FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 25, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2004-15

Mr. David T. Hardy
Bill of Rights Educational Foundation
PMB 265
Tucson, AZ 85749

Dear Mr. Hardy:

This responds to your letters dated March 15, and April 21, 2004, and your subsequent electronic mail message of May 3, 2004 requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to advertising you and the Bill of Rights Educational Foundation ("the Foundation") plan to undertake.

Background

You state you are the president of the Foundation, which is an Arizona corporation. You have stated that your organization qualifies as a nonprofit corporation organized under Section 501(c)(4) of the Internal Revenue Code, 26 U.S.C. 501(c)(4). This Advisory Opinion is contingent on these facts as you have presented them.

You explain that you are producing a documentary film, entitled "The Rights of the People," to focus on Bill of Rights issues. You state that you have completed approximately half of the filming. For the remaining half, you state you will include footage of some Congressional officeholders, some of whom are candidates for re-election in 2004. You state that the film may also make reference to "members of the current Administration" including President Bush. You explain that while you are personally producing the documentary, both you and the Foundation would pay for the marketing and would be involved in the distribution of the documentary. You plan to distribute the documentary in non-broadcast form, but would use radio and perhaps

television commercials to promote its distribution. You ask whether these commercials would constitute electioneering communications if they refer to a candidate for Federal office and if they air within 60 days before a general election or 30 days before a primary election. You indicate that if the commercials clearly identify a U.S. Congressional candidate, you do not intend to "run" the commercials in that candidate's district. [1] However, certain commercials could clearly identify at least one candidate for U.S. President and would be received by 50,000 or more people within 30 days of a presidential primary, a national nominating convention, and, in all likelihood, the general election. You ask whether these proposed commercials would be electioneering communications.

Question Presented

Would the proposed commercials that reference a clearly identified Presidential candidate be electioneering communications within the meaning of the Act and Commission regulations?

Legal Analysis and Conclusions

Yes, the proposed commercials would be electioneering communications. 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 of a general, special or runoff election for the office sought by the candidate, or within 30 days of a primary or preference election for the office sought by the candidate. 2 U.S.C. 434(f)(3) and 11 CFR 100.29; *see also* Advisory Opinion 2003-12. Elements of the definition turn on the type of Federal candidate identified. For presidential and vice presidential candidates, "publicly distributed" means that the electioneering communication 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 prior to the convention to the end of the convention; or (3) anywhere in the United States within 60 days prior to the general election. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(b)(3)(ii); see *also* 2 U.S.C. 434(f)(3)(C).

The radio and television commercials that you describe in your request would be electioneering communications because they meet all the elements of 2 U.S.C. 434(f)(3) and 11 CFR 100.29. The proposed commercials would refer to at least one presidential candidate who is a clearly identified candidate for Federal office. *See* 11 CFR 100.29(a)(1). They would also be publicly distributed because you intend to pay a radio station and perhaps a television station to air or broadcast your commercials. *See* 11 CFR

[1] The Commission assumes from your statement that the commercials would not run in the Congressional districts of the Congressional candidates means that they would not be received in the Congressional districts. *See* 11 CFR 100.29(b)(6)(i) and (ii), and 11 CFR 100.29(b)(7). Therefore, this advisory opinion addresses only commercials that refer to a Presidential candidate.

100.29(a)(2) and (b)(3)(i). Finally, they would reach 50,000 or more people within 60 days of a national nominating convention and/ or 60 days of the general election.[2]

Furthermore, none of the statutory or regulatory exemptions for electioneering communications appears to apply to the proposed commercials. *See* 2 U.S.C. 434(f)(3)(B)(i) through (iv), and 11 CFR 100.29(c)(1) through (6). The proposed commercials would not be disseminated through means other than broadcast, cable or satellite communication.[3] They would not constitute a reportable expenditure or independent expenditure.[4] They would not constitute a candidate debate or forum or promotion of such an event. They are not communications by local or State candidates. Moreover, these communications would not be made by entities organized under 26 U.S.C. 501(c)(3).

Your request did not assert that your organization was entitled to a media exemption under 2 U.S.C. 434(f)(3)(B)(i). Nor did you provide any information that would allow the Commission to determine whether or not any proposed advertisement is entitled to this exemption from the electioneering communications provision for a communication that is a "news story, commentary, or editorial . . . ." 11 CFR 100.29(c)(2). Thus the Commission makes no finding with respect to the application of the media exemption in this case.

Because your radio and television commercials would be electioneering communications, the statutory and regulatory requirements governing electioneering communications apply. *See generally* 2 U.S.C. 434(f) and 441b(b), and 11 CFR 104.20 and 114.14(b). However, these legal requirements differ depending on whether you or the Foundation pays for these commercials. If you, as an individual, pay for these commercials, you must comply with the funding and reporting requirements described in 2 U.S.C. 434(f), 441b(b)(2) and 11 CFR 104.20 and 114.14(b). Corporations and labor organizations are prohibited from making or financing electioneering communications. 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(2)(iii); *see also* 11 CFR 114.14(a) and (b). Qualified nonprofit corporations as described in 11 CFR 114.10, however, are exempt from this prohibition.[5] *See* 11 CFR 114.2(b)(2). The Foundation does not meet the

[2] Your request does not specify if 50,000 or more people who would be able to receive the proposed commercials during a presidential primary are located in the particular State where a presidential primary is held. Thus, it is unclear whether the proposed commercials broadcast during the presidential primary would be considered electioneering communications.

[3] For example, commercials for the documentary using print media (including newspaper or magazines or mailings), or commercials over the Internet (including emails) would not be electioneering communications. *See* 11 CFR 100.29(c)(1); *see also* Advisory Opinion 2004-07.

[4] The Commission assumes that the proposed commercials do not expressly advocate the election or defeat of any candidate for Federal office.

[5] Nonprofit organizations organized under 26 U.S.C. 501(c)(3) may also pay for electioneering communications pursuant to the exemption in 11 CFR 100.29(c)(6). The Commission expresses no opinion regarding the qualifications for tax treatment under 26 U.S.C. 501(c)(3).

requirements of section 114.10,[6] and therefore, may not pay for the proposed commercials or provide you with the funds to pay for them.[7]

The Commission expresses no opinion regarding qualification for tax treatment under 26 U.S.C. 501(c)(3) or (4) or any other ramifications of the proposed activities under the Internal Revenue Code because those questions are outside 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.

Sincerely,

(signed)

Ellen L. Weintraub
Vice-Chair

Enclosures (AOs 2004-07 and 2003-12)

[6] There are several requirements for Qualified Nonprofit Corporation status under 11 CFR 114.10, including that the entity be described in 26 U.S.C. 501(c)(4). *See* 11 CFR 114.10(c)(5). Although you represent that the Foundation is organized as a (c)(4) corporation, your request does not indicate that the Foundation has met any of the other requirements of 11 CFR 114.10. *See* 11 CFR 114.10(c)(1) through (4). Nor have you provided any information indicating that a court has determined that the Foundation is otherwise entitled to qualified nonprofit status. *See* 11 CFR 114.10(e)(1)(i)(B).

[7] However, should the Foundation subsequently meet the requirements of section 114.10(c), it would be able to pay for the commercials subject to the restrictions in 11 CFR 114.14 and the reporting requirements in 11 CFR 104.20. With its first report, it would also be obligated to file certification of its status as a qualified nonprofit corporation. 11 CFR 114.10(e)(1)(ii).