

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT B of ADVISORY OPINION 2012-20 is now available for comment. It was requested by Jason Torchinsky, Esq., and Shawn Sheehy, Esq., on behalf of Markwayne Mullin, and is scheduled to be considered by the Commission by tally vote on May 30, 2012.

If you wish to comment on DRAFT B of ADVISORY OPINION 2012-20, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 12 noon (Eastern Time) on May 30, 2012.
- 4) The Commission will generally not accept comments received after the deadline. 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.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

FOR FURTHER INFORMATION

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

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

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-20, 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: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2012 MAY 29 P 4:55

May 29, 2012

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Robert M. Knop *RMK by KD*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: AO 2012-20 (Mullin) (Draft B)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft be considered by tally vote on May 30, 2012.

Attachment

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DRAFT B

2012 MAY 29 P 4: 56

1 ADVISORY OPINION 2012-20

2

3 Jason Torchinsky, Esq.

4 Shawn Sheehy, Esq.

5 Holtzman Vogel Josefiak PLLC

6 45 North Hill Drive, Suite 100

7 Warrenton, VA 20186

8

9 Dear Messrs. Torchinsky and Sheehy:

10 We are responding to your advisory opinion request concerning the application of
11 the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
12 regulations to communications by Mr. Markwayne Mullin for Mullin Plumbing, Inc. and
13 Mullin Plumbing West Division, Inc. (collectively, the "Mullin Companies"). Based on
14 the samples submitted with the request, the television and radio advertisements and radio
15 program paid for by the Mullin Companies do not promote or support Mr. Mullin's
16 candidacy or attack his opponents and plainly and unquestionably do not relate to an
17 election. Therefore, the Commission concludes that these communications are exempt
18 from the definition of electioneering communications.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 May 2, 2012, including audio and audio/visual exhibits, your emails received on May 4
22 and 7, 2012, and your representations on behalf of Mr. Mullin at the Commission's Open
23 Meeting on May 24, 2012.

24 Mr. Mullin is a candidate in the Republican primary for the U.S. House of
25 Representatives from the 2nd Congressional District of Oklahoma. Mr. Mullin is also the
26 President, CEO, and sole shareholder of the Mullin Companies. Mullin Plumbing, Inc.

1 and Mullin Plumbing West Division, Inc. have been providing services in Oklahoma
2 since 1981 and 2002, respectively.

3 For the past decade, Mr. Mullin has appeared in nearly all of the Mullin
4 Companies' television and radio advertisements. The sample television and radio
5 advertisements provided to the Commission all begin with Mr. Mullin saying, "Hi. I'm
6 Markwayne Mullin with Mullin Plumbing."¹ When these advertisements are broadcast
7 on television, Mr. Mullin makes this statement while appearing on the screen. For the
8 past nine years, the Mullin Companies also have paid for a weekly Saturday morning
9 radio program in which Mr. Mullin discusses home-improvement techniques. The
10 sample radio program provided to the Commission also begins with Mr. Mullin saying,
11 "Hi. I'm Markwayne Mullin with Mullin Plumbing."²

12 The Mullin Companies' radio show and television and radio advertisements
13 reach more than 50,000 persons in the targeted electorate. See 11 CFR 100.29(b)(5). Mr.
14 Mullin has allocated approximately 5% of the Mullin Companies' annual revenue for
15 television and radio advertising; the Mullin Companies spend approximately \$40,000 per
16 month on such advertising.

¹ See <http://www.ktul.com/category/229161/mullin-plumbing>,
http://www.fec.gov/audio/2012/Mullin_Winter_Tulsa_60.mp3, and
http://www.fec.gov/audio/2012/Mullin_Spring_12_TUL.mp3.

² See http://www.fec.gov/audio/2012/Deck4_2012_04_21_07_00_00_093.mp3.

1 ***Questions Presented***

2 1. *Under 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29, do the current*
3 *television and radio advertisements and Saturday morning radio show for Mullin*
4 *Plumbing's two incorporated entities constitute electioneering communications when*
5 *aired during the upcoming pre-primary period?*

6 2. *If the television and radio advertisements and radio appearances will*
7 *constitute electioneering communications, under Judge Jackson's opinion in Van Hollen*
8 *v. FEC, No. 11-0776, 2012 WL 1066717 (D.D.C. Mar. 30, 2012), when Mr. Mullin files*
9 *electioneering communication reports for his two plumbing companies, will he be*
10 *required to disclose the names of Mullin Plumbing and Mullin Plumbing West customers*
11 *who paid \$1,000 or more for services since January 1 of 2011?*

12 ***Legal Analysis and Conclusions***

13 1. *Under 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29, do the current*
14 *television and radio advertisements and Saturday morning radio show for Mullin*
15 *Plumbing's two incorporated entities constitute electioneering communications when*
16 *aired during the upcoming pre-primary period?*

17 No, as depicted in the samples provided to the Commission, the current television
18 and radio advertisements and Saturday morning radio show for the Mullin Companies are
19 plainly and unquestionably unrelated to an election and therefore are exempt from the
20 scope of electioneering communications under 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR
21 100.29. See 2 U.S.C. 434(f)(3)(B)(iv).

22 The Act and Commission regulations define "electioneering communication" as
23 any broadcast, cable, or satellite communication that (1) refers to a clearly identified

1 candidate for Federal office; (2) is publicly distributed within 60 days before a general
2 election or 30 days before a primary election; and (3) in the case of a candidate for the
3 House of Representatives, is targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i);
4 11 CFR 100.29. In the case of a candidate for the House of Representatives, “targeted to
5 the relevant electorate” means that the communication can be received by 50,000 or more
6 persons in the district the candidate seeks to represent. 11 CFR 100.29(b)(5)(i). Certain
7 disclaimer and disclosure requirements apply to electioneering communications. *See*
8 *generally* 2 U.S.C. 434(f), 441d; 11 CFR 104.20, 110.11.³

9 A communication “refers to a clearly identified candidate” when, among other
10 identifications, “the candidate’s name [or] photograph . . . appears.” 11 CFR
11 100.29(b)(2); *see also* 2 U.S.C. 431(18); 11 CFR 100.17. In the Mullin Companies’
12 advertisements, Mr. Mullin, a candidate, identifies himself personally by name (“Hi. I’m
13 Markwayne Mullin”). In the television advertisement, Mr. Mullin appears on the screen.
14 The sample radio and television commercials and paid radio program therefore “refer to a
15 clearly identified candidate.” *See* 2 U.S.C. 434(f)(3); 11 CFR 100.29. And the
16 communications would be “electioneering communications” when aired within 30 days
17 before the primary election unless they fall within an exemption under 2 U.S.C.
18 434(f)(3)(B).

19 The Act exempts some communications, such as those appearing in news stories
20 or constituting candidate debates, from the definition of “electioneering communication.”
21 Congress decided that such communications, though they may otherwise meet the criteria

³ These disclosure requirements do not apply to “customers who pay for goods and services” for purposes of electioneering communication reporting. *Van Hollen v. FEC*, No. 11-0766, ___ F. Supp. 2d. ___, 2012 WL 1066717 at *14 n.8 (D.D.C. Mar. 30, 2012).

1 for an “electioneering communication,” are deemed to fall outside the definition. *See* 2
2 U.S.C. 434(f)(3)(B). Congress also empowered the Commission to exempt from the
3 definition of “electioneering communications” communications that do not promote,
4 support, attack, or oppose referenced candidates and are plainly and unquestionably
5 unrelated to an election. *See* 2 U.S.C. 434(f)(3)(B)(iv); 148 Cong. Rec. H411 (Feb. 13,
6 2002) (statement of Rep. Shays).

7 As explained by one of the sponsors of the legislation, “it is possible that there
8 could be some communications that will fall within this [electioneering communication]
9 definition even though they are *plainly and unquestionably not related to the election.*”
10 148 Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays) (emphasis added).

11 Congress thus provided the Commission:

12 with some limited discretion in administering the statute so that it can
13 issue regulations to exempt such communications from the definition of
14 “electioneering communications” because they are wholly unrelated to an
15 election. For instance, if a church that regularly broadcasts its religious
16 services does so in the preelection period and mentions in passing and as
17 part of its service the name of an elected official who is also a candidate,
18 and the Commission can reasonably conclude that the routine and
19 incidental mention of the official does not promote his candidacy, the
20 Commission could promulgate a rule to exempt that type of
21 communication from the definition of “electioneering communications.”
22 There could be other examples where the Commission could conclude that
23 the broadcast communication in the immediate preelection period does not
24 in any way promote or support any candidate, or oppose his opponent.

25
26 *Id.*

27 Representative Shays went on to note that “[w]e also expect the Commission to
28 use its *Advisory Opinion process* to address these [exemption] situations both before and
29 after the issuance of regulations.” 148 Cong. Rec. H411 (Feb. 13, 2002) (statement of
30 Rep. Shays) (emphasis added); *see also* 148 Cong. Rec. E178-03 (Feb. 13, 2002)

1 (statement of Rep. Meehan) (same).

2 Under the unique factual circumstances presented in the request – including that
3 the Mullin Companies have been making similar communications for the past ten years
4 and the communications do not in any way promote or support any candidate or oppose
5 Mr. Mullins’ opponents and plainly and unquestionably are not related to the election –
6 the Commission concludes that it should exercise its limited discretion to conclude that
7 they should be exempted from the definition of electioneering communication.

8 The Mullin Companies’ three current radio and television advertisements plainly
9 and unquestionably are not related to the election. The Mullin Companies’
10 advertisements in the electioneering communications time periods will be consistent in
11 medium, timing, content, and geographic distribution with the companies’ advertisements
12 prior to Mr. Mullin’s candidacy. And, indeed, they will be consistent with the
13 commercial advertisements that the Mullin Companies have aired for the past decade.
14 They are advertisements for plumbing services, wholly unrelated to an election, and the
15 ads are designed only to promote the Mullin Companies and their services in the same
16 manner as they have done for some ten years before any candidacy. They do not say
17 anything about Mr. Mullin or his qualifications for election and focus entirely and
18 exclusively on the provision of plumbing services.⁴ The advertisements do not in any
19 way express support for or promote Mr. Mullin or attack any of his opponents. They are
20 wholly unrelated to his election.

⁴ Purported commercial advertisements that discuss the business owner/candidate and not solely the business would be materially distinguishable from this advisory opinion.

1 Likewise, the sample radio program is also plainly and unquestionably not related
2 to the election. It largely involves discussion of home improvement. Future programs
3 will last an hour, are live call-in shows, and do not contain fixed content like the
4 advertisements. The radio programs will be exempt from the definition of electioneering
5 communication provided that the topics discussed – i.e., home improvement techniques –
6 remain the same and that they do not in any way support or promote Mr. Mullin or attack
7 his opponents.⁵

8 On these unique facts, the Commission concludes that it should exercise its
9 limited discretion to exempt from the definition of “electioneering communications” the
10 bona fide commercial communications here to avoid reaching a result that would be
11 inconsistent with Congress’s intent. Congress did not intend the electioneering
12 communication provision to encompass genuine commercial communications like those
13 presented here.⁶

14 Accordingly, given the specific factual circumstances presented in the request
15 and for the reasons identified above, the Commission concludes that Mr. Mullin need not
16 file electioneering communication reports for the Mullin Companies’ communications or
17 include disclaimers on the communications.

⁵ Requestor also asks whether the radio programs qualify for the media exemption from the definition of electioneering communication. Given the Commission’s response above, this question is moot.

⁶ In 2002, the Commission considered and declined to adopt a blanket exemption for communications that refer to a clearly identified candidate in the context of promoting a candidate’s business. The blanket exemption would have applied to all business advertisements, whether or not they were consistent with prior communications, regularly broadcast before any candidacy, or promoted or supported a candidate or candidacy. The Commission determined that the blanket business communication exemption was not “consistent with the limited authority provided to the Commission by the statute” because some business communications “could well be considered to promote or support the clearly identified candidate.” Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190 at 65200, 65202 (Oct. 23, 2002). The particular communications here do not present any of the concerns that led the Commission to decline to issue a blanket exemption.

