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September 28, 2005

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
SEP 29 10 21 48

Mai T. Dinh
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Proposed Electioneering Communications Rules

Dear Ms. Dinh:

Enclosed for the Commission's consideration are the Comments of Citizens United concerning the proposed Electioneering Communications rules. In particular, our comments focus on the proposal to exempt advertisements for movies, books and plays. As we note on page 4 of our comments, we request that Citizens United President be permitted to testify at the Commission's hearing on October 19, 2005. Please contact me if you should have any questions concerning the enclosed comments or the request that David Bossie be permitted to testify on Citizens United's behalf on this matter. Thank you.

Very Truly Yours,

Michael Boos
Vice President &
General Counsel

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF: :
 :
ELECTIONEERING COMMUNICATIONS : **NOTICE 2005-20**
_____ :

COMMENTS OF CITIZENS UNITED

CONCERNING PROPOSED EXEMPTION FOR ADVERTISEMENTS

PROMOTING MOVIES, BOOKS AND PLAYS

**SUBMITTED BY MICHAEL BOOS
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SEPTEMBER 28 , 2005**

INTRODUCTION

Citizens United submits the following comments in response to the Federal Election Commission's ("Commission's") Notice of Proposed Rulemaking ("NPRM"), which, among other things, seeks input from the public on a proposed rule to exempt broadcast advertisements for movies, books and plays from the definition of "electioneering communications." *See* Notice of Proposed Rulemaking, 70 Fed. Reg. 49,508, 49,513 – 49,514 (August 24, 2005).

Citizens United is a non-profit membership organization that is exempt from taxation under Section 501(c)(4) of the Internal Revenue Code. The organization is dedicated primarily to principles of limited government, national sovereignty and rights secured under the United States Constitution. Citizens United uses a variety of formats to present its views and the views of its members on legislative and public policy issues to federal, state and local government officials, and the general public. Channels of communication frequently employed by the organization include direct mail, documentary films, handbills, internet, television, radio, print publications, court briefs and public forums.

With the exception of communications paid for by Citizens United Political Victory Fund (a separate segregated fund of Citizens United, which is registered with the Commission as a Federal political committee), Citizens United does not expressly advocate the election or defeat of candidates for elective office in its communications with the public. Nevertheless, the organization's public communications, including

documentary films and broadcast advertisements, often refer to public officials and candidates for elective office, including Federal candidates.

In 2004, Citizens United produced the documentary film *Celsius 41.11: The Temperature at Which the Brain Begin to Die*.¹ The film was billed as a conservative response to Michael Moore's movie, *Fahrenheit 9/11*, and it included interviews, images, sound bites and/or commentary from a number of elected officials including, among others, President George W. Bush and Senator John Kerry.

Celsius 41.11 was released theatrically in October 2004, and played in approximately 120 theatres across the country during the final two weeks preceding the 2004 general elections. The film was concurrently released (and is still available) in DVD format.

As discussed below in greater detail, television advertisements for *Celsius 41.11* were initially produced to include brief images and sound bites of President Bush and Senator Kerry. Before airing, however, the advertisements had to be altered by removing those images and sound bites in order to comply with the Commission's electioneering communications rules. We believe those changes would have been unnecessary if, at the time, the Commission had in place an appropriate rule exempting broadcast advertisements for movies, books and plays from the definition of electioneering communications.

¹ This month, Citizens United and its sister organization Citizens United Foundation released a new documentary film entitled *Broken Promises: The United Nations at 60*. This 65 minute film is narrated by actor Ron Silver and includes interviews with several members of the U.S. House of Representatives who are likely candidates for re-election in 2006. A full listing of persons appearing in the film is available at the web-site www.brokenpromisesmovie.com.

DISCUSSION & ANALYSIS

Citizens United applauds the Commission for proposing to exempt broadcast advertisements for movies, books and plays from the definition of electioneering communications. We were one of the organizations that encouraged the Commission to act favorably on the rulemaking petition that prompted the Commission to publish a Notice of Availability in August 2004. Moreover, we were the commenter that urged the Commission to propose an exemption for all films, books and plays regardless of whether the work is “political” in character, and we are quite pleased to see that the Commission’s proposal incorporates that suggestion.

Pursuant to the NPRM, we hereby request that David N. Bossie, President of Citizens United, be permitted to testify at the Commission’s hearing on the proposed rules on October 19, 2005.

In the NPRM, the Commission seeks comment on a number of specific issues relating to the scope of the proposed exemption. Before addressing those issues we offer the following alternative for exempting advertisements for movies, books and plays.

Alternative Suggestion

As an alternative to the proposal set forth in the NPRM, Citizens United urges the Commission to adopt a rule that (1) formally recognizes that movies, books and plays fall within the news media exemption, and (2) formally recognizes that broadcast advertisements for movies, books and plays also fall within the news media exemption.²

² The Commission’s authority to adopt such a rule is set forth at 2 U.S.C. § 437d(a)(8)(“The Commission has the power . . . to develop such prescribed forms and to make , amend and repeal such rules, pursuant to the provisions of chapter 5 of title 5,

In making this suggestion, we note that the Commission, in its explanation and justification for its electioneering communications rules, stated that it recognizes documentaries and educational programming as falling within the scope of the media exemption. See Explanation and Justification for Electioneering Communications, Final Rules, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002) (“The Commission interprets ‘news story, commentary, or editorial’ to include documentaries and educational programming in this context.”). But two summers ago, the Commission created considerable confusion as to whether broadcast ads for documentary films also fall within the scope of that exemption. On June 25, 2004, the Commission concluded that broadcast advertisements for documentary films qualify as electioneering communications, but declined to address whether the news media exemption applied to such ads. AO 2004-15. About three months later, the Commission concluded that proposed television advertisements for *Celsius 41.11* would not qualify for the media exemption because, among other things, the ads “would not ‘appear in a news story, commentary, or editorial.’” AO 2004-30 (Sept. 10, 2004) at 7.

In our view, the position taken by the Commission in AO 2004-30 is wrong and cannot be reconciled with rationale of *Federal Election Commission v. Phillips Publishing, Inc.*, 517 F.Supp. 1208 (DDC 1981). In *Phillips Publishing*, the U.S. District Court for the District of Columbia held that advertising for a newsletter falls squarely within the scope of the news media exemption because such advertising is as much a functional activity of the news media as is the reporting of news or publishing of commentary or editorials.

United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26.”

Since the Commission already recognizes documentary films as falling within the news media exemption, we believe the appropriate course of action in the pending matter would be adoption of a formal rule extending the news media exemption to include all movies, books and plays, as well as advertising for these works.³ As discussed in greater detail below, we believe that this would be a better course of action than creating a new category of exemption under 2 U.S.C. § 434(f)(3)(B)(iv).

Specific Issues Raised By The NPRM

In the discussion that follows, we address various issues raised by the Commission in the NPRM.

Issue No. 1: Should the exemption for movie advertisements apply only to movies appearing in theatres, or should it also apply to movies available for rental on DVD or video, or available on pay-per-view? Similarly, should the exemption for books apply only to printed books or should it also apply to books that are made available in audio and on-line formats?

Comments: The exemption for movies and books should apply irrespective of the format or venue in which a movie or book is released. While Citizens United has not tracked data relating to book sales, our research indicates that many documentary films either do not play in movie theatres or their theatrical release is limited to film festivals and/or promotional showings. For many documentaries, video sales and/or rentals account for the bulk – if not all -- of the film's gross receipts. We believe that limiting the exemption to only those films with a theatrical release would provide the producers

³ In Advisory Opinion 2004-30, then-Chairman Bradley A. Smith issued a Concurring Statement of Reasons warning that book publishers and authors may be at risk of enforcement action by the Commission if the news media exemption continues to be narrowly construed. To assuage these concerns we urge adoption of a rule that includes not only advertising, but also the underlying works within the scope of the exemption.

and promoters of theatrical films with an unfair competitive advantage over the producers and promoters of non-theatrical productions.

According to the website boxofficemojo.com, which tracks box office movie receipts, two-hundred and sixty-eight domestically produced documentary films were theatrically released in the United States from 1982 through mid-August 2005.⁴ Forty-six of those documentaries have been categorized by the website as political documentaries and eighteen of the political documentaries were released in 2004.⁵

In rank, according to box-office receipts, the theatrically released 2004 political documentaries were: (1) *Fahrenheit 9/11*; (2) *The Corporation*; (3) *Control Room*; (4) *Going Upriver: The Long War of John Kerry*; (5) *Outfoxed: Rupert Murdoch's War on Journalism*; (6) *The Hunting of the President*; (7) *The Yes Men*; (8) *Uncovered: The War on Iraq*; (9) *Bush's Brian*; (10) *Howard Zinn; You Can't be Neutral on a Moving Train*; (11) *In the Face of Evil: Reagan's War in Word and Deed*; (12) *Celsius 41.11: The Temperature at Which the Brain Begins to Die*; (13) *Voices of Iraq*; (14) *Tying the Knot*;

⁴ See www.boxofficemojo.com/genres/chart/?id=documentary.htm.

⁵ See www.boxofficemojo.com/genres/chart/?id=politicaldoc.htm. Our analysis focuses on political documentaries because one would expect a significant number of films falling within that genre to include references to Federal candidates. We note, however, that political documentaries are not the only category of films that may be affected by the rule. For example, prior to their election to Federal office, President Ronald Reagan and former U.S. Senator Fred Thompson had long and distinguished acting careers. Moreover, two sitting U.S. Senators – George Allen of Virginia and Robert Byrd of West Virginia – appeared in acting roles in the 2003 box-office drama, *Gods and General*.

(15) *Weapons of Mass Deception*; (16) *Orwell Rolls in His Grave*; (17) *Brothers in Arms*; and (18) *Persons of Interest*.⁶

But many of 2004's political documentaries were not released at the box office. Examples include: *Stolen Honor: Wounds That Never Heal*; *Bush Family Fortunes – The Best Democracy Money Can Buy*; *George W. Bush: Faith in the White House*; *Running Against Dick*; *The Wit and Wisdom of George W. Bush*; *The Man Who Knew Bush*; *Road to the Presidency*; *Unconstitutional – The War On Our Civil Liberties and Fahrenheit 9/11*. Each of these films is marketed for sale in DVD format.⁷

In Citizens United's view there is no rational basis for denying the promoters of the aforementioned non-theatrical films an exemption from the electioneering communications rules, while granting an exemption to the promoters of theatrical films. Such a limitation makes no more sense than limiting the news media exemption to print media, while denying it to broadcast media. The Commission should not put itself in the position of providing the producers and promoters of theatrical films with a competitive advantage over their competitors in the DVD, video or pay-per-view marketplace. Also, while we have not examined any market data on books, we do not believe that there is any legitimate basis for the Commission to allow the exemption for publishers and distributors of print books, while denying it for the publishers and distributors of audio

⁶ This information was derived from the release dates and box office sales for the political documentaries listed at www.boxofficemojo.com/genres/chart/?id=politicaldoc.htm.

⁷ As of the filing of these comments, each of these films remained available for purchase in DVD format on the web-site www.amazon.com. Some of the films may also be available for sale in videocassette and some may be available on the video rental or pay-per-view market, but we have not been able to confirm such availability.

and on-line books. In our opinion, the exemption should be applied without reference to the format or market in which a film or book is released.

Issue No. 2: Should there be a temporal limitation on the exemption, which is based on the actual or projected release date of the movie, book or play?

Our primary concern with a temporal limitation on the exemption centers on the practicalities of applying such a limitation. One cannot predict with any level of certainty the marketing life-span of any movie, book or play. Some works are successfully marketed for years, even decades, while others quickly fizzle out. Moreover, many of the more successful theatrical films are not released in DVD and video format for many months or even years after the theatrical release.⁸ While the theatrical and DVD release dates of *Celsius 41.11* were simultaneous, it is more typical for the DVD or video release date to follow the theatrical release date by at least a few months. For example, the DVD release for *Fahrenheit 9/11* did not occur until almost three months after the film opened in theatres.⁹ Also, the box-office drama, *Gods and Generals*, which included acting performances by U.S. Senators George Allen and Robert Byrd, was theatrically released in February 2003, but did not become available in DVD and video until February 2005.¹⁰ The bottom line is that some movies (and presumably some books and plays) will continue to be advertised for a long time after their initial release date, while others will

⁸ An extreme example would be *Gone with the Wind*, which was theatrically released in 1939. According to the web-site www.amazon.com, the movie first became available in video in 1998 but was not released in DVD format until June 7, 2005.

⁹ According to the website www.boxofficemojo.com, *Fahrenheit 9/11* was theatrically released in the United States on June 23, 2004. The web-site www.amazon.com reports that the film was released on DVD on September 6, 2004.

¹⁰ See www.boxofficemojo.com and www.amazon.com for additional information on this film.

not. Any temporal limitation on the exemption would need to account for these factors to ensure that the exemption continues to apply throughout the marketing life-span of the work being advertised. Given the nature of this concern, we have strong doubts as to whether it is practical for the Commission to impose a temporal limitation on the exemption.¹¹

Issue No. 3: To whom should the exemption apply?

Citizens United believes the exemption should apply broadly to any entity that produces, owns or markets a film, book or play. We have major concerns with how a rule that limits the exemption to only those entities that promote movies, books or plays “within the ordinary course of business of the person that pays for such communication” will be applied.

Last year, in Advisory Opinion 2004-30, the Commission concluded that the news media exemption would not apply to television advertising for *Celsius 41.1* based in part on the Commission’s belief that Citizens United did not “regularly produce documentaries or pay to broadcast them on television.”

While *Celsius 41.11* was the first film that Citizens United advertised on television, it was not the first documentary film produced and marketed by the organization. In the mid-1990s Citizens United produced and marketed a documentary film entitled *Sinister Secrets of the U.N.* A few years later, Citizens United’s sister organization, Citizens United Foundation produced and marketed the documentary film entitled *Confidential Report: Bill Clinton, Al Gore and the Communist Chinese*

¹¹ We note further that no temporal limitation has been imposed on the news media exemption, which, as we indicate throughout these comments, is our preference for exempting advertising for movies, books and plays.

Connection. This month, Citizens United and Citizens United Foundation jointly released *Broken Promises: The United Nations at 60*. Other films are planned for the months ahead.

In the past two years, Citizens United has spent close to \$2.3 million on the production and marketing of documentary films. *Celsius 41.11* cost approximately \$1.8 million to produce and market. Thus far, Citizens United and Citizens United Foundation have spent about \$500,000 to produce and market *Broken Promises*. We anticipate spending well in excess of \$1 million producing and promoting documentary films in 2006.

Under the proposed exemption, at what point would Citizens United qualify as promoting films in the ordinary course of its business? Is it sufficient that the organization has previously produced and promoted one documentary on television to qualify for the exemption? Or does the proposed exemption require the promotion of multiple films on television or in other broadcast formats? If so, how many films need to be promoted in this manner, and how much needs to be spent, and over what period of time, in order to qualify for the proposed exemption?

Given the resources Citizens United has devoted to producing and promoting multiple documentary films over the past couple of years, coupled with the organization's future plans, we believe the organization would qualify as promoting films in the ordinary course of its business. But we took a similar position prior to the release *Celsius 41.11*, only to have the Commission conclude otherwise in Advisory Opinion 2004-30. As a consequence, we believe we are justifiably concerned over how the "ordinary course of business" requirement will be applied by the Commission and/or the courts. In our

view, this limitation is far too susceptible to subjective interpretation and we urge the Commission to eliminate it from the rule altogether.

Issue No. 4: Must or should the Commission limit the exemption to only those advertisements that do not promote, support, attack or oppose a Federal candidate?

If the Commission follows the course of action that we have suggested (*i.e.* adopt a rule recognizing advertising for films, books and plays as falling within the scope of the news media exemption), it would not be under a statutory obligation to limit the scope of the proposed exemption to only those advertisements that do not promote, support, attack or oppose (“PASO”) a Federal candidate. The news media exemption has been consistently recognized to apply irrespective of whether the communication PASO’s a Federal candidate. *See e.g., Phillips Publishing*, 517 F.Supp. 1308 (DDC 1981).

Furthermore, the provision in 2 U.S.C. § 434(f)(3)(B)(iv), which limits the Commission’s authority to adopt additional exemptions to only those communications that do not PASO a Federal candidate, is inapplicable to a rulemaking that clarifies the scope of the news media exemption. By its plain and clear language, the limitation imposed by subparagraph (iv) of 2 U.S.C. § 434(f)(3)(B) applies only to rulemakings that seek to exempt communications falling outside the scope of the statute’s enumerated exemptions. Subparagraph (iv) does not impose any limitation on the Commission’s authority to make rules relating to the specific exemptions enumerated in subparagraphs (i), (ii) and (iii) of the statute. The news media exemption is an enumerated exemption, set forth in subparagraph (i). Therefore, a rule recognizing movies, books and plays, and advertising for these works, as part of the news media exemption is not subject to the non-PASO requirement for exemptions created under subparagraph (iv) of the statute.

Since the Commission has already concluded that documentary films and similar educational programming fall within the scope of the news media exemption, it makes eminent sense to adopt an exemption for advertising for such films, as well as for books and plays, as part of that exemption. As noted in footnote 2 of these comments, 2 U.S.C. § 437d(a)(8) clearly vests the Commission with the authority to make such a rule.

If, on the other hand, the Commission were to act under 2 U.S.C. § 434(f)(3)(B)(iv) and limit the exemption to only those advertisements that do not PASO a Federal candidate, such action would raise significant First Amendment and Equal Protection issues because advertising for other press functions, such as newspapers, magazines and network news programs, would remain exempt under the news media exemption where the advertising would not be subject to a requirement that broadcast ads not PASO a Federal candidate.¹²

We also believe there are practical limitations on the Commission's ability to differentiate between advertising that PASO's a Federal candidate and advertising that does not. Unlike ads that expressly advocate the election or defeat of a candidate, it can be quite difficult to discern when an ad promotes, supports, attacks or opposes a candidate.

Citizens United had planned to air a television commercial for *Celsius 41.11* in October 2004 that included brief images and sound bites of President Bush and Senator John Kerry. As originally produced, the ad showed Senator Kerry addressing the Democratic National Convention as he uttered the following words concerning future

¹² Given the zeal with which CBS News promoted its now discredited story on President Bush's Air National Guard records in September 2004, one cannot rationally conclude that the so-called mainstream media is less likely to PASO a Federal candidate in its broadcast advertising than the promoters of a movie, book or play.

terrorist attacks on the United States: “Any attack will be met with a swift and certain response.” President Bush was shown addressing a joint session of Congress on the same topic, as he said: “Time is not on our side. I will not wait on events while dangers gather.” We believe these images and sound bites, which were removed from the *Celsius 41.11* ad prior to airing, would meet the proposed requirement that references to a Federal candidate not PASO the candidate. But we must acknowledge that others might disagree because reasonable persons can reasonably disagree as to whether an ad PASO’s a candidate.

In view of the factors addressed above, we urge the Commission not to include a requirement that broadcast ads not PASO a Federal candidate. The Commission clearly has the authority to act in such a manner if it exempts advertising for movies, books and plays as part of the media exemption. And we urge the Commission to act accordingly.

Issue No. 5: What impact, if any, did the electioneering communications rules have on broadcast advertising for movies, books and plays during the 2003 – 2004 election cycle?

The electioneering communications rules detrimentally impacted Citizens United’s ability to air broadcast ads for its documentary film *Celsius 41.11*, and they prevented us from airing broadcast ads to promote the book titled *The Many Faces of John Kerry: Why This Massachusetts Liberal Is Wrong for America*, which was authored by our president, David N. Bossie. We also believe the rules prevented the promoters of *Fahrenheit 9/11* from continuing to air broadcast ads for that film during the nationwide electioneering communications blackout period that lasted from July 31, 2004 through November 2, 2004.

As we mention above, Citizens United had planned to air a television commercial for *Celsius 41.11* in October 2004 that included brief images and sound bites of President Bush and Senator John Kerry. We do not believe the words and images that were removed from the ad PASOed either candidate. But the removed content nevertheless would have qualified the ad as an electioneering communication under the Commission's existing rules because mere reference to a clearly identified Federal candidate is sufficient to meet the content requirements of the electioneering communications rules. *See* 11 CFR § 100.29(a)(1).

In light of the ban on corporate expenditures for electioneering communications, *see* 11 CFR § 114.2(b)(2)(iii), coupled with the Commission's determination in Advisory Opinion 2004-30 that the media exemption would not apply to Citizens United's airing of the ad, the organization was forced to alter the ad's content by removing all references to Senator Kerry and President Bush.¹³

The electioneering communications rules also forced Citizens United abandon its plans to air a broadcast commercial urging the public to purchase copies of the book *The Many Faces of John Kerry*. Merely showing the book cover in an ad would have qualified it as an electioneering communication if the ad had been broadcast during the nationwide blackout period from September 3, 2004 through November 2, 2004. Besides the reference to Senator Kerry in the title, the book cover included three photographs of the senator.

¹³ Although Citizens United is organized as a Section 501(c)(4) tax-exempt organization it does not qualify as a Qualified Non-Profit Organization under the Commission rules because it accepts corporate support. *See* 11 CFR § 114.10

Finally, we note that the promoters of the film *Fahrenheit 9/11* removed their broadcast ads from the airwaves during the electioneering communications blackout period. In responding to MUR 5467, counsel for the film's promoters stated:

The distributors of the Film . . . had made a business determination as part of the marketing plan for the Film **and with a view to the legal landscape** that, along other things, no funds would be expended for paid advertisements over broadcast, cable, or satellite that would refer to clearly identified candidates for federal office during the period after July 30, 2004 and through November 2, 2004.

Response to Complaint of Lions Gate Entertainment Corp., *et al.*, MUR No. 5467 (July 15, 2004 at 2 (emphasis added). The time frame referred to in the response coincided precisely with the national blackout period for ads referring to President Bush, which began thirty days prior to the Republican National Convention and ran through election day.

It is therefore quite clear that the advertising campaigns for the films *Celsius 41.11* and *Fahrenheit 9/11*, and the book *The Many Faces of John Kerry*, were adversely affected in 2004 by the electioneering communications rules currently in place.

CONCLUSIONS

As stated at the outset of these comments, Citizens United applauds the Commission for proposing to exempt advertising for films, books and plays from the definition of electioneering communications. But we suggest the Commission follow a somewhat different approach than the proposal set forth in the NPRM. Specifically, we urge the Commission to adopt a rule that (1) formally recognizes films, books and plays as falling within the scope of the news media exemption, and (2) provides that broadcast advertising for such works also falls within the media exemption. We also urge the Commission to eliminate the proposed requirement that the exemption apply only to