

FEDERAL ELECTION COMMISSION  
CENTRAL  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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June 15, 2006

**AGENDA ITEM**

For Meeting of: 06-22-06

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *AC*  
Acting Staff Director

FROM: Lawrence H. Norton *LHN (of JAC)*  
General Counsel

Rosemary C. Smith *RCS (of JAC)*  
Associate General Counsel

Mai T. Dinh *MD*  
Assistant General Counsel

Robert M. Knop *RMK*  
Attorney

Subject: Draft AO 2006-10

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 22, 2006.

Attachment

1 ADVISORY OPINION 2006-10

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4 Robert F. Bauer, Esq.

5 Caroline P. Goodson, Esq.

6 Perkins Coie LLP

7 607 Fourteenth St., NW

8 Washington, DC 20005

9

10 Dear Mr. Bauer and Ms. Goodson:

**DRAFT**

11 We are responding to your advisory opinion request concerning the application of  
12 the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission  
13 regulations to public service announcements (“PSAs”) that EchoStar Satellite LLC  
14 (“EchoStar”) is planning to create and broadcast. The Commission concludes that  
15 EchoStar’s planned PSAs featuring Federal candidates would not be coordinated  
16 communications provided that certain conditions are met. Specifically, the planned PSAs  
17 would qualify for the charitable solicitation exemption from the definition of  
18 “coordinated communication” in 11 CFR 109.21(g) provided that: (1) the organizations  
19 for which the funds are solicited are of the type described in 11 CFR 300.65; and (2) the  
20 solicitations themselves comply with the requirements of 11 CFR 300.65.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on  
23 February 21, 2006 and your electronic-mail message received on May 11, 2006.

24 EchoStar is a limited liability company that is treated as a corporation for tax  
25 purposes and FECA purposes. *See* 11 CFR 110.1(g). It provides pay-TV satellite service  
26 nationwide via its Direct Broadcast Satellite system under the brand name “DISH  
27 Network.” EchoStar plans to air a series of PSAs nationwide that will feature well-  
28 known Americans delivering messages that promote, and solicit donations to, charitable

1 causes, such as aid to victims of Hurricane Katrina, or awareness of important health  
2 issues such as breast cancer or heart disease. The Appendix to this advisory opinion  
3 contains a sample PSA script. Background imagery in the communications will be  
4 limited to imagery associated with the charitable organization and will not include any  
5 campaign- or election-related images.

6 EchoStar will produce, direct, and record the PSAs, and will have complete  
7 financial and creative control over each PSA, including its timing. EchoStar intends to  
8 ask prominent Americans, including Members of Congress, to appear in the PSAs and  
9 read the scripts provided by EchoStar. Regardless of whether or not a particular PSA  
10 features a Member of Congress, the PSAs will not contain campaign materials or  
11 expressly advocate the election or defeat of a clearly identified Federal candidate; nor  
12 will they refer to any political party, election or campaign, or solicit any contributions for  
13 a political campaign or political committee.

14 EchoStar does not intend to air PSAs featuring candidates during the relevant  
15 “electioneering communication” time period.<sup>1</sup> Thus, any PSA featuring a Member of  
16 Congress who is a candidate for election will not air in that Member’s State (in the case  
17 of Senate candidates) or Congressional district (in the case of House candidates) within  
18 30 days of the Member’s primary or runoff election, as applicable, or within 60 days of  
19 the Member’s general or runoff election, as applicable.

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<sup>1</sup> The Act and Commission regulations define an “electioneering communication” as any 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 or 30 days before a primary election for the office sought by the candidate referenced in the communication; and (3) in the case of a Congressional candidate, is targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a).

1 ***Question Presented***

2 *Do EchoStar's proposed public service announcements featuring Members of*  
3 *Congress constitute coordinated communications under the Act and Commission*  
4 *regulations?*

5 ***Legal Analysis and Conclusions***

6 No, EchoStar's proposed public service announcements featuring Members of  
7 Congress ("the proposed PSAs") do not constitute coordinated communications under the  
8 Act and Commission regulations if they satisfy the requirements set forth below.

9 The Act and Commission regulations define the terms "contribution" and  
10 "expenditure" to include any gift of money or "anything of value" for the purpose of  
11 influencing a Federal election. 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a) and  
12 100.111(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1) (incorporating these  
13 definitions into the terms "contribution" and "expenditure" with respect to corporate  
14 activity). The Act defines an in-kind contribution to include an expenditure "made by  
15 any person in cooperation, consultation, or concert, with, or at the request or suggestion  
16 of, a candidate, his authorized political committees, or their agents." 2 U.S.C.  
17 441a(a)(7)(B)(i). A coordinated communication is an in-kind contribution by the person  
18 paying for the communication, unless it comes within an exemption from the definition  
19 of "contribution." 2 U.S.C. 441a(a)(7)(B)(i); 11 CFR 109.21(b).

20 The Act and Commission regulations prohibit any corporation from making any  
21 contribution or expenditure, including providing "anything of value," in connection with  
22 a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.1(a), 114.2(b)(1) and (b)(2). Any  
23 person who is prohibited from making contributions or expenditures, such as a

1 corporation, is also prohibited from paying for a coordinated communication. 11 CFR  
2 109.22. Thus, EchoStar may not air PSAs that constitute coordinated communications.

3         The Commission recently revised the definition of “coordinated communication”  
4 at 11 CFR 109.21. *See Explanation and Justification for Final Rules on Coordinated*  
5 *Communications*, 71 FR 33190 (June 8, 2006).<sup>2</sup> Generally, a communication is  
6 considered a coordinated communication if it satisfies the following three-pronged test:  
7 (1) the communication is paid for, in whole or in part, by a person other than the Federal  
8 candidate or authorized committee in question; (2) one or more of the six conduct  
9 standards set forth in 11 CFR 109.21(d) is satisfied; and (3) one or more of the four  
10 content standards set forth in 11 CFR 109.21(c) is satisfied. *See* 11 CFR 109.21(a).  
11 However, there are exceptions to the general definition, including certain kinds of  
12 endorsements and solicitations by Federal candidates. *See* 11 CFR 109.21(g); *see also* 11  
13 CFR 109.21(f) and (h).

14         In particular, the regulation exempts from the definition of “coordinated  
15 communication” public communications in which a Federal candidate solicits funds for  
16 organizations pursuant to 11 CFR 300.65 provided that the public communications do not  
17 promote, support, attack, or oppose the soliciting candidate or another candidate seeking  
18 election to the same office as the soliciting candidate. *See* 11 CFR 109.21(g). The  
19 proposed PSAs are public communications as defined in 2 U.S.C. 431(22) and 11 CFR  
20 100.26 because they are satellite communications. In addition, Federal candidates  
21 appearing in the PSAs will solicit funds for charitable organizations. Based on your

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<sup>2</sup> The revised regulation will take effect on July 10, 2006. *See* 71 Fed. Reg. 33190 (June 8, 2006). As you requested, we are analyzing the proposed PSAs under the revised regulation.

1 description of the PSAs, the Commission concludes that the PSAs would not promote,  
2 support, attack or oppose the Federal candidates participating in the PSAs.<sup>3</sup> Accordingly,  
3 EchoStar's proposed PSAs would qualify for the charitable solicitation exception  
4 provided that: (1) the organizations for which the funds are solicited are described in 26  
5 U.S.C. 501(c) and have applied for or have been granted tax-exempt status pursuant to 26  
6 U.S.C. 501(a) ("section 501(c) organizations"); and (2) the solicitations themselves  
7 comply with the requirements of 11 CFR 300.65.<sup>4</sup> See 11 CFR 109.21(g)(2); 11 CFR  
8 300.65. If these conditions are met, EchoStar's PSAs featuring Federal candidates would  
9 not constitute coordinated communications.<sup>5</sup>

10 Furthermore, proposed PSAs that will be publicly distributed more than 90 days  
11 before the featured candidates' elections<sup>6</sup> or that will not be publicly distributed within  
12 the featured candidates' jurisdictions would not be coordinated communications because

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<sup>3</sup> See Advisory Opinion 2003-25 (Weinzapfel) (concluding that U.S. Senate candidate Evan Bayh's endorsement of mayoral candidate Jonathan Weinzapfel in an advertisement did not promote, support, attack, or oppose Senator Bayh).

<sup>4</sup> Section 300.65 permits Federal candidates or officeholders to make a "general solicitation" on behalf of a 501(c) organization without regard to the Act's amount limitations or source prohibitions under certain circumstances. See 11 CFR 300.65(a). Such a "general solicitation" may be made on behalf of a section 501(c) organization if (1) the organization does not engage in activities in connection with an election; or (2) the organization's principal purpose is not to conduct election activity and the solicitation is not to obtain funds for activities in connection with an election. *Id.* Such a "general solicitation" may seek unlimited contributions without regard to the Act's source prohibitions or amount limitations. *Id.*

<sup>5</sup> The Commission notes that the solicitation exemption set forth at 11 CFR 109.21(g)(2) applies without regard to when a communication is made. Even if the proposed communications were to be made during the "electioneering communication" period they would not constitute coordinated communications, although they would be subject to the restrictions applicable to electioneering communications, assuming they otherwise satisfied the definition of "electioneering communication" at 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a).

<sup>6</sup> For PSAs in future years that feature candidates for President or Vice President, proposed PSAs that are publicly distributed either in a particular State more than 120 days before the featured candidate's primary election in that State, or after the general election would not be coordinated communications. See 11 CFR 109.21(c)(4)(ii).

1 they would not satisfy the content prong of the three-part test.<sup>7</sup> If the proposed PSAs,  
2 however, will be publicly distributed in the featured candidates' jurisdictions within 90  
3 days of the featured candidates' elections and the PSAs do not solicit funds for section  
4 501(c) organizations, then they would constitute coordinated communications.<sup>8</sup>

5 Because the proposed PSAs would qualify for the charitable solicitation exception  
6 in 11 CFR 109.21(g) under the facts presented in your request, it is unnecessary to  
7 consider the press exemption here. If the proposed PSAs were not exempt under 11 CFR  
8 109.21(g), it would be necessary to consider the press exemption. *See* 2 U.S.C.  
9 431(9)(B)(i); 11 CFR 100.73 and 300.65.

10 This response constitutes an advisory opinion concerning the application of the  
11 Act and Commission regulations to the specific transaction or activity set forth in your  
12 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
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<sup>7</sup> The other content standards would not be satisfied because the proposed PSAs would not be electioneering communications, would not disseminate, distribute, or republish campaign materials, and would not expressly advocate the election or defeat of a clearly identified Federal candidate. *See* 11 CFR 109.21(c)(1) through (3).

<sup>8</sup> The payment prong would be satisfied because EchoStar would be paying for the PSAs. The conduct prong would be satisfied because the candidate would be appearing in the PSAs. *See* Advisory Opinion 2003-25 (Weinzapfel). The Commission has determined that communications that satisfy the three-pronged coordinated communication test are "for the purpose of influencing a Federal election." *See* 11 CFR 109.21(b). Although the Commission considered replacing the fourth content standard in former 11 CFR 109.21(c)(4) with a standard based on public communications "made for the purpose of influencing a federal election," it ultimately declined to do so because it determined that a bright-line test was more appropriate. *See* Notice of Proposed Rulemaking on Coordinated Communications, 70 Fed. Reg. 73946, 73952 (Dec. 14, 2005); *see also* Explanation and Justification for Final Rules on Coordinated Communications, 71 Fed. Reg. at 33200. Thus, any communications that meet the coordinated communication test are, by definition, "for the purpose of influencing an election."

1 of the facts or assumptions presented, and such facts or assumptions are material to a  
2 conclusion presented in this advisory opinion, then the requestor may not rely on that  
3 conclusion as support for its proposed activity.

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Sincerely,

Michael E. Toner  
Chairman

12 Enclosure: (Advisory Opinion 2003-25 (Weinzapfel))



EXHIBIT A

Sample PSA Script: Women and Heart Disease

Announcer: Hello, I'm [NAME]. Most of us think of heart disease as a problem that mostly affects men. But today, heart disease is one of the leading causes of death among American women. It doesn't have to stay that way. Lower cholesterol, daily exercise, and regular visits to your doctor can help you fight back. So have heart, America, and together we can reduce the risk of heart disease.

Voice Over: This message brought to you by DISH Network.