

Client Matter No.: 20306-00002

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March 29, 2010

Ms. Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: *Advisory Opinion Request*

Dear Ms. Duncan:

I write on behalf of Citizens United to respectfully request an advisory opinion from the Federal Election Commission (the “Commission”) pursuant to the Federal Election Campaign Act (“FECA”). *See* 2 U.S.C. § 437f(a); 11 C.F.R. § 112.1. Citizens United seeks an advisory opinion as to whether its production and distribution of documentary films, along with related marketing activities, qualify for the media exception to FECA’s disclosure, disclaimer, and reporting requirements for “expenditures” and “electioneering communications.” 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). Additionally, Citizens United seeks an opinion as to whether those activities qualify for FECA’s exception for commercial transactions. *See, e.g.*, Advisory Opinion 2008-10.

Because Citizens United is a press entity that regularly produces and distributes documentary films that offer political information and commentary—and because it commercially distributes those films for sale to the public—the Commission should conclude that Citizens United’s documentary film activities are covered by both the media and commercial transaction exceptions.

I. FACTUAL BACKGROUND

Citizens United is a civic organization committed to informing and educating the public on conservative ideas and issues. Formed in 1988, Citizens United is incorporated as a Virginia non-stock corporation, and is exempt from federal taxes under Section 501(c)(4) of the Internal Revenue Code. Citizens United’s principal purpose is “to promote social

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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 Articles of Incorporation, art. II, § A. In furtherance of its mission, Citizens United regularly disseminates political information and commentary to the public through documentary films, newsletters, and books.

In 2004, Citizens United requested an Advisory Opinion from the Commission as to whether the media exception to FECA’s electioneering communications provisions applied to its planned broadcast of a documentary film about presidential candidate John Kerry. Advisory Opinion Request 2004-30. The Commission concluded that the media exception would not apply because, at that time, Citizens United did “not regularly produce documentaries or pay to broadcast them on television.” Advisory Opinion 2004-30, at 7; *see also id.* (emphasizing that Citizens United had “produced only two documentaries since its founding”).

Since 2004, Citizens United has produced and distributed twelve documentary films on a variety of political topics. Those films are: *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), and *Rediscovering God in America II: Our Heritage* (2009). Citizens United recently completed production on two additional films, *Nine Days that Changed the World* and *Generation Zero*. *Nine Days that Changed the World* will premier on April 9, and *Generation Zero* will be in theaters beginning in mid-April. Citizens United also has four other films currently in production.¹

¹ Citizens United has produced and distributed all but one of its documentary films through an in-house production and distribution unit known as “Citizens United Productions.” To produce and distribute the soon-to-be-released documentary film *Generation Zero*, Citizens United and an investor formed a separate limited liability company called Citizens United Productions No. 1, LLC. Citizens United has a 75% ownership interest in the limited liability company and, under the terms of the company’s operating agreement, Citizens United controls its day-to-day operations and Citizens United’s president, David N. Bossie, serves as the company’s manager.

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Citizens United's film crews and production personnel have been credentialed as "press" when covering events for possible inclusion in the organization's films.

For each of the past six years, Citizens United has spent approximately 25% of its annual budget on documentary film production and distribution. In 2009, for example, Citizens United spent approximately \$3.4 million on film production and distribution. It anticipates spending a similar proportion of its budget on those activities for the foreseeable future.

Citizens United's films are generally distributed for retail sale in DVD format. Some of its films have had (or will have, in the near future) limited theatrical releases, including *Celsius 41.11*, *Border War*, and *Generation Zero*. Two of Citizens United's films—*Ronald Reagan: Rendezvous with Destiny* and *We Have the Power*—have been televised, and the organization is currently in negotiations with The Military Channel for the broadcast of *Perfect Valor* in the second quarter of 2010. Citizens United also sells wholesale bulk orders of its DVDs to other organizations and retail businesses, and runs radio and television advertisements promoting the sale of its films. In 2008, Citizens United sought to broadcast *Hillary The Movie* on a video-on-demand channel during the Democratic presidential primaries, but was unconstitutionally prohibited from doing so on the basis of FECA's (now -invalid) prohibition on corporate electioneering communications. See *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876 (2010). The firm that offered the video-on-demand opportunity for *Hillary The Movie* is currently negotiating with Citizens United for the rights to broadcast numerous other Citizens United films in video-on-demand format.

Many of Citizens United's films include interviews, voiceovers, and visuals of private individuals and elected officials who at various times have been (and may in the future be) candidates for federal elected office. Examples include:

- Fred Thompson, a former U.S. Senator from Tennessee and a candidate for the presidency in 2008, is the narrator of *Perfect Valor*.
- Former congressman J.D. Hayworth, currently a candidate for the U.S. Senate in Arizona, is prominently featured in *Border War*.
- President Barack Obama is the subject of *Hype: The Obama Effect*.

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- Congressman Thaddeus McCotter was interviewed for and appears in *Generation Zero*.

Similarly, many of Citizens United's advertisements for its films have included images of or references to one or more political candidates. The television advertisements for *Celsius 41.11*, for example, included images and audio of President George W. Bush and Senator John Kerry. The trailer for *Hype: The Obama Effect* included images and audio of then-Senator Obama and Governor Mike Huckabee, both of whom were presidential candidates in 2008. And the proposed broadcast advertisements for *Hillary The Movie* mentioned Senator Clinton by name and included images of her.

Based on this content, some of Citizens United's films and advertisements might be classified as "express advocacy" and thus fall within the Commission's definition of an "expenditure." 2 U.S.C. § 431(9). Similarly, some of Citizens United's films and advertisements could be characterized as "electioneering communications" if aired during the period immediately preceding a federal primary or general election. *Id.* § 434(f)(3)(A)(i).²

II. LEGAL ANALYSIS

Citizens United's documentary filmmaking and related marketing activities qualify for the media exception to FECA's disclosure, disclaimer, and reporting requirements because Citizens United regularly produces and distributes films that disseminate political commentary and information to the public and is not owned or controlled by a political party, political committee, or candidate. *See* 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). The Commission's contrary conclusion in its 2004 Advisory Opinion, even if it might have been correct at the time, is no longer factually tenable because Citizens United *does* now "regularly produce documentaries." Advisory Opinion 2004-30, at 7. The 2004 Opinion also cannot be reconciled with the Supreme Court's recent decision in *Citizens United v. FEC*, which emphasizes that, in light of the increasingly "blurred" line between the traditional media and other political commentators, heightened protections for political

² Additionally, it might potentially be argued that some of Citizens United's film content meets the Commission's definition of a "coordinated communication" because any interviewee who appears in a film would have some level of material involvement regarding the content of his or her interview. *See* 11 C.F.R. § 109.21.

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speech cannot be limited to “traditional” media corporations. Citizens United’s filmmaking and related advertising also qualify for FECA’s commercial transaction exception because they are commercial, revenue-generating enterprises.

A. Citizens United’s Documentary Filmmaking And Related Advertising Qualify For FECA’s Media Exception.

FECA imposes disclosure, disclaimer, and reporting requirements in connection with funds spent on “expenditures” and “electioneering communications.” 2 U.S.C. §§ 434(c), 434(f), 441d(a)(3), 441d(d)(2). However, the statute includes parallel media exceptions for both “expenditures” and “electioneering communications” (which are collectively referred to herein as the “media exception”).

FECA’s media exception for “expenditures” encompasses:

[A]ny 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); *see also* 11 C.F.R. § 100.132 (“Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not an expenditure unless the facility is owned or controlled by any political party, political committee, or candidate . . .”).

FECA’s media exception for “electioneering communications” reaches:

[A] communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. § 434(f)(3)(B)(i); *see also* 11 C.F.R. § 100.29(c)(2) (exempting from the definition of an “electioneering communication” any communication that “[a]ppears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite

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television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate”).

In determining the applicability of the media exception, the Commission traditionally inquires (1) whether the speaker is a press entity, (2) whether the speaker is acting as a press entity in conducting the activity at issue, and (3) whether the speaker is owned by a political party, political committee, or candidate. *See* Advisory Opinion 2008-14, at 4; Advisory Opinion 2007-20, at 3-4; Advisory Opinion 2005-16, at 4; Explanation and Justification for the Regulations on Internet Communications, 71 Fed. Reg. 18,589, 18,607 (Apr. 12, 2006) (citing *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publ’g, Inc.*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981)).

Citizens United’s documentary filmmaking and related marketing activities qualify for FECA’s media exception because Citizens United is a press entity, it is acting as a press entity when it disseminates political commentary and information to the public through the production and distribution of documentary films, and Citizens United is not owned or controlled by a political party, political committee, or candidate.

1. Citizens United Is A Press Entity.

The Commission determines whether a speaker is a “press entity” by inquiring whether the speaker is in the “business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials.” Advisory Opinion 2007-20, at 4.

Most recently, the Commission found that Melothé, Inc.—a corporation that planned to launch “Internet TV stations” that would feature federal candidates—qualified as a press entity because it would regularly be providing reporting and commentary on political campaigns. Advisory Opinion 2008-14, at 4. Similarly, the Commission concluded that XM Radio was a press entity because one of its radio stations featured presidential election coverage and commentary. Advisory Opinion 2007-20, at 4. The Commission also determined that Fired Up! LLC—an organization that operated progressive political websites—was a “press entity” because “[i]ts websites are both available to the general public” and “are the online equivalent of a newspaper, magazine, or other periodical publication.” Advisory Opinion 2005-16, at 4-5; *see also* Advisory Opinion 2003-34 (applying the media exception to the websites of Viacom, Inc., and Showtime Networks, Inc., which depicted federal candidates).

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As these advisory opinions reflect—and as the Supreme Court’s recent *Citizens United* decision underscores—in determining whether a speaker is a “press entity,” it is neither appropriate nor rational to draw a rigid distinction between “traditional” media outlets and other speakers regularly engaged in the dissemination of political commentary and information to the public. As the Supreme Court held in *Citizens United*, “the line between the media and others who wish to comment on political and social issues [has] become[] far more blurred” than in the past. 130 S. Ct. at 905-06. Formalistic distinctions between the institutional press and other political speakers are therefore an inappropriate basis for defining the scope of a person’s rights to engage in political speech. *Id.*; *see also id.* at 905 (rejecting “the proposition that the institutional press has any constitutional privilege beyond that of other speakers”) (internal quotation marks omitted).

Citizens United falls squarely within the definition of a “press entity.” Since 2004, *Citizens United* has produced more than a dozen documentary films that publicly disseminate information and commentary relating to federal elections and other political topics. For that reason, the Commission can no longer rely on the conclusion set forth in its 2004 Advisory Opinion that the media exception did not apply to *Citizens United* because, at that time, *Citizens United* did “not regularly produce documentaries or pay to broadcast them on television.” Advisory Opinion 2004-30, at 7. Even if this were a legitimate basis for limiting the scope of the media exception—which it is not—it is no longer factually supportable (assuming it ever was).

Moreover, although *Citizens United* arguably may not be a “traditional” news media organization, it serves the same function as more traditional media outlets because it uses documentary films to disseminate political information and commentary to the public on a regular and ongoing basis. The in-depth analyses of political issues provided by *Citizens United*’s documentary films are ultimately no different from the political commentary offered by editorials printed in magazines and newspapers and broadcast on television news programs. Indeed, the Commission has explicitly recognized that documentaries can fall within the media exception (*see* Explanation and Justification for the Regulations on Electioneering Communications, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002)), and, even before the Supreme Court’s recent decision in *Citizens United*, recognized that the media exception is not limited to traditional publishing functions, but instead extends to “news stories, commentaries, and editorials *no matter in what medium they are published.*”

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Advisory Opinion 2008-14, at 3 (quoting Explanation and Justification for the Regulations on Internet Communications, 71 Fed. Reg. at 18,608-09).³

2. Citizens United Is Acting As A Press Entity When Producing And Distributing Its Documentary Films And Is Not Owned By A Political Party, Political Committee, Or Candidate.

Citizens United is entitled to the media exception for its documentary filmmaking and related marketing activities because, when producing and distributing its documentary films, Citizens United is acting as a press entity. Moreover, Citizens United is not owned by a political party, political committee, or candidate.

To determine whether a press entity was acting *as a press entity* when undertaking a particular activity, the Commission applies the test articulated by the Southern District of New York in *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981), which inquires whether the speech at issue was part of the speaker's legitimate press function or for an unrelated purpose. *Id.* at 1215; *see also FEC v. Mass. Citizens for Life, Inc.* ("MCFL"), 479 U.S. 238, 250-51 (1986) (distinguishing between a speaker's regularly published newsletter, which was entitled to the media exception, and a "Special Edition" flyer, which was not protected by the exception because, based on various "considerations of form," the "Special Edition" flyer was unlike the regular and ongoing newsletter); Advisory Opinion 2005-16, at 4-6.

For the reasons discussed above, Citizens United's documentary filmmaking activities are part of the organization's legitimate press function. In producing and

³ Although the Commission has identified a profit motive (as evidenced by paid subscribers or advertisers) as relevant to whether a speaker is a press entity, a showing of profit motive is not—and could not constitutionally be—essential to press entity status. *See* Advisory Opinion 2000-13, at 3 n.3. In any event, Citizens United does derive revenue from its documentary films, which are sold to the public in DVD format. Moreover, Citizens United's conservative viewpoint cannot disqualify its activities from the media exception because "the Commission does not investigate an entity's viewpoints in determining whether it qualifies as a 'press entity' under the press exemption." Advisory Opinion 2008-14, at 4-5 (citing Advisory Opinion 2005-16).

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distributing these films, Citizens United is acting as a media organization by gathering information, formulating commentary and analysis, and disseminating facts and opinions to the public. *See* 67 Fed. Reg. at 65,197. Accordingly, Citizens United's political activities are in no way comparable to those at issue in *MCFL*, where the speech was made outside the normal course of the speaker's press function. Citizens United's documentary films are the *core* of its press activities.

Moreover, the media exception applies with equal force to Citizens United's advertisements promoting its documentary films. These marketing activities are an integral component of Citizens United's overall press function because they facilitate the dissemination of Citizens United's political message to the public. *See FEC v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981) (holding that a newsletter publisher's mailings soliciting further subscriptions were part of its legitimate press activities).

Finally, Citizens United is not owned or controlled by a political party, political committee, or candidate. It is an unaffiliated organization committed to disseminating its political views to the public. As an independent press entity engaged in a press function, Citizens United is entitled to the protections of the media exception when producing and distributing its political documentaries, and is therefore exempt from FECA's disclaimer, disclosure, and reporting requirements.

B. Citizens United's Documentary Filmmaking And Related Advertising Qualify For FECA's Commercial Transaction Exception.

Citizens United's production and distribution of its documentary films are also exempt from FECA's disclaimer, disclosure, and reporting requirements under the Commission's commercial transaction exception.

The Commission has repeatedly recognized an exception for "*bona fide* commercial activity." Advisory Opinion 2008-10, at 6. Relevant factors in applying the exception include whether the sales involved fundraising, whether the purpose was genuinely commercial, whether the items were sold at the usual and normal charge, and whether the purchases were made for individuals' personal use in political expression. Advisory Opinion 1989-21, at 4; *see, e.g.*, Advisory Opinion 2008-10, at 6 (recognizing an exemption for a corporation's website that hosted political advertisements and allowed users to purchase television airtime).

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The Commission has suggested that the commercial transaction exception is applicable to commercial activity undertaken “by an entity organized and maintained for commercial purposes *only* and not for the purpose of influencing any elections.” Advisory Opinion 2008-10, at 6 (emphasis added). Although Citizens United acknowledges that its documentary filmmaking activities are not *purely* commercial—in that they are undertaken for the purpose of disseminating Citizens United’s political views to the public—the Commission’s focus on speakers’ motive in applying the exception cannot be reconciled with the Supreme Court’s decision in *FEC v. Wisconsin Right to Life, Inc.* (“*WRTL I*”), 551 U.S. 449 (2007), which rejected motive as a valid factor in determining whether it was constitutional to prohibit corporate political advertising. *Id.* at 468 (plurality op. of Roberts, C.J.). “A test focused on the speaker’s intent,” the Court explained, “could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another.” *Id.*

In light of *WRTL II*, a more appropriate standard for applying the commercial transaction exception would be whether the speech in question has a substantial commercial component. As described above, Citizens United regularly produces documentary films in its ordinary course of business, and commercially markets those films by selling DVDs to the public and making bulk sales of DVDs to commercial vendors. In light of this significant commercial element, Citizens United’s filmmaking activities should not be subject to FECA’s disclaimer, disclosure, and reporting requirements.⁴

III. CONCLUSION

Several factual and legal developments have undermined whatever validity the Commission’s Advisory Opinion 2004-30 rejecting Citizens United’s invocation of the

⁴ Citizens United’s filmmaking activities involve the use of interviews with individuals who are or may become candidates for federal office. Candidate interviews should not be treated as “coordination” for purposes of the commercial transaction exception. Indeed, a limitation based on such a ubiquitous feature of the political process would gut the exception. Because the available guidance on this issue is sparse, however, Citizens United respectfully requests that the Commission’s advisory opinion specifically address the extent to which a documentary film would be disqualified from the commercial transaction exception on the basis of this form of purported “coordination.”

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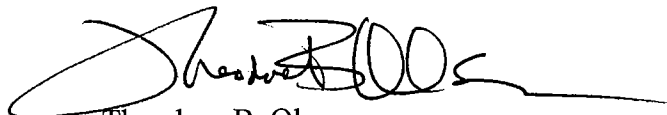
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media exception might have had. First, Citizens United has dramatically increased the frequency and regularity with which it produces and distributes political documentaries to the public, and has produced more than a dozen such films since the 2004 Opinion. Second, the Commission's recent advisory opinions have recognized that the exception is broadly applicable to entities that, while not part of the "traditional" news media, use documentary films and similar media formats to disseminate political information and commentary to the public. Third, the Supreme Court's *Citizens United* decision explicitly rejected formalistic and outdated distinctions between the "traditional" media and speakers that use more novel formats to disseminate their political views. For each of those reasons, the Commission should conclude that Citizens United's filmmaking activities and related advertising are not subject to FECA's disclaimer, disclosure, and reporting requirements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Theodore B. Olson", with a long horizontal flourish extending to the right.

Theodore B. Olson