



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2004 AUG 31 A 11: 24

August 31, 2004

MEMORANDUM

AGENDA ITEM
For Meeting of: 9-9-04

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Robert M. Knop *RMK*
Staff Attorney

Subject: Draft AO 2004-31

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 9, 2004.

Attachment

1 ADVISORY OPINION 2004-31

2
3 Cleta Mitchell, Esq.
4 Foley & Lardner LLP
5 Washington Harbour
6 3000 K Street, NW, Suite 500
7 Washington, DC 20007

DRAFT

8
9 Dear Ms. Mitchell:

10
11 This responds to your letters dated July 21 and July 30, 2004, requesting an
12 advisory opinion on behalf of Russ Darrow Group, Inc. (“RDG”), concerning the
13 application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and
14 Commission regulations, to certain radio and television advertisements that RDG is
15 planning to run.

16 ***Background***

17 You state that RDG, a Wisconsin corporation, is in the commercial business of
18 selling to the general public in Wisconsin a variety of products and services, including
19 new and used automobiles, vehicle repair and maintenance services, leasing
20 owner/operator trucks and trailers, auto fleet leasing and maintenance tracking, and
21 vendor equipment leasing. You indicate that RDG owns and operates 22 vehicle franchise
22 dealerships in Wisconsin, all of which include “Russ Darrow” as part of the dealership’s
23 name (*e.g.*, Russ Darrow West Bend, Russ Darrow Appleton Chrysler). You state that
24 during the past decade, RDG has focused on developing “Russ Darrow” as a brand name
25 for its dealerships.

26 Russ Darrow, Jr. (“the Candidate”) is a candidate for the U.S. Senate in the
27 Wisconsin Republican primary election, which is scheduled to be held on Tuesday,
28 September 14, 2004. If the Candidate wins this primary election, he will be the

1 Republican candidate for the U.S. Senate from Wisconsin in the general election, which
2 is scheduled to be held November 2, 2004. The Candidate's principal campaign
3 committee is Russ Darrow for Senate, Inc. ("the Committee").

4 In addition to being a candidate for the U.S. Senate, the Candidate is the founder,
5 Chief Executive Officer, and Chairman of the Board of RDG. His son and namesake,
6 Russ Darrow III, serves as RDG's President and Chief Operating Officer. You represent
7 that Russ Darrow III is primarily responsible for all day-to-day operations, plans, and
8 business activities of RDG, including the oversight and ultimate decision-making
9 authority regarding discretionary advertising by RDG.

10 You state that RDG has continually utilized electronic media, including television
11 and radio, to advertise its products and services for 38 years, and that RDG plans to
12 continue to air such advertisements for the foreseeable future. You represent that Russ
13 Darrow III replaced the Candidate as RDG's spokesman in the late 1980s and began
14 appearing in RDG advertisements at that time. Russ Darrow III has been the public face
15 of RDG in its advertisements for over a decade. You further state that the Candidate has
16 not appeared in any of RDG's advertisements in more than a decade.

17 You also state that the Candidate was not involved in any way in the formation of
18 the television and radio advertising contracts for 2004. You represent that all of RDG's
19 advertising decisions are made without regard to the Candidate or any campaign for
20 Federal office and are not coordinated with the Candidate, the Committee, or its agents.
21 You state that the Candidate and RDG are two distinct and separate legal entities
22 operating and advertising separately and without consultation or coordination with one
23 another. You also state that the Committee and RDG have no common media vendors of

1 any kind and that each makes wholly separate and independent decisions regarding the
2 creation, production, and distribution of any and all advertising and other promotions.

3 You have provided a sampling of television and radio advertising scripts used by
4 RDG in recent years. You represent that although the scripts for the television and radio
5 advertisements RDG plans to air during the remainder of 2004 have not yet been
6 developed, none of those advertisements will reference the Candidate's campaign either
7 directly or indirectly. In addition, you indicate that the Candidate will not appear or speak
8 in any such advertisements.¹ You also state that the proffered scripts of past radio and
9 television advertisements aired by RDG are representative of the scripts that RDG is
10 using currently and which it will use in the coming months.²

11 ***Question Presented***

12 Would the proposed RDG radio and television advertisements that include the
13 name "Russ Darrow" be electioneering communications within the meaning of the Act
14 and Commission regulations?

15 ***Legal Analysis and Conclusions***

16 RDG's radio and television advertisements that include the name "Russ Darrow"
17 would not be electioneering communications as defined in 2 U.S.C. 434(f)(3)(A)(i) and
18 11 CFR 100.29. This conclusion rests on the factual circumstances presented in which
19 the use of the name "Russ Darrow" refers to a business or to another individual who is
20 not a candidate.

¹ You state that Russ Darrow III will not appear in any of the Committee's advertisements.

² See Attachment A for scripts of RDG's typical television and radio advertisements.

1 The Act, as amended by BCRA, prohibits corporations from making or financing
2 electioneering communications. *See* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(2)(iii); *see*
3 *also* Advisory Opinion 2004-15. An “electioneering communication” is any broadcast,
4 cable, or satellite communication that (1) refers to a clearly identified Federal candidate;
5 (2) is publicly distributed for a fee within 30 days before a primary election or 60 days
6 before a general election; and (3) is targeted to the relevant electorate. *See* 2 U.S.C.
7 434(f)(3)(A)(i) and 11 CFR 100.29(a); *see also* Advisory Opinions 2004-15 and 2003-12.
8 Your request acknowledges that RDG’s proposed radio and television advertisements
9 satisfy the last two prongs of this test. The issue here is whether the advertisements refer
10 to a clearly identified Federal candidate.

11 Commission regulations provide that the term “refers to a clearly identified
12 candidate” means that the candidate’s name, nickname, photograph, or drawing appears,
13 or the identity of the candidate is otherwise apparent through an unambiguous reference
14 such as “the President,” “your Congressman,” or “the incumbent,” or through an
15 unambiguous reference to his or her status as a candidate such as “the Democratic
16 presidential nominee” or “the Republican candidate for Senate in the State of Georgia.”
17 11 CFR 100.29(b)(2).

18 The Commission concludes that your proposed advertisements refer to RDG’s car
19 dealerships or Russ Darrow III, and not to the Candidate. First, the Candidate himself
20 does not speak or appear on screen in any of the advertisements. Second, another
21 individual, Russ Darrow III, does speak and appear in the advertisements. You indicate
22 that he, not the Candidate, has been the public face of the company for more than ten
23 years. Third, “Russ Darrow” is part of the name of all of RDG’s dealerships, which RDG

1 has worked for a decade to develop as a brand name for all its dealerships. Finally, while
2 the name “Russ Darrow” is used throughout the proposed advertisements, most of these
3 references include the full name through which a particular dealership does business (*e.g.*,
4 Russ Darrow Toyota, Russ Darrow Kia, Russ Darrow Cadillac). While a couple of the
5 proposed advertisements also include a single reference to “Russ Darrow,” rather than the
6 full name through which the dealership does business, these references, taken together
7 with the other references in the advertisement, also refer to the business entity and not to
8 the Candidate. Therefore, the Commission concludes that RDG’s television and radio
9 advertisements do not refer to a clearly identified candidate under 11 CFR 100.29(b)(2).

10 In the rulemaking proceeding in which the Commission adopted its regulations on
11 electioneering communications, the Commission considered but declined to create an
12 exemption for situations where a Federal candidate shared a name with a business entity
13 because it concluded that such communications could well be considered to promote or
14 support the clearly identified candidate. *See Explanation and Justification, Final Rules on*
15 *Electioneering Communications, 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002).* The
16 decision not to adopt a blanket exemption for such communications, however, does not
17 preclude the Commission from making a determination that the specific facts and
18 circumstances of a particular case indicate that certain advertisements do not refer to a
19 clearly identified Federal candidate and, hence, do not constitute electioneering
20 communications. As stated above, the Commission concludes that the advertisements at
21 issue in this case do not constitute electioneering communications under 2 U.S.C.
22 434(f)(3)(A)(i) and 11 CFR 100.29(a). Furthermore, on the basis of the facts you present,

1 there is no indication that the advertisements have been or will be coordinated with the
2 Candidate under 2 U.S.C. 441a(a)(7)(B)(i) and 11 CFR 109.21.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
6 any of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestor may not rely on that
8 conclusion as support for its proposed activity.

9
10
11
12
13
14
15
16
17
18
19

Sincerely,

Bradley A. Smith
Chairman

Enclosures (AOs 2004-15 and 2003-12)

RUSS DARROW TOYOTA
:30 TV "Toyota Clearance"
Air Dates: July 2002
Spot #RDWBTV-019

<u>VIDEO</u>	<u>AUDIO</u>
RD III On Camera CG: Russ Darrow, III CG: Toyota's Cost Less in West Bend CG: Russ Darrow Toyota Clearance '02 Toyota Camry Footage CG: 2002 Toyota Camry \$189 a month Due at start: \$3,690 Disclaimer A CG: Clearance Priced CG: Wisconsin's All-Time Sales Leader Disclaimer B Toyota Building Footage CG: Toyotas Cost Less In West Bend RD III On-Camera	(RD III) Russ Darrow Toyota's '02 Clearance is the sale you've been waiting for! (:05) Toyota's cost less in West Bend - we'll prove it. Right now, lease the all-new 2002 Toyota Camry for just \$189 a month. This is the first time this Camry has been clearance-priced. Wisconsin's all-time sales leader has a special allocation of Toyotas, so hurry in for your best selection. We'll prove to you that Toyotas cost less in West Bend at Russ Darrow. (:17) (On-Camera) Only at Russ Darrow Toyota. (:03)
Logo Fly-In CG: Russ Darrow Toyota West Bend 262-334-9411 or 1-877-888-0777	(:03 Singout)

Disclaimer A: \$3,000 down. Tax, title & license extra. 60 mo. lease \$3690 due at start. To approved credit. Not valid in conjunction with any other advertised offer.

Disclaimer B: Based on total automotive sales.

Russ Darrow Appleton/Oshkosh

"Job & \$99" (Full Line)

:30

DATV-052 Appleton/Oshkosh Version

Air Date: November, 2003

Video	Audio
Appleton/Oshkosh Kia footage	(Tracy) Are you looking for a used car?
Quick cuts of Kia's	Do you have a job? Do you have \$99? Then
CG: Job + \$99 down= Brand New Kia Disclaimer: \$99 down payment, 9.5% APR, 72 mos. Tax, title, license & service fee extra.	why buy a used car. when you can get a brand new Kia at Wisconsin's #1 Kia dealer.
Russ Darrow Logo CG: Wisconsin's #1 Kia Dealer Disclaimer A	Russ Darrow Kia. Get a brand new Kia Rio starting at just \$7,676.
Rio Footage CG: \$7,676 Disclaimer B	All you need is a job and \$99. Call 1-866-4- new-kia to get a new Kia with a 10-year
CG: Job + \$99 down = Brand New Kia CG: 10-year, 100,000 mile warranty Disclaimer: Limited powertrain warranty – see salesperson for details	100,000 mile factory warranty. A job & 99 dollars is all you need. Call 1- 866-4-new-kia today!
CG: 1-866-4-new-kia now	(:27)
ADD 'Make Every Mile Count' TO EACH TAG Russ Darrow Kia (Appleton/Oshkosh) College Avenue; Appleton Oshkosh Kia Outlet Center 2625 S. Washburn Street CG: 1-866-4newkia	(Russ Darrow :03 singout)

Disclaimer A: Based on '02 sales for all Russ Darrow Kia stores in Wisconsin.

Disclaimer B: All rebates applied. Not valid with other advertised offers. Tax, title, service fee & license extra. For qualified credit.

ATTACHMENT A

Page 2 of 6

Russ Darrow Cadillac
:60 "Generic Version"
December 2003
RDC-004

RDIII	<p>Cadillac. Style luxury Hi, I'm Russ Darrow inviting you to visit Russ Darrow Cadillac in Waukesha. Where we uphold the Cadillac legacy of style, luxury and performance everyday. At Russ Darrow Cadillac, you'll find a huge selection of Cadillacs and receive award-winning service every time you bring your Cadillac in. Whether you're in the market for a classic sedan or SUV, you can be sure Russ Darrow Cadillac has it. And while shopping for your Cadillac, a single detail won't be missed. We know the importance of taking care of our customers. That's why you'll always find incredible service specials to help to maintain your Cadillac. When it comes to care for your Cadillac, you shouldn't settle for anything less than the best. We're Wisconsin's all-time sales leader and we want to be your Cadillac dealership. Stop into Russ Darrow Cadillac, on Highway 18 in Waukesha, and see what Cadillac style really is all about.</p>
-------	---

Russ Darrow Group
:30 "Minivan Madness"
Air Dates: July, 2004
RDCJDTV-004

Video	Audio
<p>RDIII on camera CG: RD Logo throughout spot CG: Russ Darrow, III (footage from 6/04 shoot)</p> <p>CG: Minivan Madness Sale '04 T&C/Caravan CG: 2004 Chrysler Town & Country 2004 Dodge Caravan CG: Closeout Priced</p> <p>CG: 2004 Dodge Grand Caravan \$6,000 Below Factory Invoice Disc.: Factory invoice may not reflect actual dealer cost due to holdbacks and incentives.</p> <p>2005 Chrysler Town & Country and Dodge Caravan Footage CG: 2005 Chrysler Town & Country CG: 2005 Dodge Caravan CG: Introductory Sale Priced Plus Factory Rebates Up to \$2000</p> <p>CG: Minivan Madness</p>	<p>(RDIII on camera:) <i>It's Minivan Madness at Russ Darrow.</i> (:03)</p> <p>(RDIII off camera):</p> <p>Right now, choose from hundreds of Town and Countrys or Caravans - closeout priced to move.</p> <p>Every remaining '04 Dodge Grand Caravan will be sold at \$6,000 below factory invoice.</p> <p>Every '05 minivan will be introductory sale priced to move – plus get factory rebates up to \$2,000.</p> <p><i>It's Minivan Madness.</i> (:21)</p> <p>(RDIII on camera): <i>Only at Russ Darrow: Chrysler-Jeep-Dodge.</i> (:03)</p>
<p><u>CG: Russ Darrow Group Logo</u> CG: Chrysler Jeep Dodge 7676 North 76th Street Minutes From Anywhere</p>	<p>(:03 RD Sing-Out)</p>

**RUSS DARROW CHRYSLER :60 RADIO "TWO GIRLS REV 2" AIRS WEEK
OF 3/29
JOANNE/MITCH - FAST SALE - DCJTG329**

SFX: CAR WON'T TURN OVER. FRUSTRATED WOMAN SAYS. "OHHH". SHE GETS OUT OF CAR, SLAMS DOOR

SFX: TELEPHONE RINGS

GIRL 2: HI, I HATE TO ASK YOU AGAIN BUT, CAN YOU PLEASE PICK ME UP TODAY?

GIRL 1: LET ME GUESS, YOUR CAR WOULDN'T START AGAIN!

GIRL 2: YEAH!

GIRL 1: HOW LONG ARE YOU GOING TO WAIT UNTIL YOU GET A NEW CAR?

GIRL 2: WELL, I'VE BEEN SHOPPING AROUND BUT I HAVEN'T FOUND A GREAT DEAL.

GIRL 1: YOU HAVEN'T BEEN TO RUSS DARROW CHRYSLER-JEEP-DODGE

MALE ANNOUNCER IN:

MUSIC IN: FAST SALE

DON'T MISS THE 2004 SPRING CLEARANCE EVENT! AT WISCONSIN'S ALL-TIME SALES LEADER RUSS DARROW CHRYSLER JEEP DODGE WE PURCHASED ANOTHER DEALERS INVENTORY JUST FOR THIS EVENT! NOW The largest Chrysler-Jeep-Dodge inventory in Wisconsin IS BIGGER & BETTER THAN EVER! CHOOSE FROM OVER 1,000 NEW CHRYSLERS, JEEPS AND DODGES HUNDREDS OF '04 JEEP grand cherokees & LIBERTIES HUNDREDS OF '04 CHRYSLER AND DODGE MINIVANS! ALL AT THE LOWEST ADVERTISED PRICE ...GUARANTEED!SFX: ANVIL OR WE'LL GIVE YOU THE CAR FREE! plus, Get 0% long term financing PLUS the rebate! AT RUSS DARROW CHRYSLER JEEP DODGE 7676 N. 76th STREET IN BEAUTIFUL MILWAUKEE CALL 1-888-455-3000

DISCLAIMER: OFFERS WITH APPROVED CREDIT. YOU MUST PRESENT COMPETITOR'S AD FOR EXACT SAME VEHICLE AT TIME OF PURCHASE. NOT VALID WITH ANY OTHER OFFER.

ATTACHMENT A
Page 5 of 6

**RUSS DARROW HONDA :60 RADIO "VEHICLE UPGRADE NOTICE" AIRS
WEEK OF 7/12**

PROPULSION - HONDA MUSIC - RDHVU712

**SFX: NEWS TELETYPE, WITH A SERIOUS SOUND EFFECT UNDER
ATTENTION LISTENERS IN MILWAUKEE AN OFFICIAL HONDA UPGRADE
NOTICE HAS BEEN ISSUED IN YOUR AREA: IF YOU'RE INTERESTED IN
GETTING OUT OF YOUR OLD CAR AND INTO A BRAND NEW HONDA PLEASE
BRING YOUR VEHICLE AND PAYMENT BOOK DIRECTLY TO RUSS SFX
DARROW SFX HONDA! SFX**

MUSIC IN:

RUSS DARROW HONDA WILL TERMINATE YOUR CURRENT LEASE OR LOAN
ON THE SPOT, EVEN IF YOU OWE \$5,000 MORE THAN IT'S WORTH! AND GET
YOU INTO A BRAND NEW HONDA EVEN IF YOUR CREDIT IS LESS THAN
PERFECT! OR MAKE ABSOLUTELY NO PAYMENTS 'TIL JULY 2005! CHOOSE
FROM OVER 1,000 NEW AND PRE-OWNED HONDAS! AND RIP UP THE
STICKER! (PRONOUNCE CLEARLY) BECAUSE YOU NEVER, (SFX) PAY
(SFX) RETAIL (SFX) (PRONOUNCE CLEARLY) AT RUSS SFX DARROW SFX
HONDA! SFX BRAND NEW HONDA CIVICS JUST 99 A MONTH! BRAND NEW
HONDA ACCORDS JUST 149 A MONTH!

MUSIC OUT:

HONDA UPGRADE EVENT! HUGE ECHO

MUSIC IN:

WE'LL TERMINATE YOUR CURRENT LEASE OR LOAN EVEN IF YOU OWE
\$5,000 MORE THAN IT'S WORTH! AND GET YOU INTO A BRAND NEW
HONDA EVEN IF YOUR CREDIT IS LESS THAN PERFECT! OR MAKE
ABSOLUTELY NO PAYMENTS 'TIL JULY 2005! THIS WEEK ONLY AT RUSS
SFX DARROW SFX HONDA! SFX
ON BROWN DEER ROAD AT 91ST STREET,
CALL 866-260-4926

**DISCLAIMER: TO QUALIFIED BUYERS. 36-MONTH LEASE. 2700 DOWN,
PLUS, FIRST MONTH, TAX, TITLE LICENSE & SERVICE FEE. CIVIC MODEL
ES1634W, ACCORD MODEL CM5514PLW, MANY TO CHOOSE.**