



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY *MWD*

DATE: September 8, 2004

SUBJECT: COMMENT: DRAFT AO 2004-30

Transmitted herewith is a timely submitted comment by Michael Boos, Vice President and General Counsel for Citizens United, regarding the above-captioned matter.

Proposed draft Advisory Opinion 2004-30 is on the agenda for Thursday, September 9, 2004.

Attachment

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2004 SEP -8 A 11: 33

Via Facsimile &
Hand Delivery

September 8, 2004

Mary W. Dove
Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Draft Advisory Opinion 2004-30

Dear Ms. Dove:

Pursuant to your letter of September 1, 2004 and the September 2, 2004 notice published on the Federal Election Commission's web-page, Citizens United submits the following comments regarding Draft Advisory Opinion 2004-30:

SUMMARY OF COMMENTS

The Draft Advisory Opinion ("DAO") relies on a distorted interpretation of the facts to reach the faulty conclusion that "Citizens United is not acting as a media entity in connection with the activities proposed in [the advisory opinion request]."¹ DAO 2004-30 at 9-10. Citizens United urges the Federal Election Commission ("Commission") to reject the Draft's conclusion that its documentary film ("Film") and broadcast advertising for the Film are not entitled to the media exemption that applies to electioneering communications. In addition, Citizens United requests the Commission to instruct its Office of General Counsel to draft a substitute advisory opinion, which concludes that the Film and broadcast ads for the Film are entitled to the media exemption under the Federal Election Campaign Act ("Act").

¹ We also take this opportunity to address factual inaccuracies in the Draft Advisory Opinion. On page 6, the DAO mistakenly lists Mr. Bossie as the author of *Hand of Providence: The Strong and Quiet Faith of Ronald Reagan*. The author of that work is Mary Beth Brown. Moreover, while it is technically true that Citizens United did not finance any television or radio ads for either *Intelligence Failure* or *Hand of Providence*, *see id.*, Citizens United Foundation did, in fact, finance radio advertisements for *Hand of Providence*. *See* Letter dated July 22, 2004 at 3.

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COMMENTS

1. Contrary to the DAO's conclusion, Citizens United is engaged in legitimate press activities in the production, distribution and marketing of its Film.

First, the Commission has previously decided that documentary films fall within the scope of the media exemption to electioneering communications. In its explanation and justification for its final rules, the Commission stated explicitly that it "interprets 'news story commentary, or editorial' to include documentaries and educational programming in this context." Explanation and Justification for Electioneering Communications, Final Rules, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002). Citizens United's Film falls squarely within the scope of the explanation and justification given for the final rules. Moreover, an advisory opinion request is not the appropriate forum in which to alter this right line rule regarding the scope of the media exemption.

Second, Citizens United's governing documents and its past activities support, rather than undermine, its claim to a media exemption for the Film. Article II of Citizens United's Articles of Incorporation state that the organization is organized "to promote social welfare through informing and educating the public on conservative ideas and positions on issues" (emphasis added), and that its purposes are to be accomplished through a variety of means including:

- (1) By engaging in analysis, study, and research and by preparing, assembling, and distributing the result to interested individuals and organizations and the public through various means of communications, including reports, studies, monographs, and other educational materials;
- (2) By sponsoring and supporting public discussion groups, forums, panels, lectures, symposiums, seminars, debates, and other similar events to which interested individuals and organizations and members of the public will be invited; and
- (3) By working with other educational organizations and individuals in order to achieve the above stated purposes.

In furtherance of its purposes, Citizens United has used a variety of communication modes to inform and educate the public. Examples include a nationally syndicated radio talk show program that was broadcast in the mid-1990s, newsletters, position papers, paid television editorials, a "webmercial," investigative reports/policy papers, court filings, numerous op-eds, and video documentaries.

Citizens United purposes and principal undertakings clearly qualify as press endeavors. In Austin v. Michigan Chamber of Commerce, the U.S.

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Supreme Court noted that media corporations, in contrast to other business entities, devote their resources "to the collection of information and its dissemination to the public." 494 U.S. 652, 667 (1990). The Court explained: "We have consistently recognized the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* (emphasis added). These are precisely the type activities that Citizens United was organized to engage in, and they are precisely the type of activities that Citizens United has consistently undertaken throughout its existence. The Film at issue in the pending advisory opinion request is but a further extension of Citizens United's legitimate press activities.

Third, that Citizens United engages in issue advocacy and that it maintains a separate segregated fund, Citizens United Political Victory Fund, which endorses candidates for public office is not a valid basis for disqualifying the Film from the media exemption. It is common knowledge that media entities routinely engage in issue advocacy and routinely endorse candidates for public office. If issue advocacy and candidate endorsement were not part of a legitimate press function, there would be no need for the media exemption, since the very acts that the exemption is designed to cover would disqualify the entity seeking the exemption.

Fourth, the fact that Citizens United will be paying for broadcast time to air its Film, *see* DAO 2003-30 at 12, is irrelevant to the analysis. The media exemption only comes into play if the Film otherwise qualifies as an electioneering communication and one of the requisites to qualifying as an electioneering communication is the payment of a fee to broadcast the communication. Thus, contrary to DAO's analysis, the fact that Citizens United would be paying a fee to air its documentary on television is not "one of the 'considerations of form' that can help to distinguish an electioneering communication from exempted media activity."

2. The Draft Advisory Opinion Ignores Court Precedent In Concluding That Advertising For The Film Is Not Covered By The Media Exemption.

The Draft Advisory Opinion concludes that paid broadcast advertisements for the Film are not subject to the media exemption for two reasons. First, it concludes that the advertisements fail on their face because they "would not 'appear in a news story, commentary or editorial.'" DOA 2004-30 at 13. Second, the Draft concludes that given the Draft's 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 Film cannot be considered part of a "normal, legitimate [media] function." *Id.*

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Contrary to the Draft's conclusion, court precedent establishes that advertising for activity that falls within the scope of the media exemption also falls within the scope of the exemption. In Federal Election Commission v. Phillips Publishing, Inc., the U.S. District Court for the District of Columbia unequivocally held that a direct mail letter, which solicited subscriptions for a newsletter, clearly fell within the scope of the Act's media exemption, even though the solicitation expressed opposition to a Federal candidate. 517 F.Supp. 1308 (D.D.C. 1981). Although Phillips Publishing concerned the application of the Act's media exemption to the term "expenditure," the Commission has recognized that the electioneering communication exemption is similar in scope to the "expenditure" exemption. See e.g. AO 2004-7.

In light of prior court precedent recognizing that advertising for press activity qualifies for the media exemption, the Commission should reject the DAO's conclusion that advertising for the Citizens United Film does not fall within the scope of the media exemption because it "would not appear in a news story, commentary or editorial." Moreover, since, as set forth above, the Film clearly qualifies as a legitimate press activity on the part of Citizens United, the Commission should also reject the Draft's secondary conclusion that advertising for the Film is not part of Citizens United's legitimate press function.

CONCLUSION

For the reasons set forth above, Citizens United respectfully requests the Commission to reject the draft advisory opinion's conclusion that Citizens United Film and advertising for the Film do not fall within the scope of the Federal Election Campaign Act's media exemption to electioneering communications. Citizens United further urges that Commission to instruction its Office of General Counsel to forthwith draft a substitute advisory opinion that concludes that the Film and broadcast ads for the Film are entitled to the media exemption under the Act.

Respectfully Submitted,



Michael Boos
Vice President &
General Counsel

cc: Rosemary C. Smith, Esquire
Associate General Counsel
Office of General Counsel