



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 10, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2004-30

Michael Boos, Esq.
Vice President & General Counsel
Citizens United
1006 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

Dear Mr. Boos:

This responds to your letter dated July 8, 2004, as supplemented by your letter of July 22 and additional communications, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to Citizens United's plans to buy television time to air a documentary film about presidential candidate John Kerry and his vice-presidential running mate, John Edwards, within sixty days before the general election on November 2, 2004. You also ask about the application of the Act and Commission regulations to Citizens United's plans to advertise both the film and a book about Mr. Kerry on television and radio within sixty days before the upcoming general election.

Background

The discussion below provides information about Citizens United, Citizens United's proposed documentary film and proposed advertisements for the film and book, and Citizens United's assertion that it is a member of the news media.

Citizens United. Citizens United is a Virginia non-stock corporation exempt from Federal taxes under Section 501(c)(4) of the Internal Revenue Code. Citizens United was established in 1988 "to promote social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society."¹ Citizens

¹ Citizens United Articles of Incorporation, Art. II(A).

United's Mission Statement states that Citizens United seeks to accomplish this goal "[t]hrough a combination of education, advocacy, and grass roots organization."

In support of your advisory opinion request, you provided the Commission with a copy of an affidavit that was executed by David N. Bossie, the president of Citizens United, and used in litigation challenging the Bipartisan Campaign Reform Act ("BCRA").² According to the Bossie Affidavit, Citizens United "represents its views, and the views of its members and contributors, on legislative and public policy issues before federal, state, and local officials and the general public." Bossie Affidavit at 2. Citizens United "engages in, including spending significant funds for, communications on such issues during campaigns for election to federal office." *Id.* The district court in *McConnell* recognized that "the principal function [of Citizens United] is the dissemination of information concerning [its] beliefs and advocacy."³

You state that Citizens United accepts donations from corporations and individuals. It is not owned or controlled by any political party, political committee or candidate committee.

Citizens United is an incorporated membership organization for purposes of the Act, and it has established a separate segregated fund ("SSF"), the Citizens United Political Victory Fund. Citizens United's SSF has contributed to the re-election campaign of President Bush, and you state that it has communicated its support of the Bush re-election campaign to members of its restricted class. You indicate, however, that Citizens United does not wish to finance any television broadcasts of the proposed film, or any of the proposed advertisements at issue here, through its SSF. Furthermore, you state that Citizens United does not intend to establish a new SSF for the purpose of making these communications.

The Film. You state that Citizens United plans to produce and market a documentary film that will focus on the lives and careers of presidential candidate John Kerry and vice-presidential candidate John Edwards (the "Film"). Although still in the planning stage, you anticipate that the Film will be between 60 and 80 minutes in length, that it will include numerous visual images of Senator Kerry and Senator Edwards, and that it will mention both candidates' names throughout. You state that the Film may also include visual images and the names of other Federal candidates but will not expressly advocate the election or defeat of any Federal candidate.

You state that Citizens United will own the copyright for the Film, and that Citizens United will be responsible for the Film's content. Citizens United plans to make the Film available to the public in three different ways: through movie theaters; through

² Declaration of David N. Bossie, President of Citizens United, on behalf of Plaintiffs Citizens United and Citizens United Political Victory Fund ("Bossie Affidavit"), in *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S.Ct. 619 (2003) ("*McConnell*").

³ *McConnell*, 251 F. Supp. 2d at 224.

DVD and videocassette sales; and by purchasing television airtime to broadcast the Film in its entirety in certain markets.

Citizens United also plans to produce and air advertisements for the Film in various television, cable, satellite and radio markets in the United States. These advertisements have not yet been prepared. Nonetheless, you anticipate that they will include visual images of Senator Kerry and Senator Edwards and that they will mention the candidates' names, but that they will not expressly advocate the election or defeat of either candidate.

The Book. Mr. Bossie has written a book about Senator Kerry, entitled, *The Many Faces of John Kerry, Why This Massachusetts Liberal Is Wrong for America* (the "Bossie Book"). The Bossie Book was published earlier this year by WND Books, a publisher not affiliated with Citizens United, and has been released for sale across the country.

You state that Citizens United proposes to market the Bossie Book, even though Citizens United does not own any rights to the Bossie Book, has not entered into any contractual arrangements with Mr. Bossie or with WND Books regarding the Bossie Book, and receives no book royalties. Citizens United has, however, entered into an agreement with Amazon.com, an on-line bookseller, under which Citizens United receives a small commission on certain sales of the Bossie Book by Amazon.com. Specifically, Citizens United receives this commission only if the purchaser accesses the Amazon.com website through a pop-up advertisement and hypertext link on the Citizens United website.⁴ Citizens United does not receive a commission on any other sales of the Bossie Book, such as, for instance, sales made to purchasers who gain access to Amazon.com without first going through the Citizens United website, sales made through WND Books's website, or sales made through bookstores.

You state that Citizens United is considering producing and airing advertisements for the Bossie Book in various television, cable, satellite and radio markets throughout the United States. Currently there are no scripts, outlines or treatments for the advertisements, but you anticipate that the advertisements will follow a certain format: television advertisements will display the cover of the Bossie Book, which shows the title of the Bossie Book and three photographs of Senator Kerry; radio advertisements will refer to the Bossie Book by title and will include other references to Senator Kerry; all of the advertisements, both television and radio, will direct viewers and listeners to the Citizens United website, through which they can purchase the Bossie Book from Amazon.com; and none of the advertisements will expressly advocate the election or defeat of Senator Kerry or any other candidate for Federal office.

Citizens United and the News Media. You state that Citizens United considers itself to be part of the news media. As support, you state that Citizens United paid for a

⁴ Any website owner willing to include a specially formatted link on its website may enter these agreements under the Amazon Associates Program. According to Amazon.com, "over 900,000 members" have already done so. <http://www.amazon.com/gp/browse.html/103-8193470-6651057?node=3435371>.

nationally syndicated radio talk show in the mid-1990s hosted by Citizens United's then-president, Mr. Floyd Brown,⁵ and that Citizens United is currently negotiating with the owner of an Internet broadcasting company to provide "regular news/issue programs" on the Internet. You also state that Citizens United and Citizens United Foundation (the "Foundation"), which is a tax-exempt organization under 26 U.S.C. 501(c)(3), have published and disseminated various types of informational and editorial materials. Recent examples of these materials include newsletters, position papers, paid "television editorials," a "webmercial," several "investigative reports/policy papers," court filings, and "numerous op-eds" that have been published in such newspapers as the *Washington Times*. To the best of your knowledge, however, neither Citizens United nor Mr. Bossie has ever sought or acquired press credentials.

You state that Citizens United and the Foundation recently paid to produce and place advertisements in magazines and on the Internet for two other books. The books are entitled, *Intelligence Failure: How Clinton's National Security Policy Set the Stage for 9/11* ("Intelligence Failure"), and *Hand of Providence: The Strong and Quiet Faith of Ronald Reagan*. Citizens United entered the same type of agreement with Amazon.com pertaining to the sale of these two books as it has entered in connection with the Bossie Book. Citizens United did not finance any television or radio advertisements for either of the previous books.

You have provided us with a copy of a full-page magazine advertisement for *Intelligence Failure* paid for by Citizens United. A picture of the book's cover, bearing the book's title and a photograph of former President Clinton, occupies roughly one-quarter of the page. The remaining three-quarters of the page feature statements and quotations criticizing the Clinton administration for alleged intelligence failures. Comparatively small print at the bottom of the page informs readers that the book is "available www.citizensunited.org and at bookstores everywhere."

You state that Citizens United and the Foundation also produced and sold two video documentaries during the late 1990s. The video documentaries are entitled, *Sinister Secrets of the U.N.* and *Confidential Report: Bill Clinton, Al Gore and the Communist Chinese Connection*. The videos were marketed primarily through direct mail and print advertising. Citizens United did not finance any television or radio advertisements for the videos, nor did it finance any television or radio broadcasts of the videos themselves. Citizens United understands, however, that certain local access cable channels broadcast both videos.

Questions Presented

1. Would Citizens United's proposed television broadcasts of the Film be electioneering communications within the meaning of the Act and Commission regulations?

⁵ Mr. Brown has also served as chairman of the board of directors of "the research and lobby organization Citizens United" since 1988. http://www.reaganranch.org/leadership/bios/floyd_brown.htm.

2. Would Citizens United's proposed television and radio advertisements for the Film and the Bossie Book be electioneering communications within the meaning of the Act and Commission regulations?

Legal Analysis and Conclusion

Both Citizens United's proposed television broadcasts of the Film and its proposed television and radio advertisements for the Film and the Bossie Book would be electioneering communications as defined in 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29.

Subject to certain exceptions, an electioneering communication is any broadcast, cable or satellite communication that refers to a clearly identified candidate for Federal office and is publicly distributed for a fee within 60 days before a general, special or runoff election for the office sought by the candidate, or within 30 days before a primary or preference election for the office sought by the candidate. *See* 2 U.S.C. 434(f)(3) and 11 CFR 100.29; *see also* Advisory Opinion 2004-15. For presidential and vice-presidential candidates, "publicly distributed" means that the electioneering communication is disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system, and that it can be received (1) by 50,000 or more people in a State where a primary election or caucus is being held within 30 days; or (2) by 50,000 or more people anywhere in the United States from 30 days before a presidential nominating convention to the end of the convention; or (3) anywhere in the United States within 60 days before the general election. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(b)(3)(ii); and Advisory Opinion 2004-15; *see also* 2 U.S.C. 434(f)(3)(C).

The television broadcasts of the Film and the television and radio advertisements that you describe in your request would be electioneering communications because they meet all of the elements of 2 U.S.C. 434(f)(3) and 11 CFR 100.29. The proposed Film and the proposed advertisements would refer to Senator Kerry, who is a clearly identified candidate for Federal office. *See* 11 CFR 100.29(a)(1). The proposed Film and advertisements would be publicly distributed because you intend to pay television and radio stations to air or broadcast them, and because they would be able to reach people in the United States within 60 days before the upcoming general election.⁶ *See* 11 CFR 100.29(a)(2) and (b)(3)(i).

Furthermore, the proposed Film and advertisements do not fall within any of the six exceptions to the term "electioneering communications." *See* 2 U.S.C. 434(f)(3)(B)(i)-(iv) and 11 CFR 100.29(c)(1)-(6). First, the Film and advertisements

⁶ The Commission is not addressing the part of your advisory opinion request that asks about the application of the Act and Commission regulations to the airing of paid advertisements for the Bossie Book and for the Film within 30 days before the 2004 Democratic National Convention. Your request was not completed until July 30, 2004, after the Democratic National Convention had ended. *See* 11 CFR 112.1.

would be disseminated through broadcast, cable or satellite communication.⁷ Second, they would not be reportable expenditures or independent expenditures.⁸ Third, they would not constitute a candidate debate or forum or promotion of such an event. Fourth, they would not be communications by local or State candidates. Fifth, they would not be made by entities organized under 26 U.S.C. 501(c)(3) because they will be made by Citizens United itself, and not by the Foundation.

Finally, the proposed Film and the proposed advertisements are not entitled to the media exception under 2 U.S.C. 434(f)(3)(B)(i). *See also* 11 CFR 100.29(c)(2). The media exception excludes from the term “electioneering communication” any communication “appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 11 CFR 100.29(c)(2); *see also* 2 U.S.C. 434(f)(3)(B)(i) (the “EC media exception”).

The Media Exception and Advertisements for the Bossie Book

Citizens United has no greater commercial interest in promoting the Bossie Book than does any other entity that might choose to advertise the Bossie Book on its website under the Amazon Associates Program. It is not the publisher of the Bossie Book; it is not the owner of the Bossie Book; and it is not the distributor of the Bossie Book. These facts distinguish the present situation from those addressed in *Reader's Digest Association, Inc. v. Federal Election Commission*, 509 F. Supp. 1210 (S.D.N.Y. 1981) (“*Reader's Digest*”), *Federal Election Commission v. Phillips Publishing, Inc.*, 517 F. Supp. 1308 (D.D.C. 1981) (“*Phillips*”), and Advisory Opinions 2004-7 and 2003-34, in which the parties were in the business of either publishing (*Reader's Digest* and *Phillips*), or producing and distributing (Advisory Opinions 2004-7 and 2003-34) the products that they were promoting.

Thus, Citizens United’s proposed advertisements for the Bossie Book would not qualify for the EC media exception for two reasons. First, the advertisements would not “appear in a news story, commentary, or editorial.” 2 U.S.C. 434(f)(3)(B)(i). Second, given that Citizens United is not acting as a media entity in connection with the Bossie Book, its advertising of the Bossie Book cannot be considered part of a “normal, legitimate [media] function.” *Phillips*, 717 F. Supp. at 1313.

⁷ For example, advertisements using print media (including newspapers or magazines or mailings), and advertisements and films distributed over the Internet (including e-mails), are not electioneering communications. *See* 11 CFR 100.29(c)(1); *see also* Advisory Opinion 2004-07.

⁸ You have stated that the proposed Film and the proposed advertisements would not expressly advocate the election or defeat of any candidate for Federal office and would not be coordinated with any candidate for Federal office, any candidate’s authorized committee, any party committee, or their agents. *See* 11 CFR 100.22, 109.20 and 109.21.

The Media Exception and the Film

Although the Commission has stated that the phrase “news story, commentary and editorial” in the EC media exception includes documentaries,⁹ not every “documentary” is entitled to the EC media exception. In *Federal Election Commission v. Massachusetts Citizens for Life* (“*MCFL*”), 479 U.S. 238 (1986), the Supreme Court rejected the argument that corporate publications are automatically exempt from the statutory prohibition on corporate and labor union expenditures in connection with Federal elections, under an exception for “any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication” (the “press exemption”). 2 U.S.C. 431(9)(B)(i) and 11 CFR 100.132; see also 2 U.S.C. 441b. The Supreme Court concluded that “a contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign materials to the general public, thereby eviscerating [the statutory] prohibition.” *MCFL*, 479 U.S. at 251.

The *MCFL* Court analyzed a variety of factors that differentiated *MCFL*’s “Special Edition” publication from the newsletters regularly issued by *MCFL*. The Court focused on “considerations of form,” such as how the Special Edition was produced and to whom it was disseminated, because “it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications.” *Id.* On the basis of these considerations, the Supreme Court concluded that the Special Edition was not eligible for the press exemption.

Applying the *MCFL* analysis to the facts here, the Commission concludes that the proposed Film would not be entitled to the EC media exception. 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 television. 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.

The Media Exception and Advertisements for the Film

The proposed advertisements for the Film would not qualify for the media exception for two reasons. First, the advertisements would not “appear in a news story, commentary, or editorial.” 2 U.S.C. 434(f)(3)(B)(i). Second, given our conclusion that Citizens United would not be acting as a media entity in connection with the Film and that the Film is not entitled to the media exception, Citizens United’s advertising of the

⁹ See Explanation and Justification for Electioneering Communications, Final Rules, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002)

Film cannot be considered part of a “normal, legitimate [media] function.” *Phillips*, 717 F. Supp. at 1313.

Taking all of the preceding factors into account, the Commission concludes that Citizens United’s proposed television broadcasts of the Film and its proposed television and radio advertisements of the Film and the Bossie Book would be electioneering communications. Accordingly, the statutory and regulatory requirements governing electioneering communications, which prohibit corporations such as Citizens United from making or financing electioneering communications, would apply.¹⁰ *See* 2 U.S.C. 434(f); 2 U.S.C. 441b(a) and (b)(2); 11 CFR 104.20; and 11 CFR 114.14(a) and (b).

The Commission’s conclusion does not restrict Citizens United from engaging in the same type of production and promotional activity in which it has historically engaged. Citizens United may advertise the Bossie Book in print media, on the Internet, and by direct mail, without being affected in any way by the electioneering communication provisions of either the statute or Commission regulations. Citizens United may also produce a documentary on any subject and advertise and disseminate the documentary through direct mail, print advertising, videocassette and DVD sales, the Internet, and in theaters, without being affected by the electioneering communication provisions.

The Commission expresses no opinion regarding Citizens United’s qualification for tax exempt status under 26 U.S.C. 501(c) or the tax ramifications, if any, of the proposed activities under the Internal Revenue Code. Such questions are outside of 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 requester may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Bradley A. Smith
Chairman

Enclosures (AOs 2004-15, 2004-07, and 2003-34)

¹⁰ The electioneering communication source restrictions do not apply to any corporation that is a qualified nonprofit corporation (“QNC”) under 11 CFR 114.10. *See* 2 U.S.C. 441b(c)(2) and 11 CFR 114.10(d)(2). The Commission assumes that Citizens United is not a QNC, however, because your request states that Citizens United “accept[s] contributions from a variety of sources, including . . . corporations.” *See* 11 CFR 114.10(c)(4)(ii).