

AGENDA DOCUMENT NO. 10-63-A

FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

OCT 6 P 5:14

AGENDA ITEM

October 6, 2010

For Meeting of 10-7-10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Christopher Hughey *pdh*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Peter T. Reynolds *PR*
Attorney

Jessica Selinkoff *JS*
Attorney

Subject: Draft AO 2010-25 – Revised Draft A

Attached is Revised Draft A of the subject advisory opinion. We have been asked to place this draft on the agenda for October 7, 2010.

Attachment

1 ADVISORY OPINION 2010-25

2

3 Lee E. Goodman, Esq.

4 LeClairRyan

5 1101 Connecticut Avenue, NW, Suite 600

6 Washington, DC 20036

7

8

9 Dear Mr. Goodman:

REVISED DRAFT A

10 We are responding to your advisory opinion request on behalf of RG
11 Entertainment, Ltd. (“RGE”), Star Parker, Star Parker for Congress, Motive
12 Entertainment, Inc., engage4 LLC, and InService America, Inc., concerning the
13 application of the Federal Election Campaign Act of 1971, as amended (the “Act”), to
14 several proposed activities. You ask whether RGE’s disbursements to produce,
15 distribute, and advertise the documentary film I WANT YOUR MONEY (the “Film”) are
16 expenditures or electioneering communications; whether RGE’s production and
17 distribution of the Film would be a coordinated communication with Ms. Parker; whether
18 a licensee’s payment of the cost of screening the Film would be a contribution to Ms.
19 Parker’s authorized committee; and whether Ms. Parker’s use of her personal funds to
20 license a promotional screening of the Film would be an independent expenditure.

21 The Commission concludes that disbursements for the production, distribution,
22 and advertising of the Film are not expenditures because they are for the *bona fide*
23 commercial activity of a commercial entity. Therefore, RGE does not need to report its
24 disbursements for the production, distribution, and advertising of the Film as
25 expenditures. If, however, RGE’s advertisements of the Film are electioneering
26 communications, then RGE must report those disbursements as such, because (1) there is
27 no exemption from the definition of “electioneering communication” for *bona fide*

1 commercial activity, and (2) RGE's advertisements would not qualify for the press
2 exception, also known as the media exception. Additionally, the Commission concludes
3 that RGE's production and distribution of the Film would not be a coordinated
4 communication with Ms. Parker. The Commission further concludes that a licensee's
5 payment to screen the Film would be an in-kind contribution to Ms. Parker's authorized
6 committee if it is for the purpose of influencing Ms. Parker's election. Lastly, the
7 Commission concludes that Ms. Parker's use of her personal funds to pay for a
8 promotional screening of the Film would be an independent expenditure.

9 ***Background***

10 The facts presented in this advisory opinion are based on your letters received on
11 September 9 and 20, 2010, and your email dated September 27, 2010.

12 RGE is a for-profit film company incorporated and located in California. Since
13 2005, RGE has produced, either directly or through wholly owned production
14 subsidiaries, three films: LUCIFER (2007), a short film depicting the struggle between
15 good and evil; SUPER CAPERS (2009), a family and adventure feature film; and the Film,
16 which is a political documentary expected to open in theaters on October 15, 2010, and
17 the subject of this advisory opinion. RGE is also currently producing a feature film, THE
18 WIND IN THE WILLOWS, based on the Kenneth Grahame novel. RGE intends to produce
19 both dramatic films and political documentaries in the future, although no specific film or
20 script has been prepared.

21 RGE is organized and maintained only for commercial purposes. RGE's sole
22 business is the production, distribution, and marketing of its films. No political party,

1 political committee, or candidate owns or controls RGE or has funded any of its film
2 productions.

3 Ms. Parker is a candidate for Congress in California's 37th Congressional District.
4 Ms. Parker was interviewed during the production of the Film, and portions of that
5 interview appear in the Film. Her appearances are limited to discussions of public policy.
6 The Film does not refer to Ms. Parker as a candidate or mention her election, campaign,
7 or political party affiliation.

8 The Film is a documentary about economic and fiscal policy, as portrayed
9 through a fictional debate between President Barack Obama and former President Ronald
10 Reagan. The Film features historical and original footage, interviews, and animated
11 depictions of several historical and current public political figures, several of whom are
12 currently candidates for Federal office: Representative Thaddeus McCotter, Speaker of
13 the House of Representatives Nancy Pelosi, Senate Majority Leader Harry Reid,
14 Representative Tom McClintock, and Ms. Star Parker.

15 RGE paid for the production of the Film and retains all ownership rights. RGE
16 states that its sole purpose for producing and distributing the Film is commercial profit.
17 Although investors will invest in the Film's printing and advertising budget, none of the
18 investors is a candidate, political committee or political party committee.

19 RGE has engaged four companies to market and distribute the Film. Three of
20 them – Motive Entertainment, Inc. ("Motive"), engage4 LLC ("engage4") and InService
21 America, Inc. ("InService America") (collectively known as "MEISA") – have joined in
22 this advisory opinion request. Motive is a marketing corporation organized and located
23 in California. It has marketed such feature films as THE PASSION OF THE CHRIST, ROCKY

1 BALBOA, THE POLAR EXPRESS, and UNITED 93. Engage4 is a communications and
2 marketing firm located in Virginia that specializes in direct marketing. It is currently
3 marketing feature films and documentaries, including THE BLIND SIDE, THE PERFECT
4 GAME, IN GOD WE TRUST, and A NECESSARY JOURNEY. InService America, a
5 corporation organized and located in Virginia, works with engage4 and provides
6 fulfillment and inventory management services, as well as event management services.
7 InService was involved in the marketing of THE PASSION OF THE CHRIST with Motive.
8 The fourth company, Freestyle Releasing, Inc. (“Freestyle”), is a distribution company
9 located in California.

10 MEISA and Freestyle are for-profit companies engaged in the business of
11 marketing, event management, and film promotion and distribution. None of the
12 financial arrangements between RGE and MEISA or Freestyle provides for any fees or
13 commissions to be paid to any candidate or political committee.

14 The Film is being distributed in three phases. During the first phase (September
15 through mid- to late-October, 2010), MEISA is actively marketing the Film via the
16 Internet, email, press releases, word-of-mouth campaigns, and licensed promotional
17 screenings hosted by individuals and organizations. The requestors represent that these
18 types of “grassroots/grasstops” activities are typical of film marketing campaigns.

19 The promotional screenings in the first phase are designed to generate public
20 interest in the Film and obtain audience feedback that may further inform marketing and
21 promotional decisions by RGE and MEISA before the Film’s formal theatrical release.
22 Each individual or organization wishing to host a promotional screening of the Film must
23 pay a fee of approximately \$500 to \$1,000 to cover the costs of theater rental, logistical

1 support, promotional materials, commissions for any subcontractors, and profits. The fee
2 may vary depending upon the venue, location, and timing of the screening. In addition to
3 offering logistical support to screeners, MEISA enters into licensing agreements on
4 RGE's behalf that grant the screener a one-time exhibition right. MEISA then conveys a
5 watermarked DVD to each screener to protect against piracy. Following the screening,
6 the licensee must return the DVD to engage4.

7 MEISA will license the Film to virtually any individual, business, or organization
8 that applies to screen it, including political and candidate committees. MEISA reserves
9 the right to decline an application if, for instance, it has reason to believe that the Film
10 will be used inappropriately or in a manner that might harm the Film's reputation. Each
11 screener will determine who to invite to the promotional screening and will retain
12 discretion to sell tickets or allow free attendance. Neither RGE nor MEISA will share in
13 any ticket revenues generated by these promotional screenings.

14 All license and event fees generated from the promotional screenings will be
15 divided between RGE and MEISA. MEISA will pay for their promotional expenses,
16 such as theater rentals, subcontractor costs, and printing and promotional material costs,
17 and keep the excess as profits, in addition to a service fee paid by RGE. No revenues
18 from license or event fees will be shared with any candidate, political committee, or
19 political party committee.

20 The second phase of the Film's distribution will consist of a national theatrical
21 release by Freestyle beginning on October 15, 2010. In this second phase, RGE
22 anticipates that the Film will be shown in at least 500 theaters nationwide. Movie
23 theaters that show the Film will charge moviegoers the usual and normal charge for

1 tickets and each movie theater will share a percentage of ticket sales with RGE and
2 Freestyle. MEISA may assist Freestyle with group ticket sales as part of the continuing
3 marketing efforts to promote the Film during its formal theatrical release.

4 As part of the second phase, RGE plans to advertise the Film in print media, as
5 well as on television and radio. Television and radio advertisements will consist of a film
6 trailer (the "Trailer") that contains excerpts from the Film, including images and/or audio
7 of President Obama and at least three current candidates (Speaker Pelosi, Representative
8 McCotter, and Representative McClintock).¹ These advertisements will be broadcast
9 nationally in October (and possibly November) 2010. RGE states that the advertisements
10 will not be coordinated with any candidate or political party committee. RGE and
11 MEISA intend to make advertising decisions based upon financial resources and optimal
12 commercial value for the Film.

13 The third phase of the Film's distribution will begin after its run in theaters in the
14 second phase ends. RGE estimates that the Film's theatrical release will last
15 approximately two to twelve weeks, depending on the Film's success. RGE has not yet
16 determined the timing and details of the third phase, but anticipates that it may include
17 distribution via DVD, pay-per-view, premium channels, broadcast and cable television,
18 and promotional screenings similar to those occurring in the first phase. In any event,
19 the Film will not be broadcast on or before the November 2, 2010, general election.

20 Ms. Parker has received inquiries from two promotional screeners of the Film
21 regarding her availability to attend and speak at promotional screenings during the first

¹ The Trailer is available for viewing at www.iwantyourmoney.net (last viewed September 27, 2010). The request does not indicate the extent to which the candidates appearing in the Trailer will be identifiable in a radio advertisement for the Film.

1 phase of the Film's distribution. One inquiry is from an individual who is hosting an
2 event at a public theater. The audience would consist of members of the public,
3 principally friends of the individual host. The other inquiry is from a corporation that
4 will be paying for the event with corporate funds. The promotional screening would take
5 place in a public theater, and the audience would consist of members of the public invited
6 by the corporation. The audience would not consist solely of the restricted class of the
7 corporation or the corporation's employees and their families. Additionally, Ms. Parker
8 intends to license the Film herself and to host a promotional screening.

9 ***Questions Presented***

- 10
11 1. *Are RGE's disbursements to produce, distribute, and advertise the Film for the*
12 *"bona fide commercial activity" of a commercial entity, and thus not expenditures?*
13
14 2. *Are RGE's advertisements for the Film that are electioneering communications*
15 *covered by the media exception?*
16
17 3. *Is the production and distribution of the Film by RGE a coordinated*
18 *communication with Ms. Parker?*
19
20 4. *Must public theatrical exhibitions of the Film by RGE include disclaimers?*
21
22 5. *If an individual pays a license fee to host a promotional screening of the Film, may*
23 *Ms. Parker attend the screening without receiving a campaign contribution in the*
24 *amount of the license or exhibition fee if she (1) speaks about policy, or (2)*
25 *discusses her candidacy?*
26
27 6. *If a corporation pays a license fee to host a promotional screening of the Film,*
28 *may Ms. Parker attend the screening without receiving a campaign contribution in*
29 *the amount of the license or exhibition fee if she (1) speaks about policy, or (2)*
30 *discusses her candidacy?*
31
32 7. *If Ms. Parker uses her personal funds to pay a license fee to host a promotional*
33 *screening of the Film, may she attend the screening without receiving a campaign*
34 *contribution in the amount of the license or exhibition fee if she (1) speaks about*
35 *policy, (2) discusses her candidacy, including soliciting contributions to her*
36 *campaign, or (3) advertises the screening as a campaign-related event?*
37

1 8. *Is Ms. Parker's payment of the license fee to host a promotional screening of the*
2 *Film exempt from the definition of "expenditure"? If not, must Ms. Parker file*
3 *FEC Form 5 (Independent Expenditure report)?*
4

5 ***Legal Analysis and Conclusions***

6
7 *Question 1. Are RGE's disbursements to produce, distribute, and advertise the Film for*
8 *the "bona fide commercial activity" of a commercial entity, and thus not expenditures?*
9

10 Yes, RGE's disbursements to produce, distribute, and advertise the Film are for
11 the *bona fide* commercial activity of a commercial entity and thus are not "expenditures"
12 under the Act and Commission regulations. Thus, RGE does not need to report as
13 expenditures its disbursements for the production, distribution, and advertising of the
14 Film. The Commission notes that RGE would nonetheless have to report its
15 disbursements for any advertisements for the Film that are electioneering
16 communications, because *bona fide* commercial activity is not exempt from
17 electioneering communication reporting requirements.

18 An "expenditure" includes "any purchase, payment, distribution, loan, advance,
19 deposit, or gift of money or anything of value, made by any person for the purpose of
20 influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i); *see also* 11 CFR
21 100.111(a). The Commission has concluded that disbursements by a commercial entity
22 for *bona fide* commercial activity are not expenditures. *See* Advisory Opinion 2008-10
23 (VoterVoter.org).

24 The Commission evaluates several factors in determining whether the commercial
25 sale of candidate-related merchandise would be *bona fide* commercial activity, including:
26 (1) whether the vendor is engaging in the activity for genuinely commercial purposes and
27 not for the purpose of influencing an election; (2) whether the sales of the merchandise

1 involve fundraising activity for candidates or solicitations of political contributions; (3)
2 whether the items are sold at the vendor's usual and normal charge; (4) whether the
3 purchases are made by individuals for their personal use; (5) whether the entity is owned,
4 controlled, or affiliated with a candidate or political committee; (6) whether the entity is
5 "in the business" of conducting the type of activity involved; and (7) whether the entity
6 follows usual and normal business practices and industry standards. *See* Advisory
7 Opinions 2008-10 (VoterVoter.org), 1994-30 (Conservative Concepts/Pence) and 1989-
8 21 (Create-a-Craft); MURs 5474 (Dog Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11),
9 First General Counsel's Report, dated May 25, 2005 (disbursements were for *bona fide*
10 commercial activity where there was no information to suggest "that those who made
11 disbursements related to the production and distribution of the film were motivated by
12 anything other than making a profit").²

13 Applying these factors to the facts presented by the requestor indicates that RGE's
14 production, distribution, and advertising of the Film is the *bona fide* commercial activity
15 of a commercial entity. First, RGE is a for-profit company organized and maintained
16 solely for commercial purposes, and its sole purpose for producing and distributing the
17 Film is to generate a commercial profit. Second, RGE's licenses and ticket sales of the
18 Film will not involve fundraising activity for candidates or solicitations of political

² While the Commission has noted the significance of conducting commercial activity on a non-partisan basis in determining whether the activity is engaged in for commercial purposes only, *see* Advisory Opinion 2008-10 (VoterVoter.org), partisanship by itself does not necessarily negate the otherwise commercial nature of an activity. *See* Advisory Opinion 1994-30 (Conservative Concepts/Pence) (marketing items containing express advocacy do not constitute independent expenditures so long as requestor does not "gear the motivation for making a purchase to those who wish to support or express support for a particular candidate" or "target the geographic area of the purchaser . . . to persons who are likely voters in the area in which the referenced candidate is running").

1 contributions. Third, RGE’s licenses and sale of the Film will be “similar to all other
2 movie releases.” Fourth, tickets for the Film will be sold to individuals in the general
3 public for their personal use. Fifth, RGE is not owned or controlled by any political
4 party, political committee, or candidate. Sixth, RGE is “in the business” of producing,
5 distributing, and advertising films. Finally, RGE plans to follow usual and normal
6 business practices and industry standards with respect to the production, distribution, and
7 marketing of the Film. RGE has entered into arms-length commercial agreements with
8 MEISA and Freestyle³ to market and distribute the Film. RGE has represented that a
9 three-phase exhibition is customary in the Film industry and that MEISA’s marketing
10 strategy for the Film is typical of film marketing campaigns.

11 Under these circumstances, the production, distribution, and advertising of the
12 Film by RGE is the *bona fide* commercial activity of a commercial entity. Thus,
13 disbursements by RGE for these activities are not expenditures made in connection with
14 any election. See MURs 5474 (Dog Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11),
15 First General Counsel’s Report, dated May 25, 2005.

16 The Commission notes that RGE would have to report its disbursements for any
17 advertisements for the Film that meet the definition of an “electioneering
18 communication.” An electioneering communication is any broadcast, cable, or satellite
19 communication that refers to a clearly identified candidate for Federal office, is publicly
20 distributed within sixty days before a general, special, or runoff election (or thirty days
21 before a primary) for the office sought by the candidate, and is targeted to the relevant

³ The requestors indicate that MEISA and Freestyle are not owned or controlled by any political party, political committee, or candidate.

1 electorate. *See* 2 U.S.C. 434(f)(3)(A); 11 CFR 100.29(a). An electioneering
2 communication “does not include...a communication which constitutes an expenditure or
3 an independent expenditure.” 2 U.S.C. 434(f)(3)(B)(ii); *see also* 11 CFR 100.29(c)(3).

4 RGE plans to advertise the Film by broadcasting the Trailer nationally on radio
5 and television within sixty days before the general election. The Trailer contains images
6 and audio of at least three clearly identified candidates —Speaker Pelosi, Representative
7 McCotter, and Representative McClintock— who are seeking election to Federal office
8 in the November 2, 2010, general election. Any such broadcast of the Trailer that is
9 “targeted to the relevant electorate”⁴ would be an electioneering communication.

10 Although the Commission has the authority to promulgate regulations to exempt
11 certain communications from the definition of “electioneering communication,” *see* 2
12 U.S.C. 434(f)(3)(B)(iv), it has not promulgated any regulations exempting
13 communications made as part of a commercial entity’s *bona fide* commercial activity.⁵

⁴ In the case of candidates for the House of Representatives, a communication is “targeted to the relevant electorate” when the communication can be received by 50,000 or more persons in the district the candidate seeks to represent. *See* 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(5). The Commission lacks sufficient information to determine whether RGE’s planned broadcasts of the Trailer will be “targeted to the relevant electorate” with respect to the candidates identified in the Trailer, because RGE indicates only that its broadcasts will be “national” in scope.

⁵ While commercial communications are no longer subject to the *prohibition* on corporate electioneering communications at 11 CFR 114.15 – a regulation that the Commission intends to address in light of the Supreme Court’s opinion in *Citizens United v. FEC*, 130 S.Ct. 876, 78 USLW 4078 (U.S. Jan 21, 2010) – they nonetheless remain “electioneering communications.” The Commission previously considered and rejected an exception from the definition of “electioneering communication” for communications that refer to a clearly identified candidate in the context of promoting a candidate’s business. *See* Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190, 65197, 65202 (Oct. 23, 2002). The Commission determined that it lacked the statutory authority to promulgate such an exception under 2 U.S.C. 434(f)(3)(B)(iv), because “it is likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they also serve a business purpose unrelated to the election.” *Id.*; *see also Shays v. FEC*, 414 F.3d at 109 (the Commission cannot create a blanket exemption for public service announcements by certain nonprofit corporations “given that such broadcasts could ‘associate a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate.’”).

1 Therefore, any advertisements for the Film that meet the definition of “electioneering
2 communication” will not be exempt from that definition, or from the applicable reporting
3 requirements, merely because they are the *bona fide* commercial activity of a commercial
4 entity. *See* 2 U.S.C. 434(f).

5 *Question 2. Are RGE’s advertisements for the Film that are electioneering*
6 *communications covered by the media exception?*

7
8 No, RGE’s advertisements for the Film are not covered by the media exception.

9 RGE’s advertisements that are electioneering communications may be exempt
10 from regulation under the media exception, also known as the press exception, in either
11 of two ways. First, if RGE’s production and distribution of the Film qualify for the
12 media exception to the definition of expenditure, then RGE’s advertisements of the Film
13 would also be exempt from regulation. *See FEC v. Phillips Publ’g*, 517 F.Supp. 1308,
14 1312-13 (D.D.C. 1981); Advisory Opinion 2010-08 (Citizens United). Second, RGE’s
15 advertisements would be exempt from regulation if they qualify for the media exception
16 to the definition of “electioneering communication.”

17 Media exception and expenditures

18 “The term ‘expenditure’ does not include . . . any news story, commentary, or
19 editorial distributed through the facilities of any broadcasting station, newspaper,
20 magazine, or other periodical publication, unless such facilities are owned or controlled
21 by any political party, political committee, or candidate.” 2 U.S.C. 431(9)(B)(i).

22 The Commission conducts a two-step analysis to determine whether this
23 exception applies. The first question is whether the entity engaging in the activity is a
24 press entity. *See* Advisory Opinions 2010-08 (Citizens United), 2005-16 (Fired Up!),

1 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission
2 applies the two-part analysis of *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215
3 (S.D.N.Y. 1981), which requires it to establish: (A) that the entity is not owned or
4 controlled by a political party, political committee, or candidate; and (B) that the entity is
5 acting as a press entity in conducting the activity at issue (*i.e.*, that the press entity is
6 acting in its "legitimate press function"). *See also Phillips Publ'g*, 517 F.Supp. at 1312-
7 13; Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired
8 Up!), and 2004-07 (MTV).

9 When determining whether a particular entity is a press entity, the Commission
10 often focuses on whether the entity produces on a regular basis a program that
11 disseminates news stories, commentary, and/or editorials. *See, e.g.*, Advisory Opinions
12 2008-14 (Melothé, Inc.), 2007-20 (XM Radio), and 2005-19 (Inside Track). The term
13 "news story, commentary, or editorial" includes documentaries and educational
14 programming. *See* Advisory Opinion 2010-08 (Citizens United) (exempting
15 documentaries from the definition of expenditure); *Explanation and Justification for*
16 *Final Rules on Electioneering Communications*, 67 FR 65190, 65197 (Oct. 23, 2002)
17 (exempting documentaries from the electioneering communication definition in 11 CFR
18 100.29(c)(2)).

19 Not every company that produces documentaries, however, qualifies for the
20 media exception. In Advisory Opinion 2004-30 (Citizens United), the Commission
21 determined that the requestor was not a press entity because the requestor did not
22 "regularly produce documentaries or pay to broadcast them on television." At that time,
23 the requestor had produced only two documentaries since its founding. More recently,

1 however, the Commission determined that the same requestor was a press entity for the
2 purposes of its filmmaking activities, noting the substantial increase in the “volume and
3 frequency” of the requestor’s documentary production over the preceding six years (from
4 two to fourteen films) and its consistent allocation of a substantial portion of its budget to
5 documentary film production. Advisory Opinion 2010-08 (Citizens United).

6 In those instances in which the Commission has determined that an entity without
7 a substantial history of media activity qualifies as a press entity, that determination has
8 turned on the entity’s specific plans to produce, on a regular basis, a program that
9 disseminates news, commentary, and editorials. For example, in determining that
10 Melothé, Inc. was a press entity, the Commission relied on a detailed proposal for an
11 Internet TV station that would, in its normal course, provide “interviews, daily news
12 reports, roundtable discussions, coverage of campaign events, speeches and rallies,
13 ‘reports from the road,’ and commentary related to particular political campaigns.”
14 Advisory Opinion 2008-14 (Melothé, Inc.). Similarly, in Advisory Opinion 2010-08
15 (Citizens United), Citizens United had not only a history of media activity, but it also had
16 specific plans to produce and distribute documentaries in the future, including two
17 pending premieres, four additional documentaries in production, an anticipated
18 documentary budget, and specific negotiations to broadcast several documentaries.

19 Here, by contrast, RGE has produced only one documentary to date and has only
20 a general intention to produce both dramatic films and political documentaries in the
21 future. RGE acknowledges that no specific film or script for any future documentary has
22 been prepared. RGE offers only potential methods of distribution that it “may” use in the
23 future for any such films. Nor is RGE’s current project, *THE WIND IN THE WILLOWS*,

1 “news, commentary, or editorial.” Based on its track record and representations as to
2 future activities, RGE is not, and does not appear to intend to engage in, producing
3 documentaries on a regular basis. Thus, it is not a press entity. Because RGE is not a
4 press entity, it is unnecessary to proceed to the media exception analysis set forth in
5 *Reader’s Digest*. Accordingly, the costs of producing and distributing the Film are not
6 exempt from the Act’s definition of “expenditure” under the media exception.

7 Media exception and electioneering communications

8 The Act and Commission regulations exempt from the definition of
9 “electioneering communication” any communication that appears “in a news story,
10 commentary, or editorial” distributed through the facilities of any broadcast, cable, or
11 satellite television or radio station, unless such facilities are owned or controlled by any
12 political party, political committee, or candidate. *See* 2 U.S.C. 434(f)(3)(B)(i); 11 CFR
13 100.29(c)(2). Because the Trailer will not appear in a news story, commentary, or
14 editorial, it does not qualify for this exception. *See* Advisory Opinion 2004-30.
15 Moreover, RGE is not a press entity, as discussed above. Therefore, RGE will have to
16 report its disbursements for any advertisements of the Film that meet the definition of
17 “electioneering communication.”⁶ *See* 2 U.S.C. 434(f).

18 *Question 3. Is the production and distribution of the Film by RGE a coordinated*
19 *communication with Ms. Parker?*

20

⁶ Because the Film will not be broadcast on or before the November 2, 2010, general election, it will not be an electioneering communication. Thus, the media exception from the definition of electioneering communication is not relevant with respect to the Film. *See* 2 U.S.C. 434(f)(3)(B)(i); 11 CFR 100.29(c)(2).

1 No, the production and distribution of the Film by RGE is not a coordinated
2 communication with Ms. Parker, because it does not meet the content prong of 11 CFR
3 109.21(a)(2).

4 Commission regulations set forth a three-prong test to determine whether a
5 payment for a communication is an in-kind contribution to a candidate as a result of
6 coordination between the person making the payment and the candidate. *See* 11 CFR
7 109.21(a); *see also* 2 U.S.C. 441a(a)(7)(B). Under the second prong of the test, a
8 communication must satisfy at least one of the four content standards in 11 CFR
9 109.21(c) to be a coordinated communication.⁷

10 The first content standard, at 11 CFR 109.21(c)(1), covers “electioneering
11 communications,” as defined in 11 CFR 100.29. As noted above, an electioneering
12 communication must be a “broadcast, cable, or satellite communication.” 2 U.S.C.
13 434(f)(3); 11 CFR 100.29(a). RGE indicates that the Film will be shown only in theaters
14 during the time that Ms. Parker is a candidate – that is, before November 2, 2010. A
15 documentary film shown in a movie theater is not a “broadcast, cable, or satellite
16 communication” because it is not “publicly distributed by a television station, radio
17 station, cable television system, or satellite system.” 11 CFR 100.29(b)(1).

18 The remaining content standards, at 11 CFR 109.21(c)(2) through (4), cover only
19 “public communications” as defined in 11 CFR 100.26. A “public communication” is “a
20 communication by means of any broadcast, cable, or satellite communication, newspaper,
21 magazine, outdoor advertising facility, mass mailing, or telephone bank to the general

⁷ The Commission recently adopted a fifth content standard, at 11 CFR 109.21(c)(5), for a public communication that is the functional equivalent of express advocacy. This content standard is not effective until December 1, 2010. *See* Final Rules on Coordinated Communications, 75 FR 55947 (Sept. 15, 2010).

1 public, or any other form of general public political advertising.” 2 U.S.C. 431(22);
2 11 CFR 100.26. Because a communication by means of a movie theater is not one of the
3 forms of media specifically enumerated in either the statutory or regulatory definition of
4 “public communication,” RGE’s exhibition of the Film in a movie theater would be a
5 “public communication” only if it is a form of “general public political advertising,” as
6 that term is used in 2 U.S.C. 431(22) and 11 CFR 100.26. *See Shays v. FEC*, 337 F.
7 Supp.2d 28, 70 (D. D. C. 2004).

8 The Commission concludes that RGE’s exhibition of the Film in movie theaters is
9 not a form of “general public political advertising” and is not, therefore, a public
10 communication. The Commission has previously stated that, “[b]y definition, the word
11 ‘advertising’ connotes a communication for which a payment is required, particularly in
12 the context of campaign messages.” *Final Rules on Internet Communications*, 71 FR
13 18589, 18594 (Apr. 12, 2006) (identifying several definitions and characteristics of
14 “advertising”). Thus, while a movie trailer or other advertisement placed for a fee before
15 a feature presentation in a movie theater, for example, might be considered general public
16 political advertising, RGE’s showing of the Film under the circumstances presented here
17 would not be. During the national theatrical release, RGE would not be paying the
18 theaters a fee to have the Film shown to the general public. Rather, RGE will enter into
19 an agreement where RGE, Freestyle, and the movie theater will share a percentage of
20 each ticket sale.

21 Because none of the content standards is met, the production and distribution of
22 the Film by RGE would not be a coordinated communication with Ms. Parker under

1 11 CFR 109.21. Consequently, the payments by RGE to produce and distribute the Film
2 would not be in-kind contributions to Ms. Parker's authorized committee. *See* Advisory
3 Opinion 2005-18 (Reyes).

4 *Question 4. Must public theatrical exhibitions of the Film by RGE include disclaimers?*

5

6 No, public theatrical exhibitions of the Film by RGE need not include
7 disclaimers.⁸

8 The Act and Commission regulations require electioneering communications and
9 certain public communications to include disclaimers. *See* 2 U.S.C. 441d(a); 11 CFR
10 110.11(a). When required, disclaimers must clearly state the full name and permanent
11 street address, telephone number, or World Wide Web address of the person who paid for
12 the communication, and, if made independently of any candidate, indicate that the
13 communication is not authorized by any candidate or candidate's committee. *See*
14 2 U.S.C. 441d(a)(3); 11 CFR 110.11(b)(3). The disclaimer must be presented in a clear
15 and conspicuous manner to give the viewer adequate notice of the identity of the person
16 or political committee that paid for or authorized the communication. 11 CFR
17 110.11(c)(1).

18 The answer to Question 3, above, concludes that public theatrical exhibitions of
19 the Film by RGE will not be electioneering communications or public communications.
20 Therefore, no disclaimers will be required for its public theatrical exhibitions of the Film.

21 *Question 5. If an individual pays a license fee to host a promotional screening of the*
22 *Film, may Ms. Parker attend the screening without receiving a campaign contribution in*

⁸ The requestors do not ask or provide any information about possible use of the Film in connection with non-Federal fundraising activity. *See* 2 U.S.C. 441i(e); 11 CFR 300.64. Thus, the Commission does not address disclaimers under 11 CFR 300.64.

1 *the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses*
2 *her candidacy?*

3

4 *Question 6. If a corporation pays a license fee to host a promotional screening of the*
5 *Film , may Ms. Parker attend the screening without receiving a campaign contribution in*
6 *the amount of the license or exhibition fee if she (1) speaks about policy, or (2) discusses*
7 *her candidacy?*

8

9 *Question 7. If Ms. Parker uses her personal funds to pay a license fee to host a*
10 *promotional screening of the Film, may she attend the screening without receiving a*
11 *campaign contribution in the amount of the license fee if she (1) speaks about policy, (2)*
12 *discusses her candidacy, including soliciting contributions to her campaign, or (3)*
13 *advertises the screening as a campaign-related event?*

14

15 These questions are being answered together. Yes, Ms. Parker may attend a
16 screening of the Film – whether paid for by an individual other than Ms. Parker, by a
17 corporation, or by Ms. Parker herself from her personal funds – and discuss only public
18 policy issues without receiving an in-kind contribution. If, however, her appearance at
19 the screening is for the purpose of influencing an election, as described below, then the
20 license fee paid by the screening host would be an in-kind contribution to Ms. Parker’s
21 authorized committee.

22 A “contribution” includes “anything of value” made for the purpose of
23 influencing a Federal election. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). “Anything of
24 value” includes all in-kind contributions. 11 CFR 100.52(d).

25 In prior advisory opinions, the Commission has determined that the financing of
26 activities in which a Federal candidate participates will result in a contribution to that
27 candidate if the activities involve (1) the solicitation, making or acceptance of
28 contributions to the candidate’s campaign, or (2) communications, including
29 communications by a candidate, expressly advocating the nomination, election or defeat
30 of the candidate or that candidate’s opponent. *See* Advisory Opinions 1999-11 (Byrum),

1 1994-15 (Byrne), 1992-37 (Terry), 1992-06 (Duke); *see also* Advisory Opinion 2009-26
2 (Coulson). “The Commission has also concluded that the absence of express advocacy or
3 solicitations will not preclude a determination that public appearances by candidates are
4 campaign related.” Advisory Opinion 1986-37 (National Conservative Foundation). *See*
5 *also* Advisory Opinions 1994-15 (Byrne), 1992-06 (Duke).

6 Although Ms. Parker appears several times in the Film, the request indicates that
7 she is identified in the Film only as “Author and Founder, Center for Urban Renewal &
8 Education”; her remarks are limited to discussions of public policy; and the Film does not
9 identify or discuss Ms. Parker’s party affiliation or candidacy. The requestor has asked
10 the Commission to assume, for purposes of this advisory opinion only, that the Film
11 expressly advocates the election or defeat of at least one Federal candidate and does not
12 expressly advocate the election or defeat of Ms. Parker. Nor is there any indication that
13 the Film expressly advocates the election or defeat of, or even refers to, any other clearly
14 identified candidate for the same Federal office as that sought by Ms. Parker.

15 Thus, if Ms. Parker attends a screening of the Film – whether paid for by an
16 individual, a corporation, or herself – and discusses only public policy issues, then the
17 payment of screening costs would not result in a contribution to Ms. Parker’s authorized
18 committee. If, however, Ms. Parker discusses her candidacy at the screening – such as by
19 advocating her own election, or by advocating the defeat of any other candidate for the
20 same office – or solicits or accepts contributions to her campaign, or advertises the
21 screening as a campaign event, then the license fees paid by the host of the screening
22 would be an in-kind contribution to Ms. Parker’s authorized committee. Similarly, if Ms.
23 Parker is identified as a candidate when she is introduced at the screening or in publicity

1 for the screening, then her appearance at the screening would be campaign related and the
2 license fee paid by the host of the screening would be a contribution to her authorized
3 committee. Advisory Opinion 1986-37 (National Conservative Foundation).⁹

4 These contributions would be subject to the limitations of the Act at 2 U.S.C.
5 441a(a) and the prohibitions at 2 U.S.C. 441b, 441c, 441e, and 441f. Thus, if the host of
6 the screening is a corporation, then, under the circumstances described in the request, a
7 prohibited in-kind contribution would result. A corporation may not use its general
8 treasury funds to sponsor and finance Ms. Parker’s campaign appearance to audiences
9 consisting of individuals outside of the corporation’s restricted class (or the corporation’s
10 employees and their families) beyond the limited circumstances described in 11 CFR
11 114.3 and 114.4. *See* Advisory Opinion 1986-37 (National Conservative Foundation).

12 Similarly, Ms. Parker would make a contribution to her own campaign by using
13 her personal funds to license the Film at a campaign event. Her authorized committee
14 would have to report the receipt of that contribution, just as it would report the receipt of
15 any other contribution. *See* 2 U.S.C. 434(a), 11 CFR 104.3(a)(3).

16 *Question 8. Is Ms. Parker’s payment of the license fee to host a promotional screening of*
17 *the Film exempt from the definition of “expenditure”?* *If not, must Ms. Parker file FEC*
18 *Form 5 (Independent Expenditure report)?*

19
20 Ms. Parker’s payment of the license fee to host a theater screening of the Film
21 would not be exempt from the definition of “expenditure” under the media exception.

⁹ Other factors could also demonstrate that Ms. Parker’s appearances are for the purpose of influencing an election. *See* Advisory Opinion 1992-06 (Duke) (“Nevertheless, candidate activities involving the discussion of campaign issues during an election by the candidate necessitates further scrutiny to determine campaign-relatedness”). The Commission currently lacks sufficient information to determine whether an appearance by Ms. Parker at a screening of the Film would be for the purpose of influencing an election.

1 As a candidate, Ms. Parker is eligible for the media exception only under certain
2 limited circumstances, none of which applies here. *See* 2 U.S.C. 431(9)(B)(i); 11 CFR
3 100.132; *Reader's Digest*, 509 F. Supp. at 1215. The media exception “do[es] not apply
4 to commentaries and editorials that are distributed through facilities that are owned or
5 controlled by a political party, political committee, or candidate.” Advisory Opinion
6 2005-07 (Mayberry); *see also* 2 U.S.C. 431(9)(B)(i); 11 CFR 100.73 and 100.132. When
7 the media exception applies to a facility controlled by a candidate, it is limited to costs
8 incurred to cover a *bona fide* news account communicated in a publication of general
9 circulation or on a licensed broadcast facility as part of a general pattern of campaign-
10 related news account that gives reasonably equal coverage to all opposing candidates in
11 the circulation or listening area. 11 CFR 100.132. Because RGE characterizes the Film
12 as editorial in nature, Ms. Parker’s screening of the Film would not qualify for the media
13 exception.

14 The Commission does not have sufficient information to determine whether Ms.
15 Parker’s payment of the license fee would be *bona fide* commercial activity by Ms.
16 Parker.

17 The Commission has been asked to assume for purposes of this advisory opinion
18 only that the Film expressly advocates the election or defeat of at least one clearly
19 identified Federal candidate but not Ms. Parker. As such, assuming the absence of
20 prearrangement or coordination with any other candidate or political party, Ms. Parker’s
21 use of her personal funds¹⁰ to license a promotional screening of the Film would be an

¹⁰ If Ms. Parker pays the license fee to screen the Film at her campaign event, as discussed above, then her authorized committee would have to report it accordingly.

1 independent expenditure – that is, a payment for a communication containing express
2 advocacy that is not coordinated with any candidate or political party.¹¹ See 2 U.S.C.
3 431(17); 11 CFR 100.16. Ms. Parker would have to report the independent expenditure
4 pursuant to
5 2 U.S.C. 434(c) and 11 CFR 109.10.

6 This response constitutes an advisory opinion concerning the application of the
7 Act and Commission regulations to the specific transaction or activity set forth in your
8 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
9 of the facts or assumptions presented, and such facts or assumptions are material to a
10 conclusion presented in this advisory opinion, then the requestor may not rely on that
11 conclusion as support for its proposed activity. Any person involved in any specific
12 transaction or activity which is indistinguishable in all its material aspects from the
13 transaction or activity with respect to which this advisory opinion is rendered may rely on
14 this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
15 conclusions in this advisory opinion may be affected by subsequent developments in the
16 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

17

¹¹ Ms. Parker does not ask or provide any information about possible coordination between Ms. Parker and any other candidate or political party. Thus, the Commission does not address whether Ms. Parker's payment of the license fee to screen the Film would be an in-kind contribution to any other candidate or political committee.

1 The cited advisory opinions are available on the Commission's website at
2 <http://saos.nictusa.com/saos/searchao>.

3 On behalf of the Commission,

4

5

6

7

Matthew S. Petersen
Chairman