

AGENDA DOCUMENT NO. 10-78



FEDERAL ELECTION COMMISSION
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AGENDA ITEM

MEMORANDUM

For Meeting of 12-16-10

TO: The Commission

FROM: Christopher Hughey *CH*
Acting General Counsel

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

Robert M. Knop *RMK*
Assistant General Counsel

Esther D. Heiden *EDH*
Attorney

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

SUBMITTED LATE

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
8
9 Dear Mr. Boos:

DRAFT A

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).

1 ***Questions Presented***

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

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

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

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

14 ***Legal Analysis and Conclusions***

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

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

22 The Act and Commission regulations prohibit corporations from making a
23 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.

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

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

6 To determine if a communication constitutes a “coordinated communication,”
7 Commission regulations apply a three-prong test. 11 CFR 109.21(a). First, the
8 communication must be paid for, in whole or in part, by a person other than the
9 candidate, the candidate’s authorized committee, or the political party committee (the
10 “payment prong”). 11 CFR 109.21(a)(1). Second, the communication must satisfy one
11 of five content standards (the “content prong”). 11 CFR 109.21(a)(2) and (c). Finally,
12 the communication must satisfy one of five conduct standards (the “conduct prong”).²
13 11 CFR 109.21(a)(3) and (d)(1)-(5).

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

18 3. *Will the rental of the list to Federal candidates, authorized committees, political*
19 *party committees, or other political committees for emails that solicit contributions or*
20 *invite recipients to a fundraiser violate the prohibition against corporate facilitation of*
21 *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).

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

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

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

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

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

25

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.

1 11 CFR 116.3(b).

2 The Commission's regulations further provide that:

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

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

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

9 and

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

12 11 CFR 116.3(c).

13 As the Explanation and Justification for the Commission's current regulations on
14 corporate facilitation notes, the regulations are "not intended to negate the range of
15 permissible activities found in other portions of the rules." Explanation and Justification
16 for Final Rule on Corporate and Labor Organization Activity; Express Advocacy and
17 Coordination With Candidates, 60 FR 64259, 64264 (Dec. 14, 1995); *see also* 11 CFR
18 114.2(f)(2)(i) ("Examples of facilitating the making of contributions include but are not
19 limited to – Fundraising activities by corporations (*except commercial vendors*) or labor
20 organizations ...") (emphasis added).

21 As a commercial vendor engaging in its regular business activity of renting its
22 email subscriber list, Citizens United may extend credit in its ordinary course of business
23 to Federal candidates, party committees, and other political committees by agreeing to
24 receive payment prior to the transmittal of any email messages using its list, but without
25 requiring the remittal of payment in advance. Citizens United represents that it regularly
26 rents its list to other types of entities in this manner, which is also the "industry norm."
27 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

19

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.

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On behalf of the Commission,

Matthew S. Petersen
Chairman