

October 25, 2006

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-29 is available for public comments under this procedure. It was requested by Jason Vasquez, Communications Director on behalf of Representative Mary Bono.

Proposed Advisory Opinion 2006-29 is scheduled to be on the Commission's agenda for its public meeting of Thursday, November 2, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on November 1, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-29, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM
For Meeting of: 11-02-06

October 25, 2006

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RC5*
Associate General Counsel

Amy L. Rothstein *AR*
Acting Assistant General Counsel

Ron B. Katwan *RBK*
Attorney

Stacey J. Shin *SJS*
Law Clerk

Subject: Draft AO 2006-29

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 2, 2006.

Attachment

1 **ADVISORY OPINION 2006-29**

2

3 **Mr. Jason Vasquez**
4 **Office of the Honorable Mary Bono**
5 **405 Cannon House Office Building**
6 **Washington, D.C. 20515**

DRAFT

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8 **Dear Mr. Vasquez:**

9 **We are responding to your advisory opinion request on behalf of Representative**
10 **Mary Bono, concerning the application of the Federal Election Campaign Act of 1971, as**
11 **amended (the "Act"), and Commission regulations to a proposed appearance by**
12 **Representative Bono in a televised tourism infomercial to be aired beginning in October,**
13 **2006, and running for eight months.**

14 **The Commission concludes that Representative Bono's appearance in the**
15 **infomercial would not result in the making of an in-kind contribution to Representative**
16 **Bono or her authorized committee.**

17 ***Background***

18 **The facts presented in this advisory opinion are based on your letter received on**
19 **August 31, 2006, and on your phone conversation with Commission staff on September 7,**
20 **2006.**

21 **Representative Bono serves the 45th Congressional District of California. She is**
22 **currently a candidate for reelection to the House of Representatives in the November 7,**
23 **2006 general election.**

24 **The Palm Springs Desert Resorts Convention and Visitors Authority (the "CVA")**
25 **is an unincorporated organization that promotes tourism from Los Angeles and Orange**
26 **Counties. The CVA recently invited Representative Bono to become its spokesperson and**

1 host of a 30-minute tourism infomercial. The CVA infomercial campaign is scheduled to
2 begin in October, 2006, and to continue for eight months.

3 The CVA would not broadcast its infomercial featuring Representative Bono in the
4 45th Congressional District of California. Representative Bono would not receive any
5 financial compensation for her role as the CVA spokesperson. Furthermore, the CVA
6 infomercial would not disseminate Representative Bono's campaign materials or
7 expressly advocate the election or defeat of Representative Bono or of any other clearly
8 identified Federal candidate.

9 ***Question Presented***

10 *May Representative Bono appear in the CVA tourism infomercial under the Act*
11 *and Commission regulations?*

12 ***Legal Analysis and Conclusions***

13 Yes, Representative Bono may appear in the CVA infomercial under the Act and
14 Commission regulations.

15 The Act and Commission regulations limit the amount a person may contribute to
16 any candidate, a candidate's authorized political committees, or their agents with respect
17 to any election for Federal office. See 441a(a)(1)(A); 11 CFR 110.1(b)(1). These
18 limitations apply to contributions by unincorporated entities, such as the CVA.¹

19 Under the Act and Commission regulations, the terms "contribution" and
20 "expenditure" include any gift of money or "anything of value" made by any person for
21 the purpose of influencing a Federal election. See 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11

¹ The Commission assumes, for purposes of this advisory opinion, that the cost of the infomercial in which Representative Bono has been invited to appear would exceed the \$2,100 limit that applies to contributions from the CVA to candidates for the 2006 general election. See 11 CFR 110.1(b)(1).

1 CFR 100.52(a) and 100.111(a). The phrase "anything of value" includes all in-kind
2 contributions. *See* 11 CFR 100.52(d)(1) and 100.111(e)(1). In-kind contributions include
3 expenditures made by any person "in cooperation, consultation, or concert, with, or at the
4 request or suggestion of" a candidate, a candidate's authorized committees, or their
5 agents. 2 U.S.C. 441a(a)(7)(B)(i).

6 Commission regulations specify a three-prong test to determine whether a payment
7 for a communication becomes an in-kind contribution as a result of coordination between
8 the person making the payment and a candidate.² *See* 11 CFR 109.21(a)(1)-(3). Under
9 the first prong of the coordinated communication test, the communication must be paid for
10 by a person other than a candidate, a candidate's authorized committee, a political party
11 committee, or agents of any of the foregoing. *See* 11 CFR 109.21(a)(1). The CVA
12 infomercial would satisfy this first prong of the coordinated communication test because
13 the infomercial would be paid for by the CVA.

14 Under the second prong of the coordinated communication test, the
15 communication must satisfy one of the four content standards set forth in 11 CFR
16 109.21(c). Representative Bono's appearance in the CVA infomercial would not satisfy
17 any of the content standards in this second prong of the coordinated communication test.
18 The infomercial would not be an electioneering communication under 11 CFR 100.29³

² The Commission notes that the coordination regulations at 11 CFR 109.21 are the subject of pending litigation in *Shays v. FEC*, Civil Action No. 06-1247 (D.D.C. filed July 11, 2006). The Commission's current regulations remain in full force and effect pending the outcome of this proceeding.

³ The Act and Commission regulations define "electioneering communication" as any broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is publicly distributed within 60 days before a general election or 30 before a primary election; and (3) in the case of a candidate for the House of Representatives, is targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a). In the case of a candidate for the House of Representatives, "targeted to the relevant electorate" means that the communication can be received by 50,000 or more persons in the district the candidate seeks to represent. *See* 11 CFR 100.29(b)(5)(i).

1 because it would not be received by 50,000 or more persons in Representative Bono's
2 Congressional District. *See* 11 CFR 109.21(c)(1). Additionally, the CVA infomercial
3 would not disseminate, distribute, or republish, in whole or in part, campaign materials
4 prepared by Representative Bono, her authorized committee, or their agents. *See* 11 CFR
5 109.21(c)(2). Furthermore, the infomercial would not expressly advocate the election or
6 defeat of Representative Bono or any other Federal candidate. *See* 11 CFR 109.21(c)(3).
7 Finally, the CVA would not broadcast the infomercial in Representative Bono's
8 Congressional District within 90 days of the general election. *See* 11 CFR 109.21(c)(4).

9 Under the third prong of the coordinated communication test, the communication
10 must satisfy one of the five conduct standards set forth in 11 CFR 109.21(d). The
11 Commission need not reach this prong of the analysis because Representative Bono's
12 appearance in the CVA infomercial would not satisfy the second prong set forth in 11
13 CFR 109.21(c).

14 Because the CVA infomercial would not be a coordinated communication, it
15 would not be an in-kind contribution to Representative Bono, her authorized committee,
16 or their agents. Thus, Representative Bono's appearance in the CVA infomercial would
17 not result in the CVA making an in-kind contribution to Representative Bono under the
18 Act and Commission regulations.

19 This response constitutes an advisory opinion concerning the application of the
20 Act and Commission regulations to the specific transaction or activity set forth in your
21 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
22 of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

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Sincerely,

Michael E. Toner
Chairman