

December 10, 2010

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2010-30 is available for public comments under this procedure. It was requested by Michael Boos, Esq. on behalf of Citizens United.

The Draft of Advisory Opinion 2010-30 is scheduled to be on the Commission's agenda for its public meeting of Thursday, December 16, 2010.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 pm noon (Eastern Time) on December 15, 2010.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Rosemary C. Smith
Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to 2010-30, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 10-78



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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December 10, 2010

AGENDA ITEM

MEMORANDUM

For Meeting of 12-16-10

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *AK for RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Esther D. Heiden *EDH*
Attorney

SUBMITTED LATE

Subject: Draft AO 2010-30 (Citizens United) – Draft A

Attached is proposed Draft A of the subject advisory opinion. We have been asked to place this draft on the agenda for December 16, 2010. We note that one or more additional drafts of this advisory opinion may be forthcoming.

Attachments

1 ADVISORY OPINION 2010-30

2
3 Michael Boos, Esq.
4 Vice President and General Counsel
5 Citizens United
6 1006 Pennsylvania Avenue, S.E.
7 Washington, DC 20003

DRAFT A

8
9 Dear Mr. Boos:

10 We are responding to your advisory opinion request on behalf of Citizens United,
11 concerning the application of the Federal Election Campaign Act of 1971, as amended
12 (the "Act"), and Commission regulations to the rental of email lists to Federal candidates,
13 political party committees, and political committees.

14 The Commission concludes that the list rental agreement described in the request
15 would not constitute either a coordinated expenditure or a coordinated communication.

16 The Commission further concludes that the proposed rental of email lists constitutes the
17 business activity of a commercial vendor and, therefore, does not violate the
18 Commission's current corporate facilitation regulations, regardless of whether Citizens
19 United receives advance payment for the use of email lists.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 November 1, 2010.

23 Citizens United is an incorporated membership organization, is a nonprofit
24 organization pursuant to 26 U.S.C. 501(c)(4), and is exempt from taxation under
25 26 U.S.C. 501(a). Over several years, Citizens United has developed a list of email
26 subscribers. The list includes both Citizens United's members and non-members, such as
27 individuals who have purchased DVDs from the organization. Thus, the email list

1 includes both persons within Citizens United's restricted class and persons outside of the
2 restricted class.

3 Citizens United regularly rents its email subscribers list to other entities at fair
4 market value through a commercial list brokerage firm. Citizens United wishes to begin
5 renting its list to Federal candidates, authorized committees, political party committees,
6 and other political committees using the same procedures it currently uses to rent its list.
7 Thus, although Citizens United employees would review and approve all list rental
8 requests, the commercial list brokerage firm would handle all other aspects of the list
9 rental agreement, including payment for the use of the list and the actual sending of the
10 emails. Payment would be made by the Federal candidate or political committee to the
11 list brokerage firm, which in turn would remit the payment to Citizens United less the
12 firm's fees. Although a commitment to pay would be made before any email messages
13 are sent to those on the rented list, the remittal of payment by the Federal candidate or
14 political committee to the brokerage firm or the brokerage firm's remittal of payment to
15 Citizens United would not always occur before the emails are sent. Citizens United
16 represents that the rental method described above is standard industry practice for the
17 commercial marketing of email lists. Additionally, under the brokerage firm's standard
18 practices instituted for security and legal compliance purposes,¹ all communications on
19 behalf of the list renter bear Citizens United's email address in the "from" line of the

20 communication. However, the subject heading will indicate that the message being
21 conveyed by the email is a communication from the list renter and the contents of the
22 communication is a message from the list renter.

¹ Citizens United indicates that the list brokerage firm follows this practice to comply with the "opt-out" provisions of the Federal CAN-SPAM Act of 2003. See 15 U.S.C. 7704(a)(3)(A).

Questions Presented

- 1. Will the list rental agreement described in the request violate the prohibition against corporations coordinating expenditures with a Federal candidate, authorized committee, or political party committee?*
- 2. Will the list rental agreement described in the request violate the prohibition banning corporations from making coordinated communications?*
- 3. Will the rental of the list to Federal candidates, authorized committees, political party committees, or other political committees for emails that solicit contributions or invite recipients to a fundraiser violate the prohibition against corporate facilitation of contributions to candidates or political committees?*
- 4. Will the answer to Question 3 be different if either (a) the brokerage firm does not receive advance payment for the rental of the list or (b) the brokerage firm does not remit payment to Citizens United in advance of the transmission of the email?*

Legal Analysis and Conclusions

- 1. Will the list rental agreement described in the request violate the prohibition against corporations coordinating expenditures with a Federal candidate, authorized committee, or political party committee?*

No, the list rental agreement described in the request will not violate the prohibition against corporations coordinating expenditures with a Federal candidate, authorized committee, or political party committee because the list rental is not an expenditure.

The Act and Commission regulations prohibit corporations from making a contribution in connection with a Federal election. See 2 U.S.C. 441b(a); 11 CFR

1 114.2(b)(1). Under Commission regulations, any expenditure that is coordinated but that
2 is not made for a coordinated communication is an in-kind contribution to the candidate,
3 authorized committee, or political party committee with whom it was coordinated.

4 11 C.F.R. § 109.20(b).

5 “Expenditure” is defined in the Act and Commission regulations as any
6 “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of
7 value, made by any person for the purpose of influencing any election for Federal office.”
8 2 U.S.C. 431(9)(A); 11 CFR 100.111(a). Commission regulations state that “[u]nless
9 specifically exempted . . . the provision of any goods or services without charge or at a
10 charge that is less than the usual and normal charge for the goods or services is an
11 expenditure.” 11 CFR 100.111(e)(1). “Usual and normal charge” is defined as the price
12 of goods in the market from which they ordinarily would have been purchased at the time
13 of the contribution, or the commercially reasonable rate prevailing at the time the services
14 were rendered. *See* 11 CFR 100.52(d)(2).

15 Citizens United indicates that it currently rents its email subscribers list to other
16 organizations at “fair market prices” through a commercial list brokerage firm, and that
17 the rental method described is standard practice within the industry for the commercial
18 marketing of e-mail lists. Citizens United wishes to rent its email list to Federal
19 candidates, authorized committees, political party committees, and other political

20 committees using the same rental procedures and at “fair market prices.” So long as the
21 list rental agreement is not for less than the usual and normal charge, the rental of the list
22 will not constitute an expenditure by Citizens United.

2. *Will the list rental agreement described in the request violate the prohibition banning corporations from making coordinated communications?*

No, the list rental agreement described in the request would not violate the prohibition against coordinated communications by corporations, because the emails are not coordinated communications.

To determine if a communication constitutes a “coordinated communication,” Commission regulations apply a three-prong test. 11 CFR 109.21(a). First, the communication must be paid for, in whole or in part, by a person other than the candidate, the candidate’s authorized committee, or the political party committee (the “payment prong”). 11 CFR 109.21(a)(1). Second, the communication must satisfy one of five content standards (the “content prong”). 11 CFR 109.21(a)(2) and (c). Finally, the communication must satisfy one of five conduct standards (the “conduct prong”).² 11 CFR 109.21(a)(3) and (d)(1)-(5).

Because Citizens United will charge any Federal candidate, authorized committee, or political party committee the usual and normal charge under the list rental agreement, the payment prong would not be met. Therefore, the emails will not be coordinated communications.

3. *Will the rental of the list to Federal candidates, authorized committees, political party committees, or other political committees for emails that solicit contributions or invite recipients to a fundraiser violate the prohibition against corporate facilitation of contributions to candidates or political committees?*

² A sixth conduct standard clarifies the application of the other five to the dissemination, distribution, or republication of campaign materials. See 11 CFR 109.21(d)(6).

1 No, the rental of Citizens United's email subscriber list to Federal candidates,
2 authorized committees, political party committees, or other political committees for
3 emails that solicit contributions or invite recipients to a fundraiser will not violate the
4 prohibition against corporate facilitation of contributions to candidates or political
5 committees.

6 Commission regulations prohibit corporations and labor organizations from
7 facilitating the making of contributions to candidates or political committees, other than
8 to the separate segregated funds of the corporations and labor organizations. 11 CFR
9 114.2(f)(1).³ However, Commission regulations also provide that "[a] corporation does
10 not facilitate the making of a contribution to a candidate or political committee if it
11 provides goods or services in the ordinary course of its business as a commercial vendor
12 in accordance with 11 CFR part 116 at the usual and normal charge." 11 CFR
13 114.2(f)(1). A "commercial vendor" is defined as "any persons providing goods or
14 services to a candidate or political committee whose usual and normal business involves
15 the sale, rental, lease or provision of those goods or services." 11 CFR 116.1(c).

16 Here, Citizens United acts as a commercial vendor of its email subscribers list
17 because it regularly rents the list to other entities at its usual and normal charge.
18 Moreover, the Commission has concluded that a transaction involving a mailing list
19 developed by an entity for its own use constitutes "a commercial transaction" when the
20 transaction involves a bargained-for exchange at full consideration. Advisory Opinion
21 1982-41 (Dellums). The Commission has also approved a political party committee's

³ The request asks for the Commission's analysis of the proposed activity under the existing corporate facilitation regulations, but does not ask about the constitutional validity of the regulations in light of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

rental of its mailing list in arms-length transactions at fair market rates, where the committee represented that the list rentals were part of its “business” activities.” Advisory Opinion 2002-14 (Libertarian National Committee) (concluding the transactions did not result in any contributions to the party committee). Thus, because Citizens United is considered a commercial vendor for the purpose of renting its email subscribers list, its proposed list rental agreement would not violate the Commission’s current regulations on corporate facilitation.⁴

4. *Will the answer to Question 3 be different if either (a) the brokerage firm does not receive advance payment for the rental of the list or (b) the brokerage firm does not remit payment to Citizens United in advance of the transmission of the email?*

No, the answer to Question 3 does not depend on whether Citizens United or the brokerage firm receives advance payment for the rental of the list, because Citizens United is acting as a commercial vendor.

Under Commission regulations, use of a corporate or labor organization list of customers, clients, or vendors to solicit contributions constitutes facilitation unless the corporation or labor organization receives advance payment for the fair market value of the list. 11 CFR 114.2(f)(2)(i)(C). However, Commission regulations provide, among other things, that:

A corporation in its capacity as a commercial vendor may extend credit to a candidate, a political committee or another person on behalf of a candidate or political committee provided that the credit is extended in the ordinary course of the corporation’s business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.

⁴ As further set forth below in question 4, because Citizens United is considered a commercial vendor for these purposes, 11 CFR 114.2(f)(2) (specifically 11 CFR 114.2(f)(2)(i)(A) and (f)(2)(i)(C)) does not apply.

11 CFR 116.3(b).

The Commission's regulations further provide that:

In determining whether credit was extended in the ordinary course of business, the Commission will consider—

(1) Whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit;

(2) Whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and

(3) Whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

11 CFR 116.3(c).

As the Explanation and Justification for the Commission's current regulations on corporate facilitation notes, the regulations are "not intended to negate the range of permissible activities found in other portions of the rules." Explanation and Justification for Final Rule on Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 FR 64259, 64264 (Dec. 14, 1995); *see also* 11 CFR 114.2(f)(2)(i) ("Examples of facilitating the making of contributions include but are not limited to – Fundraising activities by corporations (*except commercial vendors*) or labor organizations ...") (emphasis added).

As a commercial vendor engaging in its regular business activity of renting its email subscriber list, Citizens United may extend credit in its ordinary course of business to Federal candidates, party committees, and other political committees by agreeing to

receive payment prior to the transmittal of any email messages using its list, but without requiring the remittal of payment in advance. Citizens United represents that it regularly rents its list to other types of entities in this manner, which is also the "industry norm."

Because Citizens United has never rented its list to any Federal candidate or political

1 committee before, there is no information that any prospective candidates or political
2 committees who wish to rent Citizens United's list previously failed to provide prompt
3 payment in full to Citizens United. Accordingly, the Commission concludes that, even if
4 Citizens United does not receive advance payment, either from the renter or the list
5 brokerage firm, this would constitute an extension of credit in Citizens United's capacity
6 as a commercial vendor and in the ordinary course of its business, consistent with
7 11 CFR 116.1(c) and 116.3(c), and therefore, does not constitute corporate facilitation.

8 The Commission expresses no opinion regarding the application of Federal tax
9 law to the proposed activities, because those questions are not within the Commission's
10 jurisdiction.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
14 of the facts or assumptions presented, and such facts or assumptions are material to a
15 conclusion presented in this advisory opinion, then the requestor may not rely on that
16 conclusion as support for its proposed activity. Any person involved in any specific
17 transaction or activity which is indistinguishable in all its material aspects from the
18 transaction or activity with respect to which this advisory opinion is rendered may rely on

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

4
5 On behalf of the Commission,
6
7
8

9 Matthew S. Petersen
10 Chairman
11
