 9201/9301 W. Brown Deer Road Milwaukee, WI 53224
Russ Darrow Dodge, Inc. d/b/a Russ Darrow Chrysler, Jeep, Dodge 7676 N. 76 th Street Milwaukee, WI 53224	Russ Darrow Chrysler, Inc. d/b/a Russ Darrow Oshkosh Kia 2625 S. Washburn Street Oshkosh, WI 54904
Russ Darrow Greenfield, LLC d/b/a Russ Darrow Mazda, Suzuki 3520 S. 108 th Street Greenfield, WI 53228	Russ Darrow Chevrolet of Madison, LLC 3502 Lancaster Drive Madison, WI 53718
Russ Darrow Colonial, Inc. d/b/a Russ Darrow Mequon Isuzu 7200 W. Mequon Road Mequon, WI 53092	

J. D. Byrider Locations	CNAC Locations
76 th Street	27 th Street
7776 N. 76 th Street	4810 S. 27 th Street
Milwaukee, WI 53223	Milwaukee, WI 53221
Appleton	Madison
2301 W. College Avenue	6509 Odana Road
Appleton, WI 54914	Madison, WI 53719