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To "coordinationshays3@fec.gov"
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cc
bcc
Subject Comments of Citizens United Regarding Proposed Rules on
Coordinated Communications

Dear Ms. Rothstein,

Attached please find the comments of Citizens United regarding the proposed rules on coordinated communications.

Sincerely,
Christian Berg

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Comments of Citizens United.pdf



March 16, 2010

Ms. Amy L. Rothstein, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**RE: COMMENTS OF CITIZENS UNITED REGARDING PROPOSED
CHANGES TO THE COORDINATED COMMUNICATIONS REGULATIONS
FOUND AT 11 CFR PART 109.**

Dear Ms. Rothstein:

We appreciate the additional opportunity to submit comments regarding the proposed changes to the coordinated communications regulations in light of the questions posed and testimony presented at the public hearings.

The views expressed at the public hearings and in submitted comments make clear the need for a dramatic overhaul of the regulations found at 11 CFR 109.21. At a minimum there is a dire need for a coordinated communications regulation that simplifies the current two-part, eleven-prong test, to a more practical and practicable standard. In light of the decision in *Citizens United v. Federal Election Commission* the need for a simplified test is of the utmost urgency.

Citizens United is a Section 501(c)(4) membership organization dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.

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Contributions or gifts to Citizens United are not tax deductible.

Citizens United is widely known for having produced popular and timely documentaries including *Celsius 41.11*, *Ronald Reagan: Rendezvous with Destiny*, *Perfect Valor* and *Hype: the Obama Effect*.

Citizens United, and its film *Hillary the Movie* were at the heart of the Supreme Court decision in *Citizens United v. FEC*. In restoring the free speech rights of corporate speakers the Supreme Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in its entirety, as well as that portion of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) that upheld the ban on corporate-sponsored electioneering communications. This decision will allow corporate speakers to exercise their right to free speech. These speakers are likely unfamiliar with the complex regulatory scheme that applies. Their speech may be chilled due to the overly and unnecessarily complex coordinated communications regulations.

This decision, like previous Supreme Court precedent, seeks to protect the Freedom of Speech.

“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People “of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926). The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.” *Citizens United*, Slip Op. at 7.

The Court has demonstrated a similar preference for the protection of speech when examining electioneering communications. In *Wisconsin Right to Life (WRTL)* the Court stated “in a debatable case, the tie is resolved in favor of protecting speech.” *FEC v. Wisconsin Right to Life*, 551 U.S. at 449, at 474; at n.7.

The goal of any regulation in this field should be to avoid chilling speech. These new entrants into the realm of political speech should not be forced to remain silent due to an overly complex and burdensome coordinated communication regulation. To facilitate the exercise of these First Amendment rights, Citizens United recommends revising the coordinated communications content standard to reflect the approach found in *WRTL*. Citizens United also recommends a series of practical additions and clarifications to the safe harbor provisions of 11 CFR 109.21.

THE CONTENT STANDARDS SHOULD BE REVISED AND SIMPLIFIED TO REFLECT THE WISCONSIN RIGHT TO LIFE FUNCTIONAL EQUIVALENT TEST

Potential speakers should not be required to enlist a phalanx of accountants and lawyers to determine whether they may release a communication. Unfortunately, this cannot be said of the current multi-factor content standard.

Every speaker should be able to look to a simple and direct standard to determine whether their speech is prohibited. In addressing a content standard the standard which has historically been clearest and most practicable is the “magic words” test found in footnote 52 of *Buckley*.

The “magic words” test is easiest for potential speakers because one can clearly identify whether “communications contain express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Buckley v. Valeo*, 424 U.S. 1, at 44; at n.52.

In *WRTL* the Supreme Court expanded upon this standard and crafted a “test [that] affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate.” 551 U.S. at 474; at n.7. In crafting such a test, the Court emphasized the need for a clear standard. *See id.*

After a thorough review of the alternatives presented by the FEC, Citizens United is of the opinion that a modified *WRTL* standard is the most appropriate content standard to apply in making a determination regarding coordinated communications. This is due to the need for a clear, practicable standard, which can be understood by a person of reasonable intelligence without employing an army of attorneys and accountants.

Citizens United would like to raise a strenuous objection to the proposed Promote, Attack, Support, or Oppose (“PASO”) standard. This standard is far too vague to provide meaningful guidance to potential speakers. The breadth of the terms promote, attack, support, and oppose also pose a serious danger of allowing the test to devolve into a mere reference based standard. This is clearly at odds with the intent of the underlying law and precedent.

**ADDITIONAL SAFE HARBOR PROVISIONS ARE NECESSARY
TO PROTECT NEWLY RESTORED FIRST AMENDMENT RIGHTS
PROTECTED UNDER *CITIZENS UNITED V. FEC***

In addition to the general need for a less subjective content test, Citizens United would like to comment on issues of particular importance and consequence to our organization, and similarly situated organizations: (1) Clarification that the coordinated communications regulations are not meant to pertain to the development and promotion of documentary films which may feature current or prospective office holders discussing or advocating policy positions; (2) that the action of requesting and taking action to obtain the endorsement of an organization or corporation does not bring an organization within the specter of the coordinated communications regulation.

1. The appearance of a candidate in a documentary film discussing policy ideas or positions should not be considered a coordinated communication.

The proposed safe harbor provisions which would allow a candidate to express or seek “non-monetary support for an organization’s mission, or for a legislative or policy initiative supported by [a 501(c)(3)] organization” do not go far enough.

Citizens United makes popular and timely documentaries regarding policy issues of importance to the American public. In seeking to provide timely and relevant content oftentimes reporters, politicians, and other opinion leaders are invited to appear in our films.

In 2006, Citizens United released the film *Border War*. *Border War* took a critical look at the impact of illegal immigration by documenting the lives of individuals personally impacted. Arizona Congressman J.D. Hayworth had previously released a book on the problems and challenges of illegal immigration and the urgent need for reform entitled *Whatever it Takes*. In light of this expertise and study of the subject Congressman Hayworth was invited to participate in the film *Border War*. Currently J.D. Hayworth is seeking election to the United States Senate.

Citizens United’s latest film, *Generation Zero*, takes an in depth and thoughtful look at the societal and cultural attitudes which caused the current financial crisis. Economists, reporters, and politicians participated in the film. Featured among the expert cast are Michael Barone, Lou Dobbs, John Fund, Former Speaker of the House of Representatives Newt Gingrich, Lawrence Kudlow, and Congressman Thaddeus McCotter.

In seeking to bring informative and relevant material to the viewing public Citizens United, like any media organization, must interview not only policy commentators but also policy makers, including current and aspiring office holders. A safe harbor provision must be adopted to protect such speech, regardless of the corporate form that an entity organizes under.

2. Due to the decision in *Citizens United v. FEC* candidates should be free to seek the endorsement of corporations or non-profit organizations, as well as provide information on their policy positions without triggering the ban on coordinated communications.

In *Citizens United*, the Supreme Court showed the fallacy of distinguishing between media corporations and other corporate speakers:

“media corporations accumulate wealth with the help of the corporate form, the largest media corporations have “immense aggregations of wealth,” and the views expressed by media corporations often “have little or no correlation to the public’s support” for those views.” *Citizens United*, Slip Op. at 35.

The Court further reasoned:

“So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.” *Citizens United*, Slip op. at 36-37.

In light of the Supreme Court erasing the unfair distinction between types of corporate speakers, the FEC should clarify its regulations to make clear that the action of a candidate requesting an endorsement, and providing information on their legislative and policy preferences by filling out a candidate questionnaire would not trigger the coordinated communications regulations.

Much like a candidate or office holder may seek the endorsement of the *Washington Post* or *New York Times* without fear of running afoul of the coordinated communications regulations a candidate should be able to seek the endorsement of non-profit or other forms of corporations.

Currently 11 CFR 109.21(f) provides a “[s]afe harbor for responses to inquiries about legislative or policy issues. 11 CFR 190.21(g) provides a “[s]afe harbor for endorsements and solicitations by Federal candidates.” In light of the decision in *Citizens United*, these provisions should be expanded to explicitly protect such interactions between candidates and corporations.

Candidates should be free to seek the endorsement of corporations and non-profit organizations, as well as be able to respond to the organizations regarding their legislative and policy preferences, without running afoul of the regulations.

The proposed reforms set forth in this comment are designed to reduce the barriers to entry into the arena of political speech. As the Supreme Court has made clear, the exercise of this fundamental right should not be unduly burdensome, complicated, or necessitate the employment of lawyers and accountants.

Thank you for the opportunity to submit these comments in support of clarifying and amending the unnecessarily complex coordinated communications regulations. Should you have any questions regarding our comments or suggested regulatory amendments please do not hesitate to contact me.

Sincerely,

Michael Boos
Citizens United
Vice President & General Counsel

R. Christian Berg
Citizens United
Assistant General Counsel