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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of 06-10-10

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Peter Reynolds *PR*
Attorney

Subject: AOR 2010-08 (Citizens United) – Drafts A & B

Attached are two proposed drafts (Draft A & Draft B) of the subject advisory opinion. We have been asked to place these drafts on the agenda for June 10, 2010.

Attachment

1 ADVISORY OPINION 2010-08

2

3 Theodore B. Olson, Esq.
4 Gibson, Dunn & Crutcher LLP
5 1050 Connecticut Avenue, NW
6 Washington, DC 20036-5306

DRAFT A

7

8 Dear Mr. Olson:

9 We are responding to your advisory opinion request on behalf of Citizens United
10 concerning whether its filmmaking activities constitute expenditures and electioneering
11 communications under the Federal Election Campaign Act of 1971, as amended (the
12 “Act”), and Commission regulations.

13 The Commission concludes that Citizens United’s costs of producing and
14 distributing its films, in addition to related marketing activities, are covered by the press
15 exemption from the Act’s definitions of “expenditure” and “electioneering
16 communication.” Whether or not the activity is “*bona fide* commercial activity” is moot
17 given that the media exemption applies.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letters received on
20 March 29, 2010, and April 26, 2010.

21 Citizens United is a Virginia non-stock corporation and is exempt from Federal
22 taxes under Section 501 of the Internal Revenue Code. Its principal purpose is “to
23 promote social welfare through informing and educating the public on conservative ideas
24 and positions on issues, including national defense, the free enterprise system, belief in
25 God, and the family as the basic unit of society.” Citizens United advocates issues,
26 recruits members, and disseminates information through direct mail efforts,

1 telemarketing, conferences, publications, print and broadcast advertising, Internet
2 activities, and litigation. Citizens United conducts political activities, including making
3 contributions and independent expenditures, through Citizens United Political Victory
4 Fund (a separate segregated fund) and The Presidential Coalition, LLC (an affiliate).
5 Citizens United is not owned or controlled by a political party, political committee, or
6 candidate.

7 In furtherance of its purpose, Citizens United produces and distributes films on
8 various political topics through its in-house unit, Citizens United Productions, and, on
9 occasion, through affiliated entities.¹ Since 2004, Citizens United has produced and
10 distributed fourteen films: CELSIUS 41.11: THE TEMPERATURE AT WHICH THE BRAIN
11 BEGINS TO DIE (2004); BROKEN PROMISES: THE UNITED NATIONS AT 60 (2005); BORDER
12 WAR (2006); ACLU: AT WAR WITH AMERICA (2006); REDISCOVERING GOD IN AMERICA
13 (2007); HILLARY: THE MOVIE (2008); HYPE: THE OBAMA EFFECT (2008); BLOCKING
14 “THE PATH TO 9/11”: THE ANATOMY OF A SMEAR (2008); RONALD REAGAN:
15 RENDEZVOUS WITH DESTINY (2009); WE HAVE THE POWER (2009); PERFECT VALOR
16 (2009); REDISCOVERING GOD IN AMERICA II: OUR HERITAGE (2009); NINE DAYS THAT
17 CHANGED THE WORLD (2010); and GENERATION ZERO (2010). Citizens United also has
18 four additional films currently in production. Some of Citizens United’s films and

¹ For example, Citizens United and a non-candidate individual investor formed Citizens United Productions No. 1, LLC, to produce and distribute an upcoming documentary film (GENERATION ZERO). Citizens United owns 75% of, and maintains operational and board control over, Citizens United Productions No. 1. Citizens United also plans to establish Citizens United Productions No. 2, LLC, to produce a second film (SAVING AMERICA), as well as additional entities to produce and distribute future films. All such affiliates will be structured, owned, and operated in a manner similar to Citizens United Productions No. 1. Because Citizens United will maintain ownership and control over all such affiliates, for the purpose of this advisory opinion, the Commission assumes that all films produced and/or distributed by a Citizens United affiliate are produced and distributed by Citizens United.

1 marketing materials refer to clearly identified Federal candidates, and some may
2 constitute expenditures or electioneering communications under the Act.

3 Approximately 25% of Citizens United’s annual budget for each of the past six
4 years has been devoted to the production and distribution of its films. In 2009, that figure
5 was approximately \$3.4 million, and Citizens United anticipates spending a similar
6 proportion of its budget on film-related activities for the foreseeable future.

7 Citizens United has distributed, and plans to continue distributing, its films in
8 three primary ways: as DVDs, as theatrical releases, and on broadcast, cable, and
9 satellite television. Citizens United typically sells its films as DVDs for both retail and
10 wholesale bulk purchase, although in 2008 it provided free DVDs of one film, HYPE: THE
11 OBAMA EFFECT, as a newspaper insert in five newspapers in Florida, Nevada, and Ohio.
12 Additionally, Citizens United has arranged for limited theatrical release of three² of its
13 films. Such releases typically involve Citizens United licensing the films in exchange for
14 a percentage of box office sales, although it also allows its films to be screened free of
15 charge at film festivals and educational institutions and hosts free screenings for select
16 members of the public and news media.

17 Two of Citizens United’s films—RONALD REAGAN: RENDEZVOUS WITH DESTINY
18 and WE HAVE THE POWER—have been televised, and Citizens United is in negotiations
19 for the rights to show a third, PERFECT VALOR, on The Military Channel. Preliminary
20 discussions indicate that Citizens United will receive advertising time for its own use
21 during the cable broadcast as compensation, an arrangement which would parallel the
22 terms under which RONALD REAGAN: RENDEZVOUS WITH DESTINY was broadcast.

² CELSIUS 41.11 (2004), BORDER WAR (2006), and GENERATION ZERO (2010).

1 Additionally, Citizens United is in discussions regarding the licensing of certain of its
2 films for cable and satellite broadcast in a video-on-demand format. Citizens United
3 represents that it will receive a royalty, commission, or other fee from the broadcasters
4 each time one of its films is ordered for viewing.

5 ***Questions Presented***

6

7 1. *Are the costs of producing and distributing Citizens United's films and related*
8 *marketing activities covered by the press exemption from the Act's definitions of*
9 *"expenditure" and "electioneering communication"?*

10

11 2. *Do the production and distribution of Citizens United's films and related*
12 *marketing activities constitute "bona fide commercial activity" by a commercial*
13 *entity?*

14

15 ***Legal Analysis and Conclusions***

16

17 *Question 1. Are the costs of producing and distributing Citizens United's films and*
18 *related marketing activities covered by the press exemption from the Act's definitions of*
19 *"expenditure" and "electioneering communication"?*

20

21 Yes, the costs of producing and distributing Citizens United's films, along with
22 related marketing activities, are covered by the press exemption from the Act's
23 definitions of "expenditure" and "electioneering communication."

24 Under the Act, "The term 'expenditure' does not include . . . any news story,
25 commentary, or editorial distributed through the facilities of any broadcasting station,
26 newspaper, magazine, or other periodical publication, unless such facilities are owned or
27 controlled by any political party, political committee, or candidate." 2 U.S.C.
28 431(9)(B)(i). The Act and Commission regulations also include a similar exemption
29 from the definition of "electioneering communication" for a communication that appears
30 in a news story, commentary, or editorial distributed through the facilities of any
31 broadcast, cable, or satellite television or radio station, unless such facilities are owned or

1 controlled by any political party, political committee, or candidate. *See* 2 U.S.C.
2 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). Together, these exclusions are known as the
3 “press exemption” or “media exemption.”

4 The legislative history of the press exemption indicates that Congress did not
5 intend to “limit or burden in any way the First Amendment freedoms of the press and of
6 association. [The exemption] assures the unfettered right of the newspapers, TV
7 networks, and *other media* to cover and comment on political campaigns.” H.R. REP. NO.
8 93-1239 at 4 (1974) (emphasis added). While an earlier Commission advisory opinion
9 narrowly concluded that a news story, commentary, or editorial distributed through
10 facilities other than the enumerated media (*i.e.*, a book) is generally not covered by the
11 press exemption,³ later Commission actions have read the press exemption more broadly,
12 consistent with the Act’s legislative history, to cover cable television,⁴ the Internet,⁵
13 satellite broadcasts,⁶ and rallies staged and broadcast by a radio talk show.⁷ In fact, “[t]he

³ Advisory Opinion 1987-08 (AIG/U.S. News). This advisory opinion involved, among other things, applicability of the media exemption to a book. The Commission concluded, “With respect to AIG’s sponsorship of the Book, the Commission notes that the ‘news story’ exemption does not apply to distribution through facilities other than a broadcasting station, newspaper, magazine, or other periodical publication.... Because the Book does not fit within any of these categories, it would not qualify for the ‘news story’ exception.” *Id.* at 5. Although the question of whether a theatrical release of a film could qualify for the media exemption was raised by some respondents in MURs 5474 (Dog Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11), the Commission ultimately found no reason to believe respondents violated the Act because the documentary constituted *bona fide* commercial activity and was not an independent expenditure or electioneering communication.

⁴ *Final Rules on Candidate Debates and News Stories*, 61 FR 18049 (Apr. 24, 1996).

⁵ *Explanation and Justification for Final Rules on Internet Communications*, 71 FR 18589 (Apr. 12, 2006).

⁶ Advisory Opinion 2007-20 (XM Radio).

⁷ *See* MUR 5569 (The John and Ken Show, *et al.*), First General Counsel’s Report at 9 (in a matter where a radio talk show expressly advocated the election and defeat of federal candidates, and that also staged and broadcast public rallies outside the offices of federal candidates, the Commission concluded that the media exemption applied to the rallies because they were “similar in form to other broadcast events featured on the Show” which was also covered by the media exemption.).

1 Commission has not limited the press exemption to traditional news outlets, but rather
2 has applied it to ‘news stories, commentaries, and editorials *no matter in what medium*
3 *they are published....*’” Advisory Opinion 2008-14 (Melothé, Inc.) at 3 (citing the
4 Commission’s 2006 rulemaking, *Explanation and Justification for Final Rules on*
5 *Internet Communications*, 71 FR 18589, 18608 (Apr. 12, 2006), extending the press
6 exemption to websites and “any Internet or electronic publication”).

7 The Commission has historically conducted a two-step analysis to determine
8 whether the media exemption applies. First, the Commission asks whether the entity
9 engaging in the activity is a press or media entity. *See* Advisory Opinions 2005-16 (Fired
10 Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission
11 applies the two-part analysis presented in *Reader’s Digest Ass’n v. FEC*, 509 F. Supp.
12 1210, 1215 (S.D.N.Y. 1981), which requires it to establish:

13 (A) That the entity is not owned or controlled by a political party, political
14 committee, or candidate; and

15 (B) That the entity is acting as a press entity in conducting the activity at issue
16 (*i.e.*, whether the press entity is acting in its “legitimate press function”).

17 *See also* *FEC v. Phillips Publ’g*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981); Advisory
18 Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-
19 07 (MTV).

20 **1) Press Entity Status**

21 Neither the Act nor Commission regulations use or define the term “press entity.”
22 Therefore, when determining whether the term applies to a particular entity, the
23 Commission has focused on whether the entity in question produces on a regular basis a

1 program that disseminates news stories, commentary, and/or editorials. *See, e.g.*,
2 Advisory Opinions 2008-14 (Melothe, Inc.), 2007-20 (XM Radio), and 2005-19 (Inside
3 Track). In the Explanation and Justification for the Final Rules on Electioneering
4 Communications, the Commission stated that it will interpret “news story, commentary,
5 or editorial” to include documentaries and educational programming within the context of
6 the media exemption to the electioneering communication definition in 11 CFR
7 100.29(c)(2).⁸ *See* Explanation and Justification for the Final Rules on Electioneering
8 Communications, 67 FR 65190, 65197 (Oct. 23, 2002). Whether an entity qualifies as a
9 press entity does not necessarily turn on the presence or absence of any one particular
10 fact. *See* Advisory Opinions 2007-20 (XM Radio) and 2005-19 (Inside Track).

11 Since 2004, Citizens United has produced and distributed fourteen films, with
12 four additional films currently in production. Additionally, a substantial portion of
13 Citizens United’s annual budget for each of the past six years has been devoted to the
14 production and distribution of films, including documentaries. In light of these facts, and
15 given that Citizens United produces documentaries on a regular basis, the Commission
16 concludes it is a press entity for the purposes of this advisory opinion.⁹

⁸ The Commission has not explicitly determined that it will interpret “news story, commentary, or editorial” to include documentaries within the context of the media exemption from the definition of “expenditure.” However, because the Commission uses the same analysis to determine the application of both the 2 U.S.C. 431(9)(B)(i) and 11 CFR 100.29(c)(2) media exemptions, it follows that the term “news story, commentary, or editorial” includes documentaries for the purposes of both media exemptions discussed herein.

⁹ In Advisory Opinion 2004-30 (Citizens United), the Commission determined that the costs of a film produced by Citizens United did not qualify for the press exemption in part because Citizens United had produced only two documentaries over the preceding sixteen years. Since 2004, the volume and frequency of Citizens United’s film production have increased substantially. As a result, the Commission is presented with a significant change in the facts in the time that has passed since it issued Advisory Opinion 2004-30. The Commission has not imposed a requirement that an entity seeking to avail itself of the press exemption first demonstrate that it has a track record of engaging in media activities. *See, e.g.*, Advisory Opinion 2008-14 (Melothe, Inc.).

1 While Citizens United’s films may be designed to further its principal purpose as
2 a non-profit advocacy organization, an entity otherwise eligible for the press exemption
3 does not lose its eligibility merely because of a lack of objectivity in a news story,
4 commentary, or editorial. *See* Advisory Opinions 2005-19 (Inside Track) (citing First
5 General Counsel’s Report, MUR 5440 (CBS Broadcasting, Inc.)) and 2005-16 (Fired
6 Up!) (citing same).

7 **2) Ownership Criteria and Legitimate Press Function**

8 **A) Ownership or Control**

9 Citizens United is not owned or controlled by a political party, political
10 committee, or candidate. Further, neither Citizens United Productions No. 1 nor Citizens
11 United Productions No. 2 is owned or controlled by a political party, political committee,
12 or candidate. The Commission presumes, for purposes of this advisory opinion only, that
13 any future affiliates through which Citizens United produces and/or distributes
14 documentary films will also not be owned or controlled by a political party, political
15 committee, or candidate.

16 **B) Legitimate Press Function**

17 There are two considerations in determining whether an entity is engaging in its
18 legitimate press function: (1) whether the entity’s materials are available to the general
19 public, and (2) whether they are comparable in form to those ordinarily issued by the
20 entity. Advisory Opinions 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life*
21 (*“MCFL”*), 479 U.S. 238, 251 (1986)) and 2000-13 (iNEXTV) (concluding that a
22 website was “viewable by the general public and akin to a periodical or news program
23 distributed to the general public”). In *MCFL*, the Supreme Court held that a “Special

1 Edition” newsletter did not qualify for the press exemption on the basis that it deviated
2 from certain “considerations of form” relating to the production and distribution of its
3 regular newsletter. 479 U.S. at 250-51. Among those “considerations of form”
4 enumerated by the Supreme Court were the fact that the Special Edition was not
5 published through the facilities of the regular newsletter, but by a staff which prepared no
6 previous or subsequent newsletters, and the increase in distribution to a group far larger
7 than the newsletter’s regular audience. *Id.*

8 The distribution of documentary films to the public is the legitimate press
9 function of an entity, such as Citizens United, that regularly produces “news stories,
10 commentary, or editorials” in the form of films. The Commission previously has
11 concluded that press functions include the “provision of news stories, commentary, and
12 editorials.” Advisory Opinions 2008-14 (Melothe, Inc.) and 2005-16 (Fired Up).
13 Citizens United makes some of its films available to the general public via broadcast on
14 television satisfying the first consideration. Although not entirely in the same fashion,
15 Citizens United’s distribution of other films via cable and satellite television, including
16 the use of a video on demand format, DVD, and movie theater provides similar access to
17 the general public. Although the later forms of distribution are not free to the public,
18 whether payment is required has not been a determining factor in the Commission’s
19 discussion of this consideration. *See* Advisory Opinions 2007-20 (XM Radio) and 2004-
20 07 (MTV). *But see* Advisory Opinion 2008-14 (Melothe, Inc.) (identifying free access as
21 a relevant factor).

22 Under *MCFL*’s “considerations of form” analysis, Citizens United’s films
23 constitute a legitimate press function. The films contemplated in the request appear to be

1 comparable in form to those previously produced. For instance, Citizens United plans to
2 continue to produce its films through its in-house unit, Citizens United Productions, or
3 through affiliated entities over which Citizens United will maintain majority ownership
4 and control.

5 Moreover, Citizens United states that it will not pay to air its documentaries on
6 television; instead it will receive compensation from the broadcasters.¹⁰ See Advisory
7 Opinion 2004-30 (Citizens United) (“[T]he very act of paying a broadcaster to air a
8 documentary on television, rather than receiving compensation from a broadcaster, is one
9 of the ‘considerations of form’ that can help to distinguish an electioneering
10 communication from exempted media activity.”). Therefore, Citizens United’s
11 distribution of its documentary films by broadcast, cable, and satellite television,
12 including the use of a video on demand format, DVD, and movie theater are eligible for
13 the press exemption.

14 Although some of Citizens United’s film-related marketing advertisements also
15 may be classified as expenditures or electioneering communications, courts have held
16 that where the underlying product is covered by the press exemption, so are
17 advertisements to promote that underlying product. See *Phillips Publ’g*, 517 F. Supp. at
18 1313 (citing *Reader’s Digest*, 509 F. Supp. at 1215). Thus, Citizens United’s
19 advertisements will only come within the press exemption to the extent that Citizens
20 United is not “acting in a manner unrelated to its [press] function” when it produces and
21 distributes the advertisements themselves. See Advisory Opinion 2004-07 (MTV).

¹⁰ The request notes that in certain circumstances Citizens United pays a fee to a movie theater in order to have its films available on certain dates, but receives 100% of the box office ticket sales. According to the request, such types of contracts are standard in the film industry. Assuming that to be true, such payments would not upset the determination that this request falls within the press exemption.

1 Advertisements promoting activities that are not part of Citizens United’s legitimate press
2 function, however, may be considered expenditures or electioneering communications.
3 Advisory Opinion 2004-30 (Citizens United) (citing *Phillips Publ’g*, 717 F. Supp. at
4 1313).

5 Because the costs referenced above with respect to film production, distribution,
6 and related marketing activities fall within the media exemption for “expenditures” and
7 “electioneering communications,” they are exempt from the Act’s disclosure, disclaimer,
8 and reporting requirements.

9 *Question 2. Do the production and distribution of Citizens United’s films and related*
10 *marketing activities constitute “bona fide commercial activity” by a commercial entity?*

11
12 This question is moot given the answer to Question 1.

13 The Commission expresses no opinion regarding the possible applicability of any
14 Federal or State tax laws or other laws to the matters presented in your request, as those
15 issues are outside its jurisdiction.

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a
20 conclusion presented in this advisory opinion, then the requestor may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific
22 transaction or activity which is indistinguishable in all its material aspects from the
23 transaction or activity with respect to which this advisory opinion is rendered may rely on
24 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the

2 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

3 The cited advisory opinions are available on the Commission's website at

4 <http://saos.nictusa.com/saos/searchao>.

5

On behalf of the Commission,

6

7

8

Matthew S. Petersen

9

Chairman

1 ADVISORY OPINION 2010-08

2

3 Theodore B. Olson, Esq.

4 Gibson, Dunn & Crutcher LLP

5 1050 Connecticut Avenue, NW

6 Washington, DC 20036-5306

7

8 Dear Mr. Olson:

DRAFT B

9 We are responding to your advisory opinion request on behalf of Citizens United
10 concerning whether its filmmaking activities constitute expenditures and electioneering
11 communications under the Federal Election Campaign Act of 1971, as amended (the
12 “Act”), and Commission regulations.

13 The Commission concludes that to the extent certain of its films are distributed by
14 broadcast, cable, or satellite television, Citizens United’s costs of producing and
15 distributing these films are covered by the press exemption from the Act’s definitions of
16 “expenditure” and “electioneering communication.” However, such costs will not be
17 covered by the press exemption to the extent the films are distributed by theatrical release
18 and as DVDs. The Commission further concludes that the theatrical release and DVDs
19 proposed by Citizens United are not “*bona fide* commercial activity.”

20 ***Background***

21 The facts presented in this advisory opinion are based on your letters received on
22 March 29, 2010, and April 26, 2010.

23 Citizens United is a Virginia non-stock corporation and is exempt from Federal
24 taxes under Section 501 of the Internal Revenue Code. Its principal purpose is “to
25 promote social welfare through informing and educating the public on conservative ideas
26 and positions on issues, including national defense, the free enterprise system, belief in

1 God, and the family as the basic unit of society.” Citizens United advocates issues,
2 recruits members, and disseminates information through direct mail efforts,
3 telemarketing, conferences, publications, print and broadcast advertising, Internet
4 activities, and litigation. Citizens United conducts political activities, including making
5 contributions and independent expenditures, through Citizens United Political Victory
6 Fund (a separate segregated fund) and The Presidential Coalition, LLC (an affiliate).
7 Citizens United is not owned or controlled by a political party, political committee, or
8 candidate.

9 In furtherance of its purpose, Citizens United produces and distributes films on
10 various political topics through its in-house unit, Citizens United Productions, and, on
11 occasion, through affiliated entities.¹ Since 2004, Citizens United has produced and
12 distributed fourteen films: CELSIUS 41.11: THE TEMPERATURE AT WHICH THE BRAIN
13 BEGINS TO DIE (2004); BROKEN PROMISES: THE UNITED NATIONS AT 60 (2005); BORDER
14 WAR (2006); ACLU: AT WAR WITH AMERICA (2006); REDISCOVERING GOD IN AMERICA
15 (2007); HILLARY: THE MOVIE (2008); HYPE: THE OBAMA EFFECT (2008); BLOCKING
16 “THE PATH TO 9/11”: THE ANATOMY OF A SMEAR (2008); RONALD REAGAN:
17 RENDEZVOUS WITH DESTINY (2009); WE HAVE THE POWER (2009); PERFECT VALOR
18 (2009); REDISCOVERING GOD IN AMERICA II: OUR HERITAGE (2009); NINE DAYS THAT
19 CHANGED THE WORLD (2010); and GENERATION ZERO (2010). Citizens United also has

¹ For example, Citizens United and a non-candidate individual investor formed Citizens United Productions No. 1, LLC, to produce and distribute an upcoming documentary film (GENERATION ZERO). Citizens United owns 75% of, and maintains operational and board control over, Citizens United Productions No. 1. Citizens United also plans to establish Citizens United Productions No. 2, LLC, to produce a second film (SAVING AMERICA), as well as additional entities to produce and distribute future films. All such affiliates will be structured, owned, and operated in a manner similar to Citizens United Productions No. 1. Because Citizens United will maintain ownership and control over all such affiliates, for the purpose of this advisory opinion, the Commission assumes that all films produced and/or distributed by a Citizens United affiliate are produced and distributed by Citizens United.

1 four additional films currently in production. Some of Citizens United's films and
2 marketing materials refer to clearly identified candidates, and some may constitute
3 expenditures or electioneering communications under the Act.

4 Approximately 25% of Citizens United's annual budget for each of the past six
5 years has been devoted to the production and distribution of its films.² In 2009, that
6 figure was approximately \$3.4 million, and Citizens United anticipates spending a similar
7 proportion of its budget on film-related activities for the foreseeable future. In covering
8 events for possible inclusion in the organization's films, Citizens United's film crews
9 have been credentialed as press on at least one occasion.³

10 Citizens United has distributed, and plans to continue distributing, its films in
11 three primary ways: as DVDs, as theatrical releases, and on broadcast, cable, and
12 satellite television. Citizens United typically sells its films as DVDs for both retail and
13 wholesale bulk purchase, although in 2008 it provided free DVDs of one film, HYPE: THE
14 OBAMA EFFECT, as a newspaper insert in five newspapers in Florida, Nevada, and Ohio.
15 Additionally, Citizens United has arranged for limited theatrical release of three⁴ of its
16 films. Such releases typically involve Citizens United licensing the films in exchange for
17 a percentage of box office sales, although it also allows its films to be screened free of
18 charge at film festivals and educational institutions and hosts free screenings for select
19 members of the public and news media.

² The remaining approximately 75% of Citizens United's annual budget is devoted to non-filmmaking activities including membership recruitment, issue advocacy, information dissemination, lobbying, and political activities, such as making contributions and independent expenditures.

³ See Exhibit D to Citizens United's letter of April 26, 2010 (Republican Party of Minnesota April 7th Rally featuring Michele Bachmann & Sarah Palin).

⁴ CELSIUS 41.11 (2004), BORDER WAR (2006), and GENERATION ZERO (2010).

1 Two of Citizens United's films—RONALD REAGAN: RENDEZVOUS WITH DESTINY
2 and WE HAVE THE POWER—have been televised, and Citizens United is in negotiations
3 for the rights to show a third, PERFECT VALOR, on The Military Channel. Preliminary
4 discussions indicate that Citizens United will receive advertising time for its own use
5 during the cable broadcast as compensation, an arrangement which would parallel the
6 terms under which RONALD REAGAN: RENDEZVOUS WITH DESTINY was broadcast.
7 Additionally, Citizens United is in discussions regarding the licensing of certain of its
8 films for cable and satellite broadcast in a video-on-demand format. Although it is
9 unclear which films are the subjects of such discussions, Citizens United represents that it
10 will receive a royalty, commission, or other fee from the broadcasters each time one of its
11 films is ordered for viewing.

12 ***Questions Presented***

- 13
- 14 1. *Are the costs of producing and distributing Citizens United's films covered by the*
15 *press exemption from the Act's definitions of "expenditure" and "electioneering*
16 *communication"?*
 - 17
 - 18 2. *Do the production and distribution of Citizens United's films constitute "bona*
19 *fide commercial activity" by a commercial entity?*
- 20

21 ***Legal Analysis and Conclusions***

22

23 *Question 1. Are the costs of producing and distributing Citizens United's films covered*
24 *by the press exemption from the Act's definitions of "expenditure" and "electioneering*
25 *communication"?*

26

27 To the extent Citizens United's films are distributed through the facilities of a
28 broadcasting station, the costs of producing and distributing them are covered by the
29 press exemption from the Act's definitions of "expenditure" and "electioneering

1 communication.” However, such costs will not be covered by the press exemption to the
2 extent the films are distributed by theatrical release and as DVDs.

3 Under the Act, “The term ‘expenditure’ does not include . . . any news story,
4 commentary, or editorial distributed through the facilities of any broadcasting station,
5 newspaper, magazine, or other periodical publication, unless such facilities are owned or
6 controlled by any political party, political committee, or candidate.” 2 U.S.C.
7 431(9)(B)(i).⁵ The Act and Commission regulations also include a similar exemption
8 from the definition of “electioneering communication” for a communication that appears
9 in a news story, commentary, or editorial distributed through the facilities of any
10 broadcast, cable, or satellite television or radio station, unless such facilities are owned or
11 controlled by any political party, political committee, or candidate. *See* 2 U.S.C.
12 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). Together, these exclusions are known as the
13 “press exemption” or “media exemption.”

14 The legislative history of the press exemption indicates that Congress did not
15 intend to “limit or burden in any way the First Amendment freedoms of the press and of
16 association. [The exemption] assures the unfettered right of the newspapers, TV
17 networks, and other media to cover and comment on political campaigns.” H.R. REP. NO.
18 93-1239 at 4 (1974).

19 Thus, under the Act and the Commission’s regulations, unless a press entity’s
20 facilities are owned or controlled by a political party, political committee, or candidate,
21 the costs of distributing any news story, commentary, or editorial distributed through the

⁵ By regulation, the Commission has updated the term “broadcasting station” to include “cable television operator, programmer or producer,” 11 CFR 100.132, which, in turn, has been interpreted to include satellite broadcast. *See* Advisory Opinion 2007-20 (XM Radio).

1 enumerated media are neither expenditures nor electioneering communications.
2 Advisory Opinion 2008-14 (Melothe, Inc.). Conversely, a news story, commentary, or
3 editorial distributed through facilities other than the enumerated media is generally not
4 covered by the press exemption. *See* Advisory Opinion 1987-08 (AIG/U.S. News);
5 Statement of Reasons of Commissioners Mason and Smith, MURs 5540 (CBS
6 Broadcasting, Inc.), 5545 (CBS News), 5562 (Sinclair Broadcast Group), and 5570
7 (Sinclair Broadcast Group, Inc.); and First General Counsel’s Report, MURs 5474 (Dog
8 Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11), n.11.⁶ Citizens United distributes (or
9 plans to distribute) its films in three ways—as DVDs, as theatrical releases, and on
10 broadcast, cable, and satellite television—the first two of which are not media
11 enumerated under the press exemption. Therefore, Citizens United’s films are beyond
12 the scope of the press exemption to the extent they are distributed in theaters and as
13 DVDs. However, to the extent Citizens United’s films are televised, they could be
14 covered by the press exemption.

⁶ In its Explanation and Justification for Final Rules on Internet Communications (“Internet Rulemaking”), the Commission clearly stated its purpose with respect to the press exemption: to create “new exceptions to the definitions of ‘contribution’ and ‘expenditure’ to protect individual and media activity *on the Internet*.” Internet Rulemaking, 71 FR 18589, 18589-90 (Apr. 12, 2006) (emphasis added). Through the Internet Rulemaking, the Commission recognized “the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach,” and cited as support the Internet’s accessibility, low cost, and interactive features. *Id.* at 18589-90. In this context, the Commission clarified that the press exemption in 11 CFR 100.73 and 11 CFR 100.132 “protects news stories, commentaries, and editorials no matter in what medium they are published,” *id.* at 18608, enumerating “website” and “any Internet or electronic publication” as media covered by those regulations. The Commission further noted that those terms “are meant to encompass a wide range of existing and developing technology, such as websites, ‘podcasts,’ etc.” *Id.* at n. 52; *see also id.* at 18610 (declining to specifically exempt blogging activity because methods of communicating over the Internet “are constantly evolving and difficult to categorize precisely”) (citing *Reno v. ACLU*, 521 U.S. 844, 851 (1997)). In contrast, distribution through movie theatres and DVDs does not involve new or developing Internet technologies that were the subject of the expansion of the press exemption in that rulemaking.

1 Citizens United is currently in negotiations to broadcast one of its films, PERFECT
2 VALOR, on cable television. Additionally, Citizens United is in discussions to license
3 certain of its films for cable and satellite broadcast in a video-on-demand format. The
4 Commission conducts a two-step analysis to determine whether the press exemption
5 applies to news stories, commentaries, and editorials distributed through the facilities of
6 any broadcast station. First, the Commission asks whether the entity engaging in the
7 activity is a press entity. *See* Advisory Opinions 2005-16 (Fired Up!), 1996-16
8 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission applies the
9 two-part analysis presented in *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215
10 (S.D.N.Y. 1981), which requires it to establish:

11 (A) That the entity is not owned or controlled by a political party, political
12 committee, or candidate; and

13 (B) That the entity is acting as a press entity in conducting the activity at issue
14 (*i.e.*, whether the press entity is acting in its “legitimate press function”).

15 *See also* *FEC v. Phillips Publ'g*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981); Advisory
16 Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-
17 07 (MTV).

18 **1) Press Entity Status**

19 Neither the Act nor Commission regulations define the term “press entity.”
20 Whether an entity qualifies as a press entity does not necessarily turn on the presence or
21 absence of any one particular fact. *See* Advisory Opinions 2007-20 (XM Radio) and
22 2005-19 (Inside Track). In making this determination, the Commission focuses on
23 whether the entity in question produces on a regular basis a program that disseminates

1 news stories, commentary, and/or editorials. *See, e.g.*, Advisory Opinions 2008-14
2 (Melothé, Inc.), 2007-20 (XM Radio), and 2005-19 (Inside Track). In the Explanation
3 and Justification for Final Rules on Electioneering Communications, the Commission
4 stated that it will interpret “news story, commentary, or editorial” to include
5 documentaries and educational programming within the context of the media exemption
6 to the electioneering communication definition in 11 CFR 100.29(c)(2).⁷ *See*
7 Explanation and Justification for Final Rules on Electioneering Communications, 67 FR
8 65190, 65197 (Oct. 23, 2002).

9 Since 2004, Citizens United has produced and distributed fourteen films, with
10 four additional films currently in production.⁸ Furthermore, 25% of Citizens United’s
11 annual budget for each of the past six years has been devoted to the production of films,
12 including documentaries. In Advisory Opinion 2004-30 (Citizens United), the
13 Commission determined that the costs of a film produced by Citizens United did not
14 qualify for the press exemption in part because Citizens United had produced only two
15 documentaries over the preceding sixteen years. However, since 2004, the volume and
16 frequency of Citizens United’s film production have increased substantially. As a result,
17 the Commission is presented with a significant change in the facts in the time that has

⁷ The Commission has not explicitly determined that it will interpret “news story, commentary, or editorial” to include documentaries within the context of the media exemption from the definition of “expenditure.” However, because the Commission uses the same analysis to determine the application of both the 2 U.S.C. 431(9)(B)(i) and 11 CFR 100.29(c)(2) media exemptions, it follows that the term “news story, commentary, or editorial” includes documentaries for the purposes of both media exemptions discussed herein.

⁸ Although the Commission is aware that the Supreme Court in *Citizens United v. FEC* disagreed with Citizens United’s characterization of one of its films, HILLARY: THE MOVIE, as a “documentary,” 130 S.Ct. 876, 890 (2010), the Commission presumes for the purpose of this advisory opinion that Citizens United’s other films (including those to be produced in the future) constitute “documentaries” as contemplated in the Explanation and Justification for the Final Rules on Electioneering Communications.

1 passed since it issued Advisory Opinion 2004-30 (Citizens United). Thus, Citizens
2 United produces documentaries on a regular basis and is therefore considered a press
3 entity for the purposes of this advisory opinion.

4 While Citizens United's films may be designed to further its principal purpose as
5 a non-profit advocacy organization, an entity otherwise eligible for the press exemption
6 does not lose its eligibility merely because of a lack of objectivity in a news story,
7 commentary, or editorial. *See* Advisory Opinions 2005-19 (Inside Track) (citing First
8 General Counsel's Report, MUR 5440 (CBS Broadcasting, Inc.)) and 2005-16 (Fired
9 Up!) (citing same).

10 2) Ownership Criteria and Legitimate Press Function

11 A) Ownership or Control

12 Citizens United is not owned or controlled by a political party, political
13 committee, or candidate. Further, neither Citizens United Productions No. 1 nor Citizens
14 United Productions No. 2 is owned or controlled by a political party, political committee,
15 or candidate. The Commission presumes, for purposes of this advisory opinion only, that
16 any future affiliates through which Citizens United produces and/or distributes
17 documentary films will also not be owned or controlled by a political party, political
18 committee, or candidate.

19 B) Legitimate Press Function

20 The Commission previously has concluded that press functions include the
21 "provision of news stories, commentary, and editorials." Advisory Opinions 2008-14
22 (Melothé, Inc.) and 2005-16 (Fired Up!). Two considerations in determining whether an
23 entity is engaging in its legitimate press function include whether the entity's materials

1 are available to the general public and whether they are comparable in form to those
2 ordinarily issued by the entity. Advisory Opinions 2005-16 (Fired Up!) (citing *FEC v.*
3 *Mass. Citizens for Life* (“*MCFL*”), 479 U.S. 238, 251 (1986)) and 2000-13 (iNEXTV)
4 (concluding that a website was “viewable by the general public and akin to a periodical
5 or news program distributed to the general public”). In *MCFL*, the Supreme Court held
6 that a “Special Edition” newsletter did not qualify for the press exemption on the basis
7 that it deviated from certain “considerations of form” relating to the production and
8 distribution of its regular newsletter. *MCFL*, 479 U.S. at 250-51. Among those
9 “considerations of form” enumerated by the Supreme Court were the fact that the Special
10 Edition was not published through the facilities of the regular newsletter, but by a staff
11 which prepared no previous or subsequent newsletters, and the increase in distribution to
12 a group far larger than the newsletter’s regular audience. *Id.*

13 The distribution of documentary films through the facilities of a broadcast, cable,
14 or satellite television station is the legitimate press function of an entity, such as Citizens
15 United, that regularly produces “news stories, commentary, or editorials” in the form of
16 films. By broadcasting Citizens United’s films on television, they are made available to
17 the general public. Further, Citizens United plans to continue to produce its films
18 through its in-house unit, Citizens United Productions, or through affiliated entities over
19 which Citizens United will maintain majority ownership and control. The Commission
20 assumes for the purpose of this advisory opinion that any future broadcast distribution of
21 Citizens United’s documentaries will not reach an audience far larger than the audiences
22 reached by the previous broadcasts of *RONALD REAGAN: RENDEZVOUS WITH DESTINY*
23 and *WE HAVE THE POWER*, or the planned broadcast of *PERFECT VALOR*. Additionally, to

1 the extent that Citizens United does not pay a broadcaster to air one or more of its
2 documentaries on television (as it anticipated doing for HILLARY: THE MOVIE), but rather
3 receives compensation from a broadcaster, Citizens United will be engaging in its
4 legitimate press function. *See* Advisory Opinion 2004-30 (Citizens United) (“[T]he very
5 act of paying a broadcaster to air a documentary on television, rather than receiving
6 compensation from a broadcaster, is one of the ‘considerations of form’ that can help to
7 distinguish an electioneering communication from exempted media activity.”). Finally,
8 in light of Citizens United’s past practices (or proposed practices) relating to the
9 distribution of its candidate-focused films—including CELSIUS 41.11,⁹ HILLARY: THE
10 MOVIE,¹⁰ and HYPE: THE OBAMA EFFECT¹¹—Citizens United will only be engaging in its
11 legitimate press function to the extent the production and distribution of its candidate-
12 focused films do not vary from the production and distribution of its films that are not
13 candidate-focused. On these bases, the Commission concludes that to the extent the
14 production and distribution of Citizens United’s films do not deviate from certain
15 “considerations of form,” including those discussed above, surrounding the production
16 and distribution of Citizens United’s previously broadcast films, they will come within
17 Citizens United’s legitimate press function.

18 Some of Citizens United’s advertisements may be classified as expenditures or
19 electioneering communications. Courts have held that where the underlying product is
20 covered by the press exemption, so are advertisements to promote that underlying

⁹ *See* Advisory Opinion 2004-30 (Citizens United).

¹⁰ *See Citizens United v. FEC*, 130 S.Ct. 876, 887 (2010).

¹¹ *See supra*, n.4.

1 product. *See Phillips Publ'g*, 517 F. Supp. at 1313 (citing *Reader's Digest*, 509 F. Supp.
2 at 1215). However, Citizens United's advertisements will only come within the press
3 exemption to the extent that Citizens United is not "acting in a manner unrelated to its
4 [press] function" when it produces and distributes the advertisements themselves. *See*
5 Advisory Opinion 2004-07 (MTV) (citing First General Counsel's Report, MUR 3657
6 (Multimedia Cablevision)). Furthermore, advertisements promoting activities that are not
7 part of Citizens United's legitimate press function may be considered expenditures or
8 electioneering communications. Advisory Opinion 2004-30 (Citizens United) (citing
9 *Phillips Publ'g*, 717 F. Supp. at 1313).

10 *Question 2. Do the production and distribution of Citizens United's films constitute*
11 *"bona fide commercial activity" by a commercial entity?*
12

13 No, the theatrical release and DVD distribution of Citizens United's films do not
14 constitute "bona fide commercial activity" by a commercial entity.¹²

15 In a number of advisory opinions, the Commission has considered whether a
16 proposed transaction to be conducted by a business entity would constitute *bona fide*
17 commercial activity and therefore not a contribution or expenditure for the purpose of
18 influencing an election. The Commission has concluded that the distribution of
19 communications containing express advocacy to the general public is permissible as
20 "bona fide commercial activity" if done by an entity organized and maintained only for
21 commercial purposes, and not for the purpose of influencing any elections, and the
22 activities themselves are for *purely* commercial purposes. Advisory Opinion 2008-10
23 (VoterVoter.com). Citizens United is a non-profit social welfare organization described

¹² Because the Commission has concluded that the press exemption applies to the distribution of certain of Citizens United's documentaries on broadcast, cable, and satellite television, the answer to Question 2 is limited to distribution by theatrical release and as DVDs.

1 in 26 U.S.C. 501(c)(4), and is not an entity organized and maintained only for
2 commercial purposes. Further, Citizens United’s “filmmaking activities are not *purely*
3 commercial—in that they are undertaken for the purpose of disseminating Citizens
4 United’s political views to the public.” Advisory Opinion Request 2010-08 (Citizens
5 United). Therefore, such activities do not qualify as “*bona fide* commercial activity” and
6 will be subject to the Act. *See* First General Counsel’s Report, MURs 5474 (Dog Eat
7 Dog Films, Inc.) and 5539 (Fahrenheit 9/11) at 16 (wherein there was no information to
8 suggest “that those who made disbursements related to the production and distribution of
9 the film were motivated by anything other than making a profit”).

10 The Commission expresses no opinion regarding the possible applicability of any
11 Federal or State tax laws or other laws to the matters presented in your request, as those
12 issues are outside its jurisdiction.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
16 of the facts or assumptions presented, and such facts or assumptions are material to a
17 conclusion presented in this advisory opinion, then the requestor may not rely on that
18 conclusion as support for its proposed activity. Any person involved in any specific
19 transaction or activity which is indistinguishable in all its material aspects from the
20 transaction or activity with respect to which this advisory opinion is rendered may rely on
21 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
22 conclusions in this advisory opinion may be affected by subsequent developments in the
23 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

1 The cited advisory opinions are available on the Commission's website at

2 <http://saos.nictusa.com/saos/searchao>.

3 On behalf of the Commission,

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Matthew S. Petersen
Chairman