



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 23, 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2010-30
Michael Boos, Esq.
Vice President and General Counsel
Citizens United
1006 Pennsylvania Avenue, S.E.
Washington, DC 20003

Dear Mr. Boos:

We are responding to your advisory opinion request on behalf of Citizens United, concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the rental of email lists to Federal candidates, political party committees, and political committees.

The Commission concludes that the rental of email lists by Citizens United to Federal candidates, political party committees, and political committees as described in the request would not result in either a coordinated expenditure or a coordinated communication. The Commission could not agree on whether the proposed list rental would constitute corporate facilitation under the Commission's current regulations.

Background

The facts presented in this advisory opinion are based on your letter received on November 1, 2010.

Citizens United is an incorporated membership organization, is a nonprofit organization pursuant to 26 U.S.C. 501(c)(4), and is exempt from taxation under 26 U.S.C. 501(a). Over several years, Citizens United has developed a list of email subscribers. The list includes both Citizens United's members and non-members, such as individuals who have purchased DVDs from the organization. Thus, the email list includes both persons within Citizens United's restricted class and persons outside of the restricted class.¹

¹ The restricted class of an incorporated membership organization consists of the organization's members and its executives or administrative personnel, and their families. 11 CFR 114.1(j).

Citizens United regularly rents its email subscribers list to other entities at fair market value through a commercial list brokerage firm. Citizens United wishes to begin renting its list to Federal candidates, authorized committees, political party committees, and other political committees using the same procedures it currently uses to rent its list. Thus, although Citizens United employees would review and approve all list rental requests, the commercial list brokerage firm would handle all other aspects of the transaction, including payment for the use of the list and the actual sending of the emails. Under the brokerage firm's standard practices instituted for security and legal compliance purposes,² all communications on behalf of the list renter will appear to be from Citizens United, because Citizens United will be listed in the "from" line of the communication. However, the subject heading will indicate that the message being conveyed by the email is a communication from the list renter and the content of the communication is a message from the list renter. Payment would be made by the Federal candidate or political committee to the list brokerage firm, which in turn would remit the payment to Citizens United less the firm's fees. Although a commitment to pay would be made before any email messages are sent to those on the rented list, the remittal of payment by the Federal candidate or political committee to the brokerage firm or the brokerage firm's remittal of payment to Citizens United would not always occur before the emails are sent. Citizens United represents that the rental method described above is standard industry practice for the commercial marketing of email lists.

Questions Presented

1. *Will the rental of Citizens United's email subscriber list to Federal candidates, authorized committees, political party committees, or other political committees in the manner described in the request violate the prohibition against corporations coordinating expenditures with a Federal candidate, authorized committee, or political party committee?*
2. *Will the rental of Citizens United's email subscriber list to Federal candidates, authorized committees, political party committees, or other political committees in the manner described in the request violate the prohibition banning corporations from making coordinated communications?*
3. *Will the rental of the list to Federal candidates, authorized committees, political party committees, or other political committees for emails that solicit contributions or invite recipients to a fundraiser violate the prohibition against corporate facilitation of contributions to candidates or political committees?*

² Citizens United states that the list brokerage firm follows this practice "as a security measure to protect against unauthorized usage of the list and as a means of compliance with the opt-out provisions of the Federal CAN-SPAM Act of 2003." See 15 U.S.C. 7704(a)(3)(A). This advisory opinion is not based on and should not be construed as validating any particular interpretation of the Federal CAN-SPAM Act of 2003, which is beyond the Commission's jurisdiction.

4. *Will the answer to Question 3 be different if either (a) the brokerage firm does not receive advance payment for the rental of the list or (b) the brokerage firm does not remit payment to Citizens United in advance of the transmission of the email?*

Legal Analysis and Conclusions

1. *Will the rental of Citizens United’s email subscriber list to Federal candidates, authorized committees, political party committees, or other political committees in the manner described in the request violate the prohibition against corporations coordinating expenditures with a Federal candidate, authorized committee, or political party committee?*

No, the rental of Citizens United’s email subscriber list to Federal candidates and political committees in the manner described in the request will not violate the prohibition against corporations coordinating expenditures with a Federal candidate, authorized committee, or political party committee because the list rental would not result in a corporate expenditure by Citizens United so long as Citizens United is renting its email list for the usual and normal charge.

“Expenditure” is defined in the Act and Commission regulations as any “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. 431(9)(A); 11 CFR 100.111(a). Commission regulations state that “[u]nless specifically exempted . . . the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for the goods or services is an expenditure.” 11 CFR 100.111(e)(1). “Usual and normal charge” is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

Citizens United indicates that it currently rents its email subscribers list to other organizations at “fair market prices” through a commercial list brokerage firm, and that it wishes to rent its email list to Federal candidates, authorized committees, political party committees, and other political committees using the same rental procedures and at “fair market prices.” Because the “fair market price” is the price of the list in the market in which lists are ordinarily rented at the time of the rental, the “fair market price” is the usual and normal charge for renting the list. Thus, so long as Citizens United does not rent its list to Federal candidates, authorized committees, political party committees, or other political committees for less than the usual and normal charge, the rental of the list will not constitute a corporate expenditure by Citizens United.

2. *Will the rental of Citizens United's email subscriber list to Federal candidates, authorized committees, political party committees, or other political committees in the manner described in the request violate the prohibition banning corporations from making coordinated communications?*

No, the rental of Citizens United's email subscriber list to Federal candidates, authorized committees, political party committees, or other political committees in the manner described in the request would not violate the prohibition against coordinated communications by corporations, because the list rental will not result in coordinated communications.

To determine if a communication constitutes a "coordinated communication," Commission regulations apply a three-prong test. 11 CFR 109.21(a). First, the communication must be paid for, in whole or in part, by a person other than the candidate, the candidate's authorized committee, or the political party committee (the "payment prong"). 11 CFR 109.21(a)(1). Second, the communication must satisfy one of five content standards (the "content prong"). 11 CFR 109.21(a)(2) and (c). Finally, the communication must satisfy one of five conduct standards (the "conduct prong").³ 11 CFR 109.21(a)(3) and (d)(1)-(5).

Because Citizens United will charge any Federal candidate, authorized committee, or political party committee the usual and normal charge for rental of the email list, Citizens United is not paying for the communications and therefore the payment prong would not be met. Accordingly, the rental of the email subscriber list will not result in coordinated communications.

3. *Will the rental of the list to Federal candidates, authorized committees, political party committees, or other political committees for emails that solicit contributions or invite recipients to a fundraiser violate the prohibition against corporate facilitation of contributions to candidates or political committees?*

The Commission considered this question, but could not approve a response by the required four affirmative votes. 2 U.S.C. 437c(c) and 11 CFR 112.4(a).

4. *Will the answer to Question 3 be different if either (a) the brokerage firm does not receive advance payment for the rental of the list or (b) the brokerage firm does not remit payment to Citizens United in advance of the transmission of the email?*

The Commission considered this question, but could not approve a response by the required four affirmative votes. 2 U.S.C. 437c(c) and 11 CFR 112.4(a).

The Commission expresses no opinion regarding the application of Federal tax law, the Federal CAN-SPAM Act of 2003, or Federal Trade Commission regulations to

³ A sixth conduct standard clarifies the application of the other five to the dissemination, distribution, or republication of campaign materials. See 11 CFR 109.21(d)(6).

the proposed activities, because those questions are not within the Commission's jurisdiction.

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. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.

On behalf of the Commission,

(signed)
Matthew S. Petersen
Chairman