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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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**AGENDA ITEM**  
For Meeting of: 11-02-06

October 25, 2006

**MEMORANDUM**

TO: The Commission

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Amy L. Rothstein *ALR*  
Acting Assistant General Counsel

Ron B. Katwan *RBK*  
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Stacey J. Shin *SJS*  
Law Clerk

Subject: Draft AO 2006-29

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 2, 2006.

Attachment

1 ADVISORY OPINION 2006-29

2

3 Mr. Jason Vasquez  
4 Office of the Honorable Mary Bono  
5 405 Cannon House Office Building  
6 Washington, D.C. 20515

**DRAFT**

7

8 Dear Mr. Vasquez:

9 We are responding to your advisory opinion request on behalf of Representative  
10 Mary Bono, concerning the application of the Federal Election Campaign Act of 1971, as  
11 amended (the “Act”), and Commission regulations to a proposed appearance by  
12 Representative Bono in a televised tourism infomercial to be aired beginning in October,  
13 2006, and running for eight months.

14 The Commission concludes that Representative Bono’s appearance in the  
15 infomercial would not result in the making of an in-kind contribution to Representative  
16 Bono or her authorized committee.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on  
19 August 31, 2006, and on your phone conversation with Commission staff on September 7,  
20 2006.

21 Representative Bono serves the 45th Congressional District of California. She is  
22 currently a candidate for reelection to the House of Representatives in the November 7,  
23 2006 general election.

24 The Palm Springs Desert Resorts Convention and Visitors Authority (the “CVA”)  
25 is an unincorporated organization that promotes tourism from Los Angeles and Orange  
26 Counties. The CVA recently invited Representative Bono to become its spokesperson and

1 host of a 30-minute tourism infomercial. The CVA infomercial campaign is scheduled to  
2 begin in October, 2006, and to continue for eight months.

3 The CVA would not broadcast its infomercial featuring Representative Bono in the  
4 45th Congressional District of California. Representative Bono would not receive any  
5 financial compensation for her role as the CVA spokesperson. Furthermore, the CVA  
6 infomercial would not disseminate Representative Bono's campaign materials or  
7 expressly advocate the election or defeat of Representative Bono or of any other clearly  
8 identified Federal candidate.

9 ***Question Presented***

10 *May Representative Bono appear in the CVA tourism infomercial under the Act*  
11 *and Commission regulations?*

12 ***Legal Analysis and Conclusions***

13 Yes, Representative Bono may appear in the CVA infomercial under the Act and  
14 Commission regulations.

15 The Act and Commission regulations limit the amount a person may contribute to  
16 any candidate, a candidate's authorized political committees, or their agents with respect  
17 to any election for Federal office. *See* 441a(a)(1)(A); 11 CFR 110.1(b)(1). These  
18 limitations apply to contributions by unincorporated entities, such as the CVA.<sup>1</sup>

19 Under the Act and Commission regulations, the terms "contribution" and  
20 "expenditure" include any gift of money or "anything of value" made by any person for  
21 the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11

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<sup>1</sup> The Commission assumes, for purposes of this advisory opinion, that the cost of the infomercial in which Representative Bono has been invited to appear would exceed the \$2,100 limit that applies to contributions from the CVA to candidates for the 2006 general election. *See* 11 CFR 110.1(b)(1).

1 CFR 100.52(a) and 100.111(a). The phrase “anything of value” includes all in-kind  
2 contributions. *See* 11 CFR 100.52(d)(1) and 100.111(e)(1). In-kind contributions include  
3 expenditures made by any person “in cooperation, consultation, or concert, with, or at the  
4 request or suggestion of” a candidate, a candidate’s authorized committees, or their  
5 agents. 2 U.S.C. 441a(a)(7)(B)(i).

6 Commission regulations specify a three-prong test to determine whether a payment  
7 for a communication becomes an in-kind contribution as a result of coordination between  
8 the person making the payment and a candidate.<sup>2</sup> *See* 11 CFR 109.21(a)(1)-(3). Under  
9 the first prong of the coordinated communication test, the communication must be paid for  
10 by a person other than a candidate, a candidate’s authorized committee, a political party  
11 committee, or agents of any of the foregoing. *See* 11 CFR 109.21(a)(1). The CVA  
12 infomercial would satisfy this first prong of the coordinated communication test because  
13 the infomercial would be paid for by the CVA.

14 Under the second prong of the coordinated communication test, the  
15 communication must satisfy one of the four content standards set forth in 11 CFR  
16 109.21(c). Representative Bono’s appearance in the CVA infomercial would not satisfy  
17 any of the content standards in this second prong of the coordinated communication test.  
18 The infomercial would not be an electioneering communication under 11 CFR 100.29<sup>3</sup>

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<sup>2</sup> The Commission notes that the coordination regulations at 11 CFR 109.21 are the subject of pending litigation in *Shays v. FEC*, Civil Action No. 06-1247 (D.D.C. filed July 11, 2006). The Commission’s current regulations remain in full force and effect pending the outcome of this proceeding.

<sup>3</sup> The Act and Commission regulations define “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 before a primary election; and (3) in the case of a candidate for the House of Representatives, is targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a). In the case of a candidate for the House of Representatives, “targeted to the relevant electorate” means that the communication can be received by 50,000 or more persons in the district the candidate seeks to represent. *See* 11 CFR 100.29(b)(5)(i).

1 because it would not be received by 50,000 or more persons in Representative Bono's  
2 Congressional District. *See* 11 CFR 109.21(c)(1). Additionally, the CVA infomercial  
3 would not disseminate, distribute, or republish, in whole or in part, campaign materials  
4 prepared by Representative Bono, her authorized committee, or their agents. *See* 11 CFR  
5 109.21(c)(2). Furthermore, the infomercial would not expressly advocate the election or  
6 defeat of Representative Bono or any other Federal candidate. *See* 11 CFR 109.21(c)(3).  
7 Finally, the CVA would not broadcast the infomercial in Representative Bono's  
8 Congressional District within 90 days of the general election. *See* 11 CFR 109.21(c)(4).

9 Under the third prong of the coordinated communication test, the communication  
10 must satisfy one of the five conduct standards set forth in 11 CFR 109.21(d). The  
11 Commission need not reach this prong of the analysis because Representative Bono's  
12 appearance in the CVA infomercial would not satisfy the second prong set forth in 11  
13 CFR 109.21(c).

14 Because the CVA infomercial would not be a coordinated communication, it  
15 would not be an in-kind contribution to Representative Bono, her authorized committee,  
16 or their agents. Thus, Representative Bono's appearance in the CVA infomercial would  
17 not result in the CVA making an in-kind contribution to Representative Bono under the  
18 Act and Commission regulations.

19 This response constitutes an advisory opinion concerning the application of the  
20 Act and Commission regulations to the specific transaction or activity set forth in your  
21 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
22 of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that

2 conclusion as support for its proposed activity.

3

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Sincerely,

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Michael E. Toner

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Chairman

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