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Via Hand Delivery

AOR 2010-30

November 1, 2010

Christopher Hughey, Esquire
Acting General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request

Dear Mr. Hughey:

I write on behalf of Citizens United to request an advisory opinion pursuant to the Federal Election Campaign Act of 1971, as amended ("FECA"). Citizens United desires an advisory opinion on whether it is permissible for the organization to rent its e-mail subscribers list to Federal candidates, political party committees and other political committees in the manner described below.

Relevant Facts

Citizens United is a membership organization that is organized as a Virginia non-stock corporation and is exempt from Federal taxes under section 501(c)(4) of the Internal Revenue Code. Over the past several years, Citizens United has developed an extensive list of e-mail subscribers who regularly receive e-mail communications from the organization. While this list includes the e-mail addresses of many Citizens United members, it also includes non-members, such as individuals who have purchased documentary film DVDs from the organization. Thus, while the e-mail subscribers list includes persons within Citizens United's restricted class, it also includes persons who fall outside of the organization's restricted class.

Citizens United regularly rents its e-mail subscribers list to other organizations and entities at fair market prices through a commercial list brokerage firm. When Citizens United rents its e-mail subscriber list it is compensated based on the volume of e-mails sent. Although Citizens United employees review and approve all list rental requests, the commercial list brokerage firm handles all other aspects of the transaction, including the financial aspects of the transaction and the actual sending of the e-mail.

1006 Pennsylvania Avenue, S.E. • Washington, D.C. 20003
Tel (202) 547-5420 • Fax (202) 547-5421 • www.citizensunited.org

Contributions or gifts to Citizens United are not tax deductible.

Payment is made by the renter of the list to the list brokerage firm, which in turn remits the payment to Citizens United minus the firm's fees. While a commitment to pay Citizens United is made prior to the transmittal of any e-mail messages, per industry norms, the remittal of payment by the list renter to the brokerage firm and/or the brokerage firm's remittal to Citizens United may not always be effectuated prior to the sending of an e-mail.

This practice is in many ways an evolution of the traditional practice of renting a mailing list of physical addresses. However, the manner by which the rental of the e-mail subscribers list is conducted is substantially different than the manner in which the rental of a mailing list is conducted.

When a mailing list is rented, the party renting the list mails its communication to the names on the list in an envelope identifying the mailing as coming from the list renter or some representative of the list renter. Thus, for example, if Citizens United were to rent its mailing list to the XYZ Committee, the carrier envelope containing the XYZ Committee's message would include the XYZ Committee's name and return address on it.

In contrast, when the e-mail subscribers list is rented, the communication on behalf of the list renter bears Citizens United's e-mail address on the "from" line in the communication. The subject heading, however, will indicate that the message being conveyed by the e-mail is a communication from the list renter and the content of the communication is a message from the list renter.

The commercial list brokerage firm that markets the rental of Citizens United's e-mail subscribers list has advised Citizens United that the rental method described above is standard practice within the industry for the commercial marketing of e-mail lists. The list brokerage firm sends the e-mail communications in the manner described as a security measure to protect against unauthorized usage of the list and as a means of compliance with the opt-out provisions of the Federal CAN-SPAM Act of 2003.¹

While Citizens United regularly rents its e-mail subscribers list as described above, the organization has thus far refrained from renting the list to Federal candidates, political party committees and other political committees out of concern that doing so may violate FECA's prohibitions against coordinated expenditures and/or coordinated

¹ The Federal CAN-SPAM Act is codified at 15 USC §§ 7701-7713 and the Federal Trade Commission's underlying regulations are published at 16 CFR Part 316. The opt-out provisions of the CAN-SPAM Act require senders of commercial e-mail communications to include a return e-mail address that the recipient may use to submit a reply e-mail message requesting not to receive future commercial e-mail messages from the sender. See 15 U.S.C. § 7704(a)(3)(A).

communications by corporations, and/or regulations prohibiting a corporation from facilitating the making of a contribution to a Federal candidate or political committee.² Citizens United is therefore requesting an advisory opinion on whether it may lawfully rent its e-mail subscribers list to Federal candidates, political party committees and other political committees in the manner described above without violating FECA.

Legal Analysis

FECA prohibit corporations from making coordinated expenditures or coordinated communications with a Federal candidate, candidate's committee or political party committee. FEC regulations further prohibit a corporation from facilitating the making of a contribution to a Federal candidate or political committee. Citizens United does not believe that the method described above for renting its e-mail subscribers list would violate the prohibitions against either coordinated expenditures or coordinated communications, but the organization is uncertain as to whether the list rental methodology would violate the prohibition against facilitating contributions to Federal candidates or political committees.

Coordinated Expenditures & Coordinated Communications

Under the Commission's regulations, an "expenditure" on the part of Citizens United that is "coordinated" with a candidate or candidate's authorized committee would be an in-kind contribution by Citizens United to the candidate or candidate's committee. 11 CFR § 100.20(b). Citizens United does not believe that the rental of its e-mail subscriber list in the manner described above to a candidate, candidate's committee or political party committee would qualify as a coordinated expenditure because Citizens United will not be making any "expenditure" in connection with the list rental.³ As the Commission noted in its rulemaking regarding internet communications, "there is virtually no cost associated with sending e-mail communications." Explanation & Justification for Internet Communications Rules, 71 FR 18,589, 18,596 (Apr. 12, 2006). Since it costs Citizens United essentially nothing to send an e-mail communication on behalf of a renter of its e-mail subscribers list, it stands to reason that the rental of the list

² In each instance in which a candidate, political party committee or other political committee has sought to rent the Citizens United e-mail subscribers list the proposed communication has included express advocacy with respect to one or more candidates for Federal office and/or a solicitation of contributions by the prospective list renter.

³ The rental of the e-mail list conceivably entails coordination under the applicable regulations because there would be negotiations over the terms and timing of the rental between agents of Citizens United and the entity renting the list. In the case of a rental to a candidate, candidate's committee or political party committee, such negotiations arguably qualify as being "in cooperation, consultation or concert with" the entity renting the list. See 11 CFR § 109.20(a).

to a candidate, candidate's committee or political party committee would not constitute a coordinated expenditure.

Under the applicable regulations governing coordinated communications, any "communication" from Citizens United that is "coordinated" with a candidate or candidate's committee would be an in-kind contribution by Citizens United to the candidate or candidate's committee. 11 CFR § 100.21(b). It appears clear to Citizens United that the rental of its e-mail subscribers list would not qualify as coordinated communication for at least two reasons. First, if a candidate or a candidate's committee is renting the list and pays the market rate for the list rental, the communication will not be paid for in whole or in part by a person other than the candidate or candidate's committee on whose behalf the e-mail communication would be sent. See 11 CFR § 109.21(a)(1). Therefore, any rental of the e-mail list fails to meet a threshold requirement to qualify as a coordinated communication. Second, the communication does not meet any of the content standards for a coordinated communication, see 11 CFR § 109.21(c), since e-mail communications do not fall within the definition of either an electioneering communication, see 11 CFR § 100.29, or a public communication. See 11 CFR § 100.26.

Citizens United requests that the FEC confirm that its analysis with respect to coordinated expenditures and coordinated communications is correct.

Facilitating a Contribution

As we see it, the more difficult issue in this advisory opinion request centers on whether or not the rental of Citizens United's e-mail subscribers list to a candidate or political committee would constitute the unlawful facilitation of contributions if the communication includes a solicitation of contributions by the list renter. The applicable regulation states:

Corporations and labor organizations (including officers, directors or other representatives acting as agents of corporations and labor organizations) are prohibited from facilitating the making of contributions to candidates or political committees, other than to the separate segregated funds of the corporations and labor organizations. Facilitation means using corporate or labor organization resources or facilities to engage in fundraising activities in connection with any federal election, such as activities which go beyond the limited exemptions set forth in 11 CFR part 100, subparts B and C, part 100, subparts D and E, 114.9(a) through (c) and 114.13. A corporation does not facilitate the making of a contribution to a candidate or political committee if it provides goods or services in the ordinary course of its business as a commercial vendor in accordance with 11 CFR part 116 at the usual and normal charge.

11 CFR § 114.2(f)(1).

The regulation also lists several examples of what constitutes facilitating the making of contributions. Although none of the examples are precisely on point, two appear to be relevant to the list rental methodology described in this advisory opinion request. One example states that facilitating the making of contributions includes fund-raising activities that involve:

Officials or employees of the corporation or labor organization ordering or directing subordinates or support staff (who therefore are not acting as volunteers) to plan, organize or carry out the fundraising project as part of their work responsibilities using corporate or labor organization resources, unless the corporation or labor organization receives advance payment for the fair market value of such services.

11 CFR § 114.2(f)(2)(i)(A). The other example discusses the use of lists for fund-raising purposes, stating:

Using a corporate or labor organization list of customers, clients, vendors or others who are not in the restricted class to solicit contributions or distribute invitations to the fund-raiser [constitutes facilitating the making of contributions], unless the corporation or labor organization receives advance payment for the fair market value of the list.

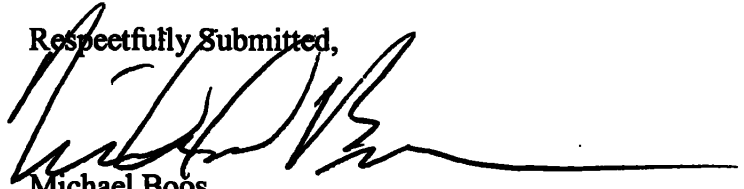
In our view, the exceptions discussed in the two examples cited above imply that it is lawful for Citizens United to rent its e-mail subscribers list to a candidate or political committee in the manner discussed herein, provided Citizens United receives advance payment for the fair market value of its e-mail subscribers list. We also believe such a conclusion is consistent with the conciliation agreement in MUR 6127.

Citizens United requests that the FEC confirm whether or not its analysis of the list rental under the rule governing the facilitation of contributions by corporations is correct. And we further request that the Commission advise us whether the outcome of our request would be different if (a) the entity who rents the list does not pay the rental fee to the list brokerage firm in advance of the transmission of the e-mail communication, or (b) if the renter pays the rental fee to the list brokerage firm in advance of the transmission of the e-mail, but the list brokerage firm does not remit payment to Citizens United prior to the transmission of the e-mail communication.

Conclusion

In light of the foregoing concerns, Citizens United requests an advisory opinion on whether or not the rental of its e-mail subscribers list to candidates, political party committees and other political committee in the manner described in this advisory opinion request would violate the prohibitions against coordinated expenditures and coordinated communications on the part of a corporation or the prohibition against facilitating a contribution to a candidate or political committee by a corporation.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Michael Boos', with a long horizontal line extending to the right.

Michael Boos
Citizens United Vice President &
General Counsel