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September 27, 2004

Brad C. Deutsch, Esquire  
Assistant General Counsel  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2004 SEP 27 PM 1:00*Re: Rulemaking Petition: Exception for the Promotion of Political  
Documentary Films from "Electioneering Communications"*

Dear Mr. Deutsch:

These comments are filed on behalf of our client, Fellowship Adventure Group LLC, in response to the Petition for Rulemaking ("Petition") filed by Mr. Robert F. Bauer, on his own behalf, asking the Commission to revise its regulations by exempting documentary films and the promotion thereof from the electioneering communication requirements of the Federal Election Campaign Act of 1971, as amended (the "Act").<sup>1</sup> In particular, the Petitioner "requests that the Commission institute an immediate rulemaking to provide an appropriate exception under 11 C.F.R. §100.29, protecting the exhibition and promotion of documentary films." See Petition at p. 4.

The Commission seeks comment on whether to initiate this rulemaking on electioneering communications. In short we believe that, in light of the recent court decision in Shays v. FEC, No. 02-1984, slip op. (D.D.C. 2004), the Commission should decline to initiate a rulemaking at this time. We presume, for purposes of these comments and based on current reporting of the Shays decision, that the Commission is likely to appeal that decision.<sup>2</sup> Pending such appeal and pending the Commission's

<sup>1</sup> Fellowship Adventure Group LLC is a Delaware limited liability company and holds the worldwide distribution rights to the documentary film *Fahrenheit 9/11*.

<sup>2</sup> See, e.g., Keller, Judge Upends FEC Guidelines, Roll Call, September 21, 2004, p.1 ("In all, four FEC members — three Republicans and one Democrat — confirmed on the record that they would support an appeal of the decision.")

deliberations on the outcome thereof, the language of the electioneering communication definition will be directly affected. Initiating a rulemaking at this time will only lead to confusion and provide additional uncertainty to the regulated community and may ultimately be duplicative of future processes.

In addition, despite Petitioner's assertion that substantial uncertainty exists and that none of the exceptions to the definition of electioneering communications apply to documentaries, we believe that the Commission has clearly indicated that the contrary is true, by stating unequivocally that the news exemption applies to documentaries. See Electioneering Communications, Final Rules, 67 Fed. Reg. 65190, 65197 (October 23, 2002) ("The Commission interprets 'news story, commentary, or editorial' to include documentaries and educational programming in this context.")

In short, then, accepting that the exhibition of the documentary is covered by the press exemption, then, logically, the promotion of a documentary should be covered by the same existing exemption as the film itself, consistent with Commission precedent, just as the Commission has treated advertisements promoting news stories as covered by the news story exemption. In other words, if, for example, Tom Brokaw were to interview Candidate X on NBC Nightly News or Dateline NBC, then commercials promoting that interview will be entitled to the press exemption. If Time Magazine were to feature a cover story on Candidate Y, then commercials advertising that issue will be entitled to the press exemption. Similarly, if a documentary includes mention of Candidate Z, then commercials for the documentary should be entitled to the press exemption.

This is not intended to be an exhaustive discussion of the substance of the matter, and we look forward to commenting more fully should the Commission grant this petition and move forward with the rulemaking process. In conclusion, however, we respectfully submit that the Commission should deny or delay action on the Petition until such time as the judicial process relating to the electioneering communication regulation has been completed.

On behalf of Fellowship Adventure Group, LLC, we appreciate the opportunity to provide this comment and the Commission's consideration thereof.

Sincerely,

  
Lyn Utrecht

  
Eric Kleinfeld