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Hand Delivery

September 27, 2004

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Federal Election Commission
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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
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Re: Comments on Rulemaking Petition Concerning Proposed
Documentary Film Advertising Exception to the Term "Electioneering
Communications"

Dear Mr. Deutsch:

Citizens United submits the following comments in response to the Petition for Rulemaking from Robert F. Bauer, which asks the Federal Election Commission ("Commission") to revise its regulations by exempting the promotion of political documentary films, books, plays and other forms of political expression from the term "electioneering communications."

Summary of Comments

Citizens United urges the Commission to initiate a rulemaking on "electioneering communications" that is somewhat broader than the rulemaking requested by Mr. Brauer. We do not believe the rulemaking should be limited to films, books, plays and other forms of expression that are "political" in character. Rather, we urge the Commission to open a rulemaking to exempt advertising for documentary films, books, plays and other forms of expression, irrespective of whether the works are considered "political." In addition, Citizens United calls on the Commission to initiate a rulemaking to exempt documentary films and similar cinematic works from the term "electioneering communications."

Background

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 considers itself part of the

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news media, and it employs 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. Frequently employed modes of communication include direct mail, handbills, internet, documentary films, paid television and radio commentaries, print publications, court filings and public speaking forums.

Recently, Citizens United requested and received an advisory opinion from the Commission concerning the application of the term "electioneering communications" to the organization's plans to buy television time to air a documentary film that included images of and references to presidential candidate John Kerry and other Federal candidates. The advisory opinion request and opinion issued by the Commission also concerned plans to advertise the film and a book about Mr. Kerry on television and radio. The Commission concluded that the film and advertising for both the film and book would qualify as "electioneering communications," and that none of the exemptions to the term applied.¹ See Advisory Opinion 2004-30.

In addressing the application of the media exemption to Citizens United's film the Commission backpedaled from its earlier position that the phrase "news story, commentary and editorial" includes documentaries, see Explanation and Justification for Electioneering Communications, Final Rules, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002), stating instead, "not every 'documentary' is entitled to the EC media exemption." AO 2004-30 at 7 (emphasis in original). The analysis that followed concluded that Citizens United's film was not entitled to the media exemption because it was more akin to the "Special Edition" publication addressed by the Supreme Court in Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986), than a true news media production.

The Commission further concluded that advertisements for the film would not qualify for the media exemption because: (1) the ads "would not 'appear in a news story, commentary, or editorial,'" and (2) since it had concluded that the film was not entitled to the media exception, "Citizens United's advertising of the Film cannot be considered part

¹ In June, the Commission reached a similar conclusion with respect to advertising for a documentary film that was to be marketed by David T. Hardy and the Bill of Rights Educational Foundation, but declined to address whether the media exemption was applicable to the proposed advertising. See Advisory Opinion 2004-15. The Commission also recently declined to address the scope of the media exemption in an enforcement matter involving Michael Moore's film, Fahrenheit 9/11. See First General Counsel's Report, MUR 5467, (Michael Moore, Lion's Gate, et al.) July 22, 2004.

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of a 'normal, legitimate [media] function.'² AO 2004-30 at 7-8 (quoting Federal Election Commission v. Phillips Publishing, Inc., 517 F.Supp. 1380, 1313 (D.D.C. 1981)).

In Comments filed with the Commission prior to its issuance of the advisory opinion, Citizens United took issue with the then proposed conclusions and rationale underlying the conclusions. The comments questioned whether an advisory opinion was the appropriate forum in which to alter the Commission's previous bright line recognition that documentaries fall within the scope of the media exemption. Citizens United also emphasized that its governing documents and 16 year record of activities establish that it is a media entity and is acting in a media capacity with respect to its film. The comments pointed out that the organization's purposes of "informing and educating the public" are consistent with U.S. Supreme Court precedent recognizing such activity as the key component to the news media's "unique role" in America. Compare Austin v. Michigan Chamber of Commerce, 494 US. 652, 667 (1990), with Citizens United Articles of Incorporation, Art. II.A. The comments also included a sampling of media activities undertaken by Citizens United, including, among other thing, the production and distribution of earlier documentary films.

The organization's comments and objections notwithstanding, the Commission adopted the adverse advisory opinion, which seeks to distinguish Citizens United's press activities from similar activities by the institutional media on grounds that Citizens United "does not regularly produce documentaries or pay to broadcast them on television." AO-2004-30 at 7. Among other things, the Commission stated:

Indeed, the very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster, is one of the 'considerations of form that can help to distinguish an electioneering communication form exempted media activity.'³

Id.

² The Commission concluded that advertising for the book about John Kerry would not qualify for the media exemption for similar reasons. See AO 2004-30 at 6.

³ One week after the Commission issued the advisory opinion to Citizens United, the U.S. District Court for the District of Columbia struck down the portion of the Commission rules requiring the payment of "a fee" in order to qualify a communication as an electioneering communication. The court stated that the rule's blanket exemption for unpaid broadcast communications "cannot be squared with the plain meaning of [the Act's] text." Shays and Meehan v. FEC, Civ. Act. 02-CV-1984 (D.D.C. Sept. 18, 2004) slip op. at 153-1524.

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Although he voted to adopt the advisory opinion, Chairman Bradley A. Smith wrote a separate "Concurring Statement of Reasons," in which he questioned the appropriateness of the current narrow interpretation of the media exemption.⁴ Noting that the language of the media exemption for electioneering communications parallels the Federal Election Campaign Act's ("Act") general media exemption, Chairman Smith pointed out that books and other works are not specifically exempted from Act under the general press exemption. Thus, he warns:

[U]nder a narrow approach, it may be that the publication and promotion of a number of popular books are vulnerable to a similar result, for instance Bill Press, Bush Must Go: The Top Ten Reasons Why George Bush Doesn't Deserve a Second Term (Dutton Books), or John E. O'Neill and Jerome R. Corsi, Unfit for Command: Swift Boat Veterans Speak Out Against John Kerry (Regnery Publishing). These could be subject to government regulation (and potentially suppression) under the campaign finance laws, because they appear to expressly advocate the defeat of a clearly identified federal candidate, and are produced and promoted by corporations. Books by politicians could meet the same fate. See Howard Dean, Winning Back America (Simon and Schuster); John F. Kerry, A Call to Service: My Vision for a Better America (Viking). The same could be said of politically charged documentaries – to the extent they expressly advocate the election or defeat of a candidate for federal office, their production and promotion may violate the corporate expenditure ban.

AO 2004-30 at 10.

In its Notice of Availability, the Commission states that Mr. Bauer's petition asks the Commission to:

[R]evise 11 CFR 1002.9(c) to exempt from the term 'electioneering communications' any communication appearing in a promotion for a political documentary film 'by corporations and other entities established and operating for such purposes in the ordinary course of their businesses,' provided that the promotion does not 'promote, support, attack or oppose' a

⁴ Citing McConnell v. FEC, 124 S.Ct. 619, 697 (2003) ("the provision exempts news and commentary only; it does not afford carte blanche to media companies generally to ignore FECA's provisions. The statute's narrow exemption is wholly consistent with First Amendment principles") and FEC V. Massachusetts Citizens for Life, 479 U.S. 238 (1986), Chairman Smith contends that the existing narrow interpretation of the media exemption has been imposed on the Commission by the courts.

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candidate for federal office within the meaning of 2 U.S.C. 431(20(A)(iii). Petitioner seeks to have any such protections also apply to the promotion, in the ordinary course of business, of 'books, plays, and other forms of political expression that may involve references to Federal candidates.

Rulemaking Petition: Exception for the Promotion of Political Documentary Films From "Electioneering Communications," 69 Fed. Reg. 52,461 (Aug. 26, 2004). Additionally, the Commission asks for comments "on whether there are other issues regarding the electioneering communications rules that should also be addressed in the rulemaking at this time." Id.

Comments

For the reasons set forth below, Citizens United urges the Commission to initiate a rulemaking that is somewhat broader than the rulemaking requested in Mr. Bauer's petition. In particular, Citizens United requests the Commission to commence a rulemaking on electioneering communications in order to adopt rules that would (A) exempt the promotion of any documentary film or cinematic work from the term electioneering communications, (B) exempt the promotion of any book, play or theatrical work that may involve references to Federal candidates from the term and (C) exempt any documentary film or other cinematic work from the term electioneering communications.

As an initial observation, we note that the petition limits its request to an exemption for "'political' documentary films," Petition for Rulemaking, July 20, 2004 at 1 (emphasis added), and "books, plays and other forms of political expression that may involve references to Federal candidates." Id. at 1 n. 1 (emphasis added). In Citizens United's view it would be a mistake for the Commission to focus on a narrow exemption for political works. First, it would be difficult, if not impossible, for the Commission delineate between a work that is "political" and one that is non-political. Second, even if the Commission could delineate between political and non-political works, it would be hard to justify a rule that singles out political works for greater protection than non-political works given the underlying objectives of the Act's electioneering communications provisions. Thus, Citizens United calls on the Commission to open a broader rulemaking to consider whether a general exemption should be adopted to cover documentary films, other cinematic works and advertisements for documentaries, books, plays, and other cinematic or theatrical productions that might otherwise qualify as electioneering communications.

- A. The Commission should initiate a rulemaking to exempt the promotion of documentary films and other cinematic works from the term electioneering communications.

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On at least three occasions this year the Commission has been confronted with questions on whether advertising for a documentary film qualifies as an electioneering communication. In Advisory Opinion 2004-15, the Commission concluded that paid broadcast advertising for a documentary was an electioneering communication, but declined to address whether the advertising was exempted from the definition under the term's media exemption. In MUR 5467, the Commission sidestepped the issue of whether advertising for Michael Moore's film, Fahrenheit 9/11, was an electioneering communication, because the respondents promised not to air any of the ads at issue during the 30-day period preceding the Republican National Convention and the 60-day period preceding the November 2, 2004 presidential election. More recently, however, in Advisory Opinion 2004-30, the Commission concluded that paid broadcast advertisements for a Citizens United documentary film are not entitled to the media exemption.

The Commission cited what appear to be two independent justifications for its conclusions regarding advertising for the Citizens United film. First, it said "the advertisements would not 'appear in a news story, commentary, or editorial,'" AO 2004-30 at 7, quoting, 2 U.S.C. § 434(f)(3)(B)(i). And second, in light of its conclusion that the underlying film was not subject to the media exemption, the Commission said, "advertising of the Film cannot be considered part of a 'normal, legitimate [media] function.'" Id. at 7-8, quoting Phillips Publishing, 717 F.Supp. at 1313.

While Citizens United strongly disagrees with the Commission's conclusion that its film is not subject to the media exemption, we find the first justification even more troubling than the second, because the first justification appears to state a position that forecloses the application of the media exemption to any broadcast advertising for a documentary film. As we see it, advertising for a documentary film should be treated no differently than advertising for other media activities that have long been held to fall within the scope of the Act's general media exemption.

Since at least 1981, media advertising has been recognized as falling within the scope of the Act's general media exemption. For example, in Phillip Publishing, the U.S. District Court for the District of Columbia held that advertising material for one of the company's newsletters was exempted from the definition of expenditure under the Act even though the advertising at issue -- a direct mail subscription solicitation letter -- "emphasized" [the newsletter's] opposition to the campaign and philosophy of Senator [Ted] Kennedy." The Court reasoned that the press exemption applied because the publisher "was acting in its capacity as the publisher of a newsletter in printing and distributing the solicitation letter for [the newsletter]." A similar result was reached in Reader's Digest Association v. Federal Election Commission, 509 F.Supp. 120 (S.D. N.Y. 1981).

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Moreover, in a pair of post-BCRA advisory opinions, the Commission has cited the Phillips Publishing and Readers Digest decisions in determining that the electioneering communications press exemption and the Act's general press exemption are similar in scope with respect to the type of media activity that they exempt. Advisory Opinion 2003-34, opines that Viacom, Inc., Showtime Networks and TMD Productions, Inc. would be acting in a media capacity in the airing and promotion of a fictional television series entitled "American Candidate." In that advisory opinion, the Commission stated:

Therefore, to the extent that actual Federal candidates or officeholder are depicted or discussed in the series or the websites, no contribution or expenditure will result from payments for the production (including payments received for "product placements"), promotion, distribution, or licensing of rights, even if statements that expressly advocate the election or defeat of a clearly identified Federal candidate are included. 2 U.S.C. 432(9)(B)(i). Similarly, no broadcast or cablecast of the series will constitute an electioneering communication. 2 U.S.C. 434(f)(3)(B)(i).

Similarly in Advisory Opinion 2004-7, the Commission refers to the general press exemption and electioneering communications press exemption as "similar exemption[s]" and concludes that "any broadcast, satellite or radio communication that MTV undertakes as part of its press function is exempt from the definition of electioneering communication."

In Citizens United's opinion, the positions taken by the Commission in addressing the application of the media exemption in Advisory Opinions 2003-34 and 2004-7 are not compatible with its assertion in Advisory Opinion 2004-30 that advertising for the Citizens United film would not fall within the scope of the media exemption because Citizens United's advertising "would not 'appear in a news story, commentary, or editorial.'" If nothing else, the apparent contradictory conclusions create confusion among the regulated community and justifies further clarification from the Commission on the extent to which advertising for documentary films is exempt from the term "electioneering communications."

Citizens United believes that a formal rulemaking is an appropriate forum in which to undertake such a clarification. We therefore urge the Commission to undertake a rulemaking to ensure that advertising for a documentary film is exempted from the term electioneering communications to the same extent that advertising for other media activity is exempted from regulation under the Act's general media exemption. In our opinion, this could best be accomplished by adopting a rule specifying that advertising for documentary films falls within the scope of the electioneering communications media exemption.

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- B. The Commission should initiate a rulemaking to exempt the promotion of any book, play or other theatrical works from the term electioneering communications.

In Citizens United's view there is no constitutionally valid reason why advertisements for a book, play or other theatrical work should be treated differently than advertisements for a documentary movie, newspaper, print magazine, or television or radio news program. While the facts surrounding Citizens United proposed advertising of the book about John Kerry are somewhat different than the relevant facts relating to the Citizens United film, Advisory Opinion 2004-30 lists identical reasons for denying the media exemption to advertisements for the book and film. Compare AO 2004-30 at 6, with id. at 7-8. In both instances the Commission concluded that the media exemption is inapplicable because: (1) the ads at issue "would not 'appear in a news story, commentary, or editorial,'" and (2) because of its determination that Citizens United is not acting as a media entity in connection with the proposed activity, its ads "cannot be considered part of a 'normal, legitimate [media] function.'"

In light to the Commission's identical analysis in Advisory Opinion 2004-30, in the treatment of advertising for the book and documentary film, Citizens United incorporates by reference its comments in Section "A" above as the basis for its calling on the Commission to initiate a rulemaking to exempt advertising for books, plays and other theatrical works from the term electioneering communications. As in the case of advertising for documentary films, Citizens United believes the desired result can best be attained by adopting a rule that specifying that advertising for books, plays and other theatrical works falls within the scope of the electioneering communications media exemption.

- C. The Commission should initiate a rulemaking to exempt documentary films and other cinematic works from the term electioneering communications.

Advisory Opinion 2004-30 has blurred what previously appeared to be a bright line rule. In explaining the final rules on electioneering communications, the Commission clearly determined that documentary films would fall within the scope of the media exemption to electioneering communications, stating:

Some of the comments suggested additional exemptions for documentaries, educational programming, or entertainment, which apparently reflects a concern that [the media] exemption would be narrowly interpreted. The Commission interprets "news story, commentary, or editorial" to include documentaries and educational programming in this context.

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Explanation and Justification for Electioneering Communications, Final Rules, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002). In the Citizens United advisory opinion, however, the Commission clouds the issue, stating "not every 'documentary' is entitled to the EC media exemption." AO 2004-30 at 7 (emphasis in original). According to the advisory opinion, documentaries that are produced by organizations such as Citizens United are not eligible for the media exemption because such films are the functional equivalent of the "Special Edition" publication at issue in FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986), which the Supreme Court determined was not eligible for the Act's general media exemption. In purporting to apply the Massachusetts Citizens for Life analysis to the Citizens United documentary, the Commission stated:

Citizens United does not regularly produce documentaries or pay to broadcast them on television. In fact, the information that you provided indicates that Citizens United has produced only two documentaries since its founding in 1988, both of which it marketed primarily through direct mail and print advertising, and neither of which it paid to broadcast on televisions. Indeed, the very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster, is one of the "considerations of form" that can help to distinguish an electioneering communication from exempted media activity.

AO 2004-30 at 7.

As we stated in our comments in response to the draft advisory opinion, Citizens United believes an advisory opinion request is an inappropriate forum in which to alter a previously stated bright line rule of interpretation that was adopted as part of a rulemaking. If the Commission is going to modify its position regarding the application of the media exemption to documentary films, we believe it should do so through the formal rulemaking process.

As things stand today, based on Advisory Opinion 2004-30, there are no clear rules in place for determining whether a documentary film will qualify for the media exemption. For example, the advisory opinion states that Citizens United's history of having produced two prior documentaries is a factor leading the Commission to conclude that the organization does not regularly produce documentaries. This, of course, begs the question: How many documentaries, and over what time frame, must an entity produce in order to qualify a documentary for the media exemption?

Another serious problem centers on the Commission's contention that "the very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster, is one of the 'considerations of form' that can help to

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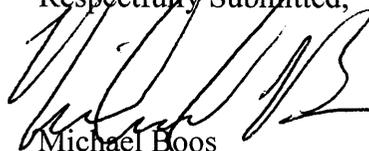
distinguish an electioneering communication from exempted media activity." Id. This factor suggests that no documentary that would qualify as an electioneering communication absent exemption under the media exemption would qualify for the media exemption, since, under the existing rules, paying a fee to broadcast the film is a prerequisite to qualifying as an electioneering communication.⁵

In our opinion, the Commission got it right when it decided at the time it adopted its electioneering communications rules to include documentary films within the scope of the media exemption. We believe further that the Commission erred in attempting to narrow the application of the exemption as it did in Advisory Opinion 2004-30. Citizens United, therefore, urges the Commission to avail itself of this opportunity to rectify the situation through the rulemaking process by adopting a bright line rule making it clear that documentary films and similar cinematic works are exempt from the term "electioneering communication." As with our other recommendations, we believe that this can best be accomplished through a rule stating that documentary films and other cinematic works are exempt under the media exemption.

Conclusion

For the reasons set forth herein, Citizens United urges the Commission to open a rulemaking to: (A) exempt the promotion of any documentary film or cinematic work from the term electioneering communications, (B) exempt the promotion of any book, play or theatrical work that may involve references to Federal candidates from the term and (C) exempt any documentary film or other cinematic work from the term electioneering communications.

Respectfully Submitted,



Michael Boos
Vice President &
General Counsel

⁵ The continued viability of the "for a fee" requirement was recently cast into serious doubt by the U.S. District Court for the District of Columbia, which struck down the rule on the grounds that it "cannot be squared with the plain meaning of BCRA's text." Shays & Meehan v. Federal Election Commission, Civ. Act. 02-CV-1984 (D.D.C. Sept. 18, 2004), slip op. at 155.