



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 10, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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

ADVISORY OPINION 2004-31

Dear Ms. Mitchell:

This responds to your letters dated July 21 and July 30, 2004, requesting an advisory opinion 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 radio and television advertisements that RDG is planning to run.

Background

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 in Wisconsin, all of which include "Russ Darrow" as part of the dealership's name (e.g., Russ Darrow West Bend, Russ Darrow Appleton Chrysler). You state that during the past decade, RDG has focused on developing "Russ Darrow" as a brand name for its dealerships.

Russ Darrow, Jr. ("the Candidate") is a candidate for the U.S. Senate in the Wisconsin Republican primary election, which is scheduled to be held on Tuesday, September 14, 2004. If the Candidate wins this primary election, he will be the Republican candidate for the U.S. Senate from Wisconsin in the general election, which

is scheduled to be held November 2, 2004. The Candidate's principal campaign committee is Russ Darrow for Senate, Inc. ("the Committee").

In addition to being a candidate for the U.S. Senate, the Candidate is the founder, 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, and that RDG plans to continue to air such advertisements for the foreseeable future. You represent that Russ Darrow III replaced the Candidate as RDG's spokesman in the late 1980s and began appearing in RDG advertisements at that time. Russ Darrow III has been the public face of RDG in its advertisements for over a decade. You further state that the Candidate has not appeared in any of RDG's advertisements in more than a decade.

You also state that the Candidate was not involved in any way in the formation of the television and radio advertising contracts for 2004. You represent that all of RDG's advertising decisions are made without regard to the Candidate or any campaign for Federal office and are not coordinated with the Candidate, the Committee, or its agents. You state that the Candidate and RDG are two distinct and separate legal entities operating and advertising separately and without consultation or coordination with one another. You also state that the Committee and RDG have no common media vendors of any kind and that each makes wholly separate and independent decisions regarding the creation, production, and distribution of any and all advertising and other promotions.

You have provided a sampling of television and radio advertising scripts used by RDG in recent years. You represent that although the scripts for the television and radio advertisements RDG plans to air during the remainder of 2004 have not yet been developed, none of those advertisements will reference the Candidate's campaign either directly or indirectly. In addition, you indicate that the Candidate will not appear or speak in any such advertisements. You also state that the proffered scripts of past radio and television advertisements aired by RDG are representative of the scripts that RDG is using currently and which it will use in the coming months.¹

Question Presented

Would the proposed RDG radio and television advertisements that include the name "Russ Darrow" be electioneering communications within the meaning of the Act and Commission regulations?

¹ See Attachment A for scripts of RDG's typical television and radio advertisements.

Legal Analysis and Conclusions

RDG's radio and television advertisements that include the name "Russ Darrow" would not be electioneering communications as defined in 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29. This conclusion rests on the factual circumstances presented in which the use of the name "Russ Darrow" refers to a business or to another individual who is not a candidate.

The Act, as amended by BCRA, prohibits corporations from making or financing electioneering communications. *See* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(2)(iii); *see also* Advisory Opinion 2004-15. An "electioneering communication" is any broadcast, cable, or satellite communication that (1) refers to a clearly identified Federal candidate; (2) is publicly distributed for a fee within 30 days before a primary election or 60 days before a general election; and (3) is targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29(a); *see also* Advisory Opinions 2004-15 and 2003-12. Your request acknowledges that RDG's proposed radio and television advertisements satisfy the last two prongs of this test. The issue here is whether the advertisements refer to a clearly identified Federal candidate.

Commission regulations provide that the term "refers to a clearly identified candidate" means that 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 CFR 100.29(b)(2).

The Commission concludes that your proposed advertisements refer to RDG's car dealerships or Russ Darrow III, and not to the Candidate. First, the Candidate himself does not speak or appear on screen in any of the advertisements. Second, another individual, Russ Darrow III, does speak and appear in the advertisements. You indicate that he, not the Candidate, has been the public face of the company for more than ten years. Third, "Russ Darrow" is part of the name of all of RDG's dealerships, which RDG has worked for a decade to develop as a brand name for all its dealerships. Finally, while the name "Russ Darrow" is used throughout the proposed advertisements, most of these references include the full name through which a particular dealership does business (*e.g.*, Russ Darrow Toyota, Russ Darrow Kia, Russ Darrow Cadillac). While a couple of the proposed advertisements also include a single reference to "Russ Darrow," rather than the full name through which the dealership does business, these references, taken together with the other references in the advertisement, also refer to the business entity and not to the Candidate. Therefore, the Commission concludes that RDG's television and radio advertisements do not refer to a clearly identified candidate under 11 CFR 100.29(b)(2).

In the rulemaking proceeding in which the Commission adopted its regulations on electioneering communications, the Commission considered but declined to create an exemption for situations where a Federal candidate shared a name with a business entity

because it concluded that such communications could well be considered to promote or support the clearly identified candidate. *See* Explanation and Justification, Final Rules on Electioneering Communications, 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002). The decision not to adopt a blanket exemption for such communications, however, does not preclude the Commission from making a determination that the specific facts and circumstances of a particular case indicate that certain advertisements do not refer to a clearly identified Federal candidate and, hence, do not constitute electioneering communications. As stated above, the Commission concludes that the advertisements at issue in this case do not constitute electioneering communications under 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29(a). Furthermore, on the basis of the facts you present, there is no indication that the advertisements have been or will be coordinated with the Candidate under 2 U.S.C. 441a(a)(7)(B)(i) and 11 CFR 109.21.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Bradley A. Smith
Chairman

Enclosures (AOs 2004-15 and 2003-12)

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</p> <p>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</p> <p>CG: 2002 Toyota Camry \$189 a month</p> <p>Due at start: \$3,690</p> <p>Disclaimer A</p> <p>CG: Clearance Priced</p> <p>CG: Wisconsin's All-Time Sales Leader</p> <p>Disclaimer B</p> <p>Toyota Building Footage</p> <p>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</p> <p>CG: Russ Darrow Toyota</p> <p>West Bend</p> <p>262-334-9411</p> <p>or</p> <p>1-877-888-0777</p>	(:03 Singout)

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
Appleton/Oshkosh Kia footage	(Tracy) Are you looking for a used car?
Quick cuts of Kia's	Do you have a job? Do you have \$99? Then
CG: Job + \$99 down= Brand New Kia Disclaimer: \$99 down payment, 9.5% APR, 72 mos. Tax, title, license & service fee extra.	why buy a used car, when you can get a brand new Kia at Wisconsin's #1 Kia dealer, Russ Darrow Kia.
Russ Darrow Logo CG: Wisconsin's #1 Kia Dealer Disclaimer A	Get a brand new Kia Rio starting at just \$7,676.
Rio Footage CG: \$7,676 Disclaimer B	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.
CG: Job + \$99 down = Brand New Kia CG: 10-year, 100,000 mile warranty Disclaimer: Limited powertrain warranty – see salesperson for details	A job & 99 dollars is all you need. Call 1-866-4-new-kia today!
CG: 1-866-4-new-kia now 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	(:27) (Russ Darrow :03 singout)

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 hug 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 Cadillac

:30 "Minivan Madness"

Air Dates: July, 2004

RDCJDTV-004

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

**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 HUNDRED OF '04 CHRYSLER AND DOGE 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**

PROPELLION - 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 CRED 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.