



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

June 11, 2010

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2010-08

Theodore B. Olson, Esq.  
Gibson, Dunn & Crutcher LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5306

Dear Mr. Olson:

We are responding to your advisory opinion request on behalf of Citizens United concerning whether its filmmaking activities constitute expenditures and electioneering communications under the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations.

The Commission concludes that Citizens United’s costs of producing and distributing its films, in addition to related marketing activities, are covered by the press exemption from the Act’s definitions of “expenditure” and “electioneering communication.” Whether or not the activity is “*bona fide* commercial activity” is moot given that the media exemption applies.

### ***Background***

The facts presented in this advisory opinion are based on your letters received on March 29, 2010, and April 26, 2010.

Citizens United is a Virginia non-stock corporation and is exempt from Federal taxes under Section 501 of the Internal Revenue Code. Its principal purpose is “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.” Citizens United advocates issues, recruits members, and disseminates information through direct mail efforts,

telemarketing, conferences, publications, print and broadcast advertising, Internet activities, and litigation. Citizens United conducts political activities, including making contributions and independent expenditures, through Citizens United Political Victory Fund (a separate segregated fund) and The Presidential Coalition, LLC (an affiliate). Citizens United is not owned or controlled by a political party, political committee, or candidate.

In furtherance of its purpose, Citizens United produces and distributes films on various political topics through its in-house unit, Citizens United Productions, and, on occasion, through affiliated entities.<sup>1</sup> Since 2004, Citizens United has produced and distributed fourteen films: CELSIUS 41.11: THE TEMPERATURE AT WHICH THE BRAIN BEGINS TO DIE (2004); BROKEN PROMISES: THE UNITED NATIONS AT 60 (2005); BORDER WAR (2006); ACLU: AT WAR WITH AMERICA (2006); REDISCOVERING GOD IN AMERICA (2007); HILLARY: THE MOVIE (2008); HYPE: THE OBAMA EFFECT (2008); BLOCKING “THE PATH TO 9/11”: THE ANATOMY OF A SMEAR (2008); RONALD REAGAN: RENDEZVOUS WITH DESTINY (2009); WE HAVE THE POWER (2009); PERFECT VALOR (2009); REDISCOVERING GOD IN AMERICA II: OUR HERITAGE (2009); NINE DAYS THAT CHANGED THE WORLD (2010); and GENERATION ZERO (2010). Citizens United also has four additional films currently in production. Some of Citizens United’s films and marketing materials refer to clearly identified Federal candidates, and some may constitute expenditures or electioneering communications under the Act.

Approximately 25% of Citizens United’s annual budget for each of the past six years has been devoted to the production and distribution of its films. In 2009, that figure was approximately \$3.4 million, and Citizens United anticipates spending a similar proportion of its budget on film-related activities for the foreseeable future.

Citizens United has distributed, and plans to continue distributing, its films in three primary ways: as DVDs, as theatrical releases, and on broadcast, cable, and satellite television. Citizens United typically sells its films as DVDs for both retail and wholesale bulk purchase, although in 2008 it provided free DVDs of one film, HYPE: THE OBAMA EFFECT, as a newspaper insert in five newspapers in Florida, Nevada, and Ohio. Additionally, Citizens United has arranged for limited theatrical release of three<sup>2</sup> of its films. Such releases typically involve Citizens United licensing the films in exchange for a percentage of box office sales, although it also allows its films to be screened free of

---

<sup>1</sup> For example, Citizens United and a non-candidate individual investor formed Citizens United Productions No. 1, LLC, to produce and distribute an upcoming documentary film (GENERATION ZERO). Citizens United owns 75% of, and maintains operational and board control over, Citizens United Productions No. 1. Citizens United also plans to establish Citizens United Productions No. 2, LLC, to produce a second film (SAVING AMERICA), as well as additional entities to produce and distribute future films. All such affiliates will be structured, owned, and operated in a manner similar to Citizens United Productions No. 1. Because Citizens United will maintain ownership and control over all such affiliates, for the purpose of this advisory opinion, the Commission assumes that all films produced and/or distributed by a Citizens United affiliate are produced and distributed by Citizens United.

<sup>2</sup> CELSIUS 41.11 (2004), BORDER WAR (2006), and GENERATION ZERO (2010).

charge at film festivals and educational institutions and hosts free screenings for select members of the public and news media.

Two of Citizens United's films—RONALD REAGAN: RENDEZVOUS WITH DESTINY and WE HAVE THE POWER—have been televised, and Citizens United is in negotiations for the rights to show a third, PERFECT VALOR, on The Military Channel. Preliminary discussions indicate that Citizens United will receive advertising time for its own use during the cable broadcast as compensation, an arrangement which would parallel the terms under which RONALD REAGAN: RENDEZVOUS WITH DESTINY was broadcast. Additionally, Citizens United is in discussions regarding the licensing of certain of its films for cable and satellite broadcast in a video-on-demand format. Citizens United represents that it will receive a royalty, commission, or other fee from the broadcasters each time one of its films is ordered for viewing.

### ***Questions Presented***

1. *Are the costs of producing and distributing Citizens United's films and related marketing activities covered by the press exemption from the Act's definitions of "expenditure" and "electioneering communication"?*
2. *Do the production and distribution of Citizens United's films and related marketing activities constitute "bona fide commercial activity" by a commercial entity?*

### ***Legal Analysis and Conclusions***

*Question 1. Are the costs of producing and distributing Citizens United's films and related marketing activities covered by the press exemption from the Act's definitions of "expenditure" and "electioneering communication"?*

Yes, the costs of producing and distributing Citizens United's films, along with related marketing activities, are covered by the press exemption from the Act's definitions of "expenditure" and "electioneering communication."

Under the Act, "[t]he term 'expenditure' does not include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. 431(9)(B)(i). The Act and Commission regulations also include a similar exemption from the definition of "electioneering communication" for a communication that appears 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. *See* 2 U.S.C. 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). Together, these exclusions are known as the "press exemption" or "media exemption."

The legislative history of the press exemption indicates that Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and *other media* to cover and comment on political campaigns.” H.R. REP. NO. 93-1239 at 4 (1974) (emphasis added). While an earlier Commission advisory opinion narrowly concluded that a news story, commentary, or editorial distributed through facilities other than the enumerated media (*i.e.*, a book) is generally not covered by the press exemption,<sup>3</sup> later Commission actions have read the press exemption more broadly, consistent with the Act’s legislative history, to cover cable television,<sup>4</sup> the Internet,<sup>5</sup> satellite broadcasts,<sup>6</sup> and rallies staged and broadcast by a radio talk show.<sup>7</sup> In fact, “[t]he Commission has not limited the press exemption to traditional news outlets, but rather has applied it to ‘news stories, commentaries, and editorials *no matter in what medium they are published....*’” Advisory Opinion 2008-14 (Melothé, Inc.) (citing the Commission’s 2006 rulemaking, *Explanation and Justification for Final Rules on Internet Communications*, 71 FR 18589, 18608 (Apr. 12, 2006), extending the press exemption to websites and “any Internet or electronic publication”).

The Commission has historically conducted a two-step analysis to determine whether the media exemption applies. First, the Commission asks whether the entity engaging in the activity is a press or media entity. *See* Advisory Opinions 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission applies the two-part analysis presented in *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to establish:

---

<sup>3</sup> Advisory Opinion 1987-08 (AIG/U.S. News). This advisory opinion involved, among other things, applicability of the media exemption to a book. The Commission concluded, “[w]ith respect to AIG’s sponsorship of the Book, the Commission notes that the ‘news story’ exemption does not apply to distribution through facilities other than a broadcasting station, newspaper, magazine, or other periodical publication.... Because the Book does not fit within any of these categories, it would not qualify for the ‘news story’ exception.” *Id.* at 5. Although the question of whether a theatrical release of a film could qualify for the media exemption was raised by some respondents in MURs 5474 (Dog Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11), the Commission ultimately found no reason to believe respondents violated the Act because the documentary constituted *bona fide* commercial activity and was not an independent expenditure or electioneering communication.

<sup>4</sup> *Explanation and Justification for Final Rules on Candidate Debates and News Stories*, 61 FR 18049 (Apr. 24, 1996).

<sup>5</sup> *Explanation and Justification for Final Rules on Internet Communications*, 71 FR 18589 (Apr. 12, 2006).

<sup>6</sup> Advisory Opinion 2007-20 (XM Radio).

<sup>7</sup> *See* MUR 5569 (The John and Ken Show, *et al.*), First General Counsel’s Report at 9 (in a matter where a radio talk show expressly advocated the election and defeat of Federal candidates, and that also staged and broadcast public rallies outside the offices of Federal candidates, the Commission concluded that the media exemption applied to the rallies because they were “similar in form to other broadcast events featured on the Show” which was also covered by the media exemption.).

- (A) That the entity is not owned or controlled by a political party, political committee, or candidate; and
- (B) That the entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is acting in its “legitimate press function”).

*See also FEC v. Phillips Publ’g*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV).

### 1) Press Entity Status

Neither the Act nor Commission regulations use or define the term “press entity.” Therefore, when determining whether the term applies to a particular entity, the Commission has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials. *See, e.g.*, Advisory Opinions 2008-14 (Melothe, Inc.), 2007-20 (XM Radio), and 2005-19 (Inside Track). In the Explanation and Justification for the Final Rules on Electioneering Communications, the Commission stated that it will interpret “news story, commentary, or editorial” to include documentaries and educational programming within the context of the media exemption to the electioneering communication definition in 11 CFR 100.29(c)(2).<sup>8</sup> *See Explanation and Justification for Final Rules on Electioneering Communications*, 67 FR 65190, 65197 (Oct. 23, 2002). Whether an entity qualifies as a press entity does not necessarily turn on the presence or absence of any one particular fact. *See Advisory Opinions 2007-20 (XM Radio) and 2005-19 (Inside Track)*.

Since 2004, Citizens United has produced and distributed fourteen films, with four additional films currently in production. Additionally, a substantial portion of Citizens United’s annual budget for each of the past six years has been devoted to the production and distribution of films, including documentaries. In light of these facts, and given that Citizens United produces documentaries on a regular basis, the Commission concludes it is a press entity for the purposes of this advisory opinion.<sup>9</sup>

---

<sup>8</sup> The Commission has not explicitly determined that it will interpret “news story, commentary, or editorial” to include documentaries within the context of the media exemption from the definition of “expenditure.” However, because the Commission uses the same analysis to determine the application of both the 2 U.S.C. 431(9)(B)(i) and 11 CFR 100.29(c)(2) media exemptions, it follows that the term “news story, commentary, or editorial” includes documentaries for the purposes of both media exemptions discussed herein.

<sup>9</sup> In Advisory Opinion 2004-30 (Citizens United), the Commission determined that the costs of a film produced by Citizens United did not qualify for the press exemption in part because Citizens United had produced only two documentaries over the preceding sixteen years. Since 2004, the volume and frequency of Citizens United’s film production have increased substantially. As a result, the Commission is presented with a significant change in the facts in the time that has passed since it issued Advisory Opinion 2004-30 (Citizens United). The Commission has not imposed a requirement that an entity seeking to avail itself of the press exemption first demonstrate that it has a track record of engaging in media activities. *See, e.g.*, Advisory Opinion 2008-14 (Melothe, Inc.).

While Citizens United's films may be designed to further its principal purpose as a non-profit advocacy organization, an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial. *See* Advisory Opinions 2005-19 (Inside Track) (citing First General Counsel's Report, MUR 5440 (CBS Broadcasting, Inc.)) and 2005-16 (Fired Up!) (citing same).

## **2) Ownership Criteria and Legitimate Press Function**

### **A) Ownership or Control**

Citizens United is not owned or controlled by a political party, political committee, or candidate. Further, neither Citizens United Productions No. 1 nor Citizens United Productions No. 2 is owned or controlled by a political party, political committee, or candidate. The Commission presumes, for purposes of this advisory opinion only, that any future affiliates through which Citizens United produces and/or distributes documentary films will also not be owned or controlled by a political party, political committee, or candidate.

### **B) Legitimate Press Function**

There are two considerations in determining whether an entity is engaging in its legitimate press function: (1) whether the entity's materials are available to the general public, and (2) whether they are comparable in form to those ordinarily issued by the entity. Advisory Opinions 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life ("MCFL")*, 479 U.S. 238, 251 (1986)) and 2000-13 (iNEXTV) (concluding that a website was "viewable by the general public and akin to a periodical or news program distributed to the general public"). In *MCFL*, the Supreme Court held that a "Special Edition" newsletter did not qualify for the press exemption on the basis that it deviated from certain "considerations of form" relating to the production and distribution of its regular newsletter. 479 U.S. at 250-51. Among those "considerations of form" enumerated by the Supreme Court were the fact that the Special Edition was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters, and the increase in distribution to a group far larger than the newsletter's regular audience. *Id.*

The distribution of documentary films to the public is the legitimate press function of an entity, such as Citizens United, that regularly produces "news stories, commentary, or editorials" in the form of films. The Commission previously has concluded that press functions include the "provision of news stories, commentary, and editorials." Advisory Opinions 2008-14 (Melothé, Inc.) and 2005-16 (Fired Up). Citizens United makes some of its films available to the general public via broadcast on television, satisfying the first consideration. Although not entirely in the same fashion, Citizens United's distribution of other films via cable and satellite television, including the use of a video on demand format, DVD, and movie theater provides similar access to

the general public. Although the latter forms of distribution are not free to the public, whether payment is required has not been a determining factor in the Commission's discussion of this consideration. See Advisory Opinions 2007-20 (XM Radio) and 2004-07 (MTV). *But see* Advisory Opinion 2008-14 (Melothé, Inc.) (identifying free access as a relevant factor).

Under *MCFL's* "considerations of form" analysis, Citizens United's films constitute a legitimate press function. The films contemplated in the request appear to be comparable in form to those previously produced. For instance, Citizens United plans to continue to produce its films through its in-house unit, Citizens United Productions, or through affiliated entities over which Citizens United will maintain majority ownership and control.

Moreover, Citizens United states that it will not pay to air its documentaries on television; instead it will receive compensation from the broadcasters.<sup>10</sup> See Advisory Opinion 2004-30 (Citizens United) ("[T]he 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."). Therefore, Citizens United's distribution of its documentary films by broadcast, cable, and satellite television, including the use of a video on demand format, DVD, and movie theater are eligible for the press exemption.

Although some of Citizens United's film-related advertisements also may be classified as expenditures or electioneering communications, courts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product. See *Phillips Publ'g*, 517 F. Supp. at 1313 (citing *Reader's Digest*, 509 F. Supp. at 1215). Thus, Citizens United's advertisements will only come within the press exemption to the extent that Citizens United is not "acting in a manner unrelated to its [press] function" when it produces and distributes the advertisements themselves. See Advisory Opinion 2004-07 (MTV). Advertisements promoting activities that are not part of Citizens United's legitimate press function, however, may be considered expenditures or electioneering communications. Advisory Opinion 2004-30 (Citizens United) (citing *Phillips Publ'g*, 717 F. Supp. at 1313).

Because the costs referenced above with respect to film production, distribution, and related marketing activities fall within the media exemption for "expenditures" and "electioneering communications," they are exempt from the Act's disclosure, disclaimer, and reporting requirements.

---

<sup>10</sup> The request notes that in certain circumstances Citizens United pays a fee to a movie theater in order to have its films available on certain dates, but receives 100% of the box office ticket sales. According to the request, such types of contracts are standard in the film industry. Assuming that to be true, such payments would not upset the determination that this request falls within the press exemption.

*Question 2. Do the production and distribution of Citizens United's films and related marketing activities constitute "bona fide commercial activity" by a commercial entity?*

This question is moot given the answer to Question 1.

The Commission expresses no opinion regarding the possible applicability of any Federal or State tax laws or other laws to the matters presented in your request, as those issues are outside its 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. The cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)  
Matthew S. Petersen  
Chairman