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ADR 2012-20

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May 1, 2012

Anthony Herman
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
2012 MAY -2 PM 12:40
OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Mr. Herman,

Pursuant to 2 U.S.C. § 473f and 11 C.F.R. § 112.1, Mr. Markwayne Mullin, a Republican candidate for Congress from Oklahoma's Second Congressional District, by and through the undersigned counsel, requests an advisory opinion on the questions set forth below. Furthermore, due to the rapidly approaching electioneering communications window that begins on May 27, 2012, Mr. Mullin seeks an expedited response to his request under 11 C.F.R. § 112.4(b)(1). The congressional primary election in Oklahoma is on June 26, 2012. As of the date of this letter, therefore, this request is submitted within the 60 day window as required by 11 C.F.R. § 112.4(b)(1).

The FEC has statutory authority to adopt regulations that exempt certain communications from the definition of electioneering communications, provided those communications do not promote, support, attack, or oppose a candidate for Federal office. 2 U.S.C. § 434(f)(3)(B)(iv). *See also Electioneering Communications: Final Rules*, 67 Fed. Reg. 65,198 (October 23, 2002) ("[T]he principal Congressional sponsors of BCRA explained the exemption authority would allow the Commission to exempt communications that plainly and unquestionably are wholly unrelated to an election and do not in any way support or oppose a candidate."). In addition, the Commission may make exceptions on a case-by-case basis through the advisory opinion process. In Advisory Opinion 2004-31 (Russ Darrow Group, Inc.), the Commission explained,

The decision not to adopt a blanket exemption for such communications, however, does not preclude the Commission from making a determination that the specific facts and circumstances of a particular case indicate that certain advertisements do not refer to a clearly identified Federal candidate and, hence, do not constitute electioneering communications.

AO 2004-31 (Russ Darrow Group, Inc.), at 4.

Factual Background

Markwayne Mullin is the President and CEO of Mullin Plumbing, Inc., an Oklahoma for-profit business entity incorporated on September 17, 1981, (Exhibit A), but founded under a different name in 1973. The company was founded by Jim Mullin, Markwayne Mullin's father. Markwayne Mullin became president of the company in 1997.

Mullin Plumbing provides services primarily in the northeastern portion of Oklahoma which includes Tulsa. To facilitate Mullin Plumbing's operations in western Oklahoma—which includes Oklahoma City—Mr. Mullin split the company's operations into two entities and incorporated the second one under the name Mullin Plumbing West Division, Inc. (Exhibit B). Between these two entities, Mr. Mullin's companies are able to service nearly all of Oklahoma.

For the past decade, Mr. Mullin has allocated approximately 5% of annual revenues for television and radio advertising. In the past five years, spending on television and radio advertising has ranged from a high of 5.16% of revenue (2010) to a low of 4.34% (2009). Monthly spending for television and radio advertising is approximately \$40,000. Furthermore, for more than a decade, Mr. Mullin has engaged in branding his family's name onto his company. To further this goal, Mr. Mullin has appeared in all of his company's television advertisements and nearly all of his company's radio advertisements since approximately 1999.¹ Additionally, for the past nine years, Mr. Mullin has paid for radio air time to host a weekly radio show on Saturday mornings where he discusses home-improvement techniques. We have included copies of recent television and radio ads for Mullin Plumbing, and a recording of a recent Saturday morning radio show on the enclosed CD-ROM for the Commission's review. (Exhibit C).

¹ There is no campaign coordination issue as Mullin Plumbing develops its own marketing campaign while an outside campaign consulting firm develops the ads for Mullin for Congress. Furthermore, such corporate advertising activity is explicitly exempted from the coordination regulations. 11 C.F.R. § 109.21(i).

Questions Presented

Mr. Mullin seeks to avoid the burden of having to choose between foregoing legitimate business advertising or having to modify his advertisements to include FECA mandated disclaimers and file electioneering reports during the electioneering communication period. Additionally, Mr. Mullin is concerned that by continuing to air such advertisements during the electioneering communications period, that he might be obligated to disclose the names and addresses of his customers who paid \$1,000 or more for services.

Mr. Mullin therefore requests an advisory opinion concerning the following questions:

1. Under 2 U.S.C. § 434(f)(3)(A)(i) and 11 C.F.R. § 100.29, do the current television and radio advertisements and Saturday morning radio show for Mullin Plumbing's two incorporated entities constitute electioneering communications when aired during the upcoming pre-primary period?
2. If the television and radio advertisements and radio appearances will constitute electioneering communications, under Judge Jackson's opinion in *Van Hollen v. FEC*, No. 11-0776 (D. D.C. March 30, 2012), when Mr. Mullin files electioneering communication reports for his two plumbing companies, will he be required to disclose the names of Mullin Plumbing and Mullin Plumbing West customers who paid \$1,000 or more for services since January 1 of 2011?

ELECTIONEERING COMMUNICATIONS: An electioneering communication is defined as:

[A]ny broadcast, cable, or satellite communication that:

- (1) Refers to a clearly identified candidate for Federal office;
- (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and
- (3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

11 C.F.R. 100.29(a).

The term "clearly identified candidate for Federal office" is defined as:

[T]he candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

11 C.F.R. § 100.29(b)(2). This definition repeats pre-existing language found at 11 C.F.R. § 100.17 (defining "clearly identified").²

A. THE LEGISLATIVE AND REGULATORY HISTORY SURROUNDING ELECTIONEERING COMMUNICATIONS.

It is well established that Congress' stated motivation in enacting BCRA's restrictions on "electioneering communications" was to regulate so-called "sham issue ads" that were paid for with non-federal funds. There is no suggestion anywhere in the legislative record that Congress intended to include *bona fide* commercial advertisements.

In the first electioneering communications rulemaking, the FEC declined to adopt a blanket exemption for commercial advertisements that refer to a clearly identified federal candidate in connection with promoting the candidate's business. It appears from the Explanation and Justification that the Commission was concerned that such an exemption could be subject to abuse and the Commission was unsure of how to craft an exemption that ensured compliance with the statutory directive that the Commission not exempt any advertisements that promote, support, attack, or oppose a federal candidate. *See Electioneering Communications: Final Rules*, 67 Fed. Reg. 65,202 (October 23, 2002) ("Based on past experience, the Commission believes that it is likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they *also* serve a business purpose unrelated to the election.") (emphasis added). These concerns, while certainly valid, are not raised by the advertisements at issue in this matter. Mr. Mullin has consistently appeared in all of the television advertisements and nearly all of his radio advertisements for more than a decade; these ads have not coincidentally emerged just as Mr. Mullin has become a candidate. *See, e.g.*, MUR 5410 (Oberweis Dairy) (dairy's first television advertisements in 75 year history aired between Mr. Oberweis's first and second campaigns for

² 11 C.F.R. § 100.17 is the result of the 1995 consolidation of 11 C.F.R. § 106.1(d) (defining "clearly identified") and 11 C.F.R. § 109.1(b)(3) (defining "clearly identified candidate"). *See Final Rule on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,293 (July 6, 1995).

office). The advertisements have not, and will not, feature any dramatic shift in content that could be explained only by Mr. Mullin's candidacy. In short, Mr. Mullin simply wishes to continue running *bona fide* commercial advertisements, as he has done for more than a decade, and which would have continued airing regardless of Mr. Mullin's candidacy.

B. FEC ADVISORY OPINIONS: THE RUSS DARROW ADVISORY OPINION.

The FEC has previously exempted a bona fide commercial advertisement from the electioneering communications rules. In 2004, the Commission determined that commercial advertisements that (technically) mentioned a candidate's name were not subject to the electioneering communications provisions because the references contained in those ads were most reasonably interpreted as either references to a different person named "Russ Darrow" (i.e., the candidate's son), or a business ("Russ Darrow Group, Inc."). See AO 2004-31 (Russ Darrow Group, Inc.).

There, the FEC received an advisory opinion request from the Russ Darrow Group, Inc., a Wisconsin corporation that owned and operated 22 "vehicle franchise dealerships in Wisconsin." *Id.* at 1. The candidate's name was Russ Darrow, Jr. *Id.* When the commercial advertisement ran, the name Russ Darrow was consistently used in connection with the dealership involved. *Id.* (See, e.g., Russ Darrow Appleton Chrysler). Occasionally, the reference was concerning the candidate's son, the company's chief operating officer, who shared the same name as the candidate. *Id.* at 2. While the candidate did not appear in any of the advertisements, during the decade previous to the candidate's campaign for the U.S. Senate, Russ Darrow, Jr. focused on developing "Russ Darrow" as the brand name for its various dealerships. *Id.* Finally, while campaigning for the U.S. Senate, the candidate still served as the CEO and Chairman of the Board. *Id.* at 2.

The FEC ruled that this was not an electioneering communication for four reasons. First, the name Russ Darrow was used either as a reference to the corporation, or was used in a reference to the candidate's son. *Id.* at 3. Second, the candidate did not appear in the advertisements. *Id.* Third, Russ Darrow had worked for ten years on branding the name Russ Darrow on all of the dealerships. *Id.* Finally, the name Russ Darrow was almost uniformly used in connection with the name of the dealership. *Id.* Therefore, the FEC concluded, the advertisements did not refer to a clearly identified candidate. *Id.*

C. ANALYSIS: MR. MULLIN'S TELEVISION ADVERTISEMENTS, RADIO ADVERTISEMENTS AND THE RADIO SHOW DO NOT CONSTITUTE ELECTIONEERING COMMUNICATIONS.

Here, Mr. Mullin presents a similar situation. He is the president and CEO of Mullin Plumbing. He has appeared in every television advertisement and nearly every radio advertisement for more than a decade. He is the face of Mullin Plumbing. He consistently and briefly announces his name in these advertisements, but the vast majority of references are in connection to his company, Mullin Plumbing. Like Russ Darrow, Mr. Mullin—for more than a decade—has engaged in branding his family's name on the company. The factual situation in Russ Darrow is identical to the scenario here, except that here, Mr. Mullin appears in the Mullin Plumbing ads.

This factual difference, however, should not make a legal difference. First the legislative history indicates that while the electioneering communication standard was intended to broaden the scope of the FECA's authority, the FECA's authority was still limited to activity that is "campaign related." *Electioneering Communications: Final Rules*, 67 Fed. Reg. 65191 (October 23, 2002). Furthermore BCRA's sponsors were determined to regulate putative issue ads. The legislative and regulatory history is bereft of any indication that the sponsors of BCRA intended to dictate how the owner of a plumbing company could advertise his company's plumbing services within 30 days of the primary election. Advertisements promoting the services of Mullin Plumbing cannot be viewed as a "putative issue ad...used to circumvent FECA..." *Electioneering Communications: Final Rules*, 67 Fed. Reg. 65190 (October 23, 2002).

The ads at issue here do not discuss politics, political issues or campaigns. [They do not PASO any federal candidate.] Instead, these ads discuss plumbing. The only call to action is to obtain the services of Mullin Plumbing. There is no call to action, other than to obtain Mullin Plumbing's services, and there is nothing that is campaign related. Additionally, with the exception of the consistent and brief introduction of himself, the name Mullin—like the name Russ Darrow—is consistently used in connection with the company and not Mr. Mullin. There is no concern, therefore, that these advertisements are sham business advertisements designed to incidentally promote Mullin Plumbing and primarily promote the candidacy of Markwayne Mullin; rather, these advertisements are designed to solely promote the business of Mullin Plumbing.

In short, Mullin Plumbing's advertisements are "wholly unrelated to an election and do not in any way support or oppose a candidate." *See Electioneering Communications: Final Rules*, 67 Fed. Reg. 65,198 (October 23, 2002). Like the ads in Russ Darrow, the ads simply support the product that Mr. Mullin is selling and the services his company provides and have been providing for several decades. The mere fact that Mr. Mullin has chosen—for more than a

decade—to appear in his ads to sell his products and his company's services should not make this case any different from the Russ Darrow case.

Finally, the FEC has granted the explicit exemption to state candidates, for state elections who use the names or images of clearly identified federal candidates. 11 C.F.R. § 100.29(c)(5). The FEC has noted that this exemption is permitted so long as the ads “do not promote support, attack or oppose federal candidates.” *Electioneering Communications: Final Rules*, 67 Fed. Reg. 65199 (October 23, 2002). If the FEC permits a federal candidate to appear in an ad that is campaign related when the funds to pay for the ad are unregulated by the FECA, it should likewise be permissible to permit a federal candidate to appear in his own company's ad, something that the candidate has done for more than a decade, and the ad does not contain any mention or inference of any issue or any campaign for any office.

D. EVEN IF THE FEC DECIDES THE ADVERTISEMENTS AND THE RADIO SHOW CONSTITUTE AN ELECTIONEERING COMMUNICATION REQUIRING REPORTING, MARKWAYNE MULLIN SHOULD NOT BE REQUIRED TO DISCLOSE HIS CUSTOMERS NAMES AND ADDRESSES.

If the FEC were to conclude that Judge Jackson's opinion in *Van Hollen v. FEC* requires Mr. Mullin to disclose every single name and address of all of his customers who purchased \$1,000 of his services, this would be detrimental to Mullin Plumbing as it would give a competitive advantage to Mr. Mullin's competitors. It would have a chilling effect on Mr. Mullin's customers as the customers would then weigh if they want Mr. Mullin's services at the cost of disclosing their name and address or the services of another company.

Furthermore, Judge Jackson's opinion strongly indicates the court's belief that disclosure of shareholders and dues paying members might be required to be disclosed if the corporation or organization makes an electioneering communication. The opinion also suggests but does not conclude that a corporation need not disclose its customers. If a corporation must disclose its shareholders, a distinction between shareholders and customers is sensible. A shareholder is contributing to the capital of the corporation permitting the corporation to function. *Van Hollen v. FEC*, No. 11-0776, slip op. at 7 (D. D.C. March 30, 2012) (quoting from FEC rulemaking “*Explanation and Justification for Final Rules on Electioneering Communications*” (“E&J”) 72 Fed. Reg. 72899 (Dec. 26, 2007)). A customer is purchasing goods and services and thus the payment is a quid pro quo for services rendered, not a contribution to the capital of a corporation.

As Judge Jackson's opinion stated, a contribution is something that is given for nothing in return. *Van Hollen v. FEC*, No. 11-0776, slip op. at 27 (quoting plaintiff Van Hollen “[contributor] means a person who gives money without *expectation of service*...in return) (emphasis added). Nothing in the statute however limits the definition of “contributor” in the way the plaintiff in that case claims it is limited. However, we believe it is within the scope of

the *Van Hollen* decision for the FEC to conclude that a corporation's customers need not be disclosed as the customers gave money with the expectation of service in return for the customer's payment.

E. CONCLUSION

First, the FEC should find that Mr. Mullin's advertisements and radio show are not electioneering communications because the advertisements are wholly unrelated to the campaign. The advertisements do not discuss issues, candidates or the election. Instead, the advertisements and the radio show discuss home-improvement techniques and the services of Mullin Plumbing. Additionally, Mr. Mullin—for more than a decade—has engaged in a consistent campaign of branding his family's name onto Mullin Plumbing. The FEC should therefore treat this situation in the same manner as it treated the Russ Darrow advertisements.

Second, if the FEC concludes that these advertisements are electioneering communications thus requiring reporting and disclaimer requirements, the FEC should not require Mr. Mullin to disclose the names and addresses of his customers. *Van Hollen* provides the FEC with the room to conclude that paying customers of a for profit business are not within the scope of the electioneering communications disclosure statute. We believe it would be advisable that the FEC exercise this option in this case.

Finally, a decision to refuse an exemption in this situation will trammel the decision of future business leaders to venture into politics. The denial of an exemption here will force business leaders who do choose to campaign for federal office to alter long-standing, consistent legitimate business advertising. A denial of exemption would force a business leader to weigh a decision to enter public service against the cost of disclosing the names and addresses of his company's customers. Such a result cannot be what the FECA and the BCRA intended.

Please do not hesitate to contact us if we can provide any further information to the Commission as it considers this request. We will be available for questions at the Commission's open session consideration of this request.

Sincerely,



Jason Torchinsky

Shawn Sheehy

Counsel to Markwayne Mullin

EXHIBIT

A



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MULLIN PLUMBING, INC.

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Details

Filing Number: 1900374498
Name Type: Legal Name
Status: In Existence
Corp type: Domestic For Profit Business Corporation
Jurisdiction: Oklahoma
Formation Date: 17 Sep 1981

Registered Agent Information

Name: MARKWAYNE MULLIN
Effective: N/A
Address: 118 S ELM PL
City, State , ZipCode: BROKEN ARROW OK 74012

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MULLIN PLUMBING WEST DIVISION, INC.

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Details

Filing Number: 1900703039
Name Type: Legal Name
Status: In Existence
Corp type: Domestic For Profit Business Corporation
Jurisdiction: Oklahoma
Formation Date: 9 Dec 2002

Registered Agent Information

Name: BARBER & BARTZ, A PROFESSIONAL CORPORATION
Effective: N/A
Address: 525 S MAIN AVE STE 800
City, State , ZipCode: TULSA OK 74103 4511

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EXHIBIT

C

TRANSCRIBED TV AD

Hi, I'm Markwayne Mullin with Mullin plumbing and the red rooter.

We're the guys in all those red vans taking care of all your plumbing needs.

24 hours a day 7 days a week.

Look, if you want to try fixing your plumbing problems around your house go to our website at [mullinplubming .com](http://mullinplubming.com) or give us a call at 918-258-6636.



Markwayne Mullin AOR

Shawn Sheehy to: JSelinkoff

05/04/2012 04:13 PM

Cc: Jason Torchinsky

Ms. Selinkoff,

Per our conference call this morning, here are the answers to your questions.

- 1. The radio show and advertisements reach more than 50,000 persons in the targeted electorate under 11 C.F.R. 100.29(B)(5). The radio show is broadcast on KTOK radio in Oklahoma City and KRMG and KFAQ in Tulsa.**
- 2. The requestor is Markwayne Mullin, CEO and President of Mullin Plumbing/Mullin Plumbing West, and candidate for Oklahoma's Second Congressional District. He is the sole shareholder of both Mullin Plumbing and Mullin Plumbing West.**
- The radio and TV advertisements and the radio program are paid for with funds from Mullin Plumbing and Mullin Plumbing West. The corporation allocates the funds for the advertisements. Mr. Mullin, as sole shareholder, President and CEO would sign and file the electioneering communication reports.**
- 3. The radio program is an hour long and the entire hour is paid for by Mullin Plumbing/Mullin Plumbing West. The corporations and individuals who purchase advertising time during the hour Mullin Plumbing purchased, pay Mullin Plumbing for the advertising time.**
- 4. As for the radio files we submitted, we are interested in the FEC's opinion concerning the content contained on Mr. Mullin's radio show and not the commercial advertising content, except to the extent that there are Mullin Plumbing advertisements aired during the radio program.**

If you have any further questions, please feel free to contact us.

Thank you.

Sincerely,

Shawn Sheehy.



Video Links

Shawn Sheehy to: JSelinkoff

05/07/2012 09:28 AM

Cc: Jason Torchinsky

Ms. Selinkoff,

Per your voicemail this morning, below is the link where people can go to view the video of Mr. Mullin's television advertisements.

<http://www.ktul.com/category/229161/mullin-plumbing>

Please let me know if you need anything further.

Thank you very much.

Sincerely,

Shawn Sheehy



Shawn Sheehy.vcf

Request from Markwayne Mullin – CD-Rom Exhibits

http://www.fec.gov/audio/2012/Mullin_Winter_Tulsa_60.mp3

http://www.fec.gov/audio/2012/Mullin_Spring_12_TUL.mp3

http://www.fec.gov/audio/2012/Deck4_2012_04_21_07_00_00_093.mp3