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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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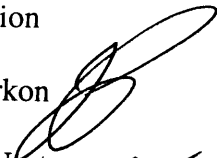
August 11, 2004


Memorandum

AGENDA ITEM

For Meeting of: 8-19-04

To: The Commission

Through: James A. Pehrkon 

From: Lawrence H. Norton
General Counsel 

Rosemary C. Smith *RCS*
Associate General Counsel

Brad C. Deutsch *RCS for BCD*
Assistant General Counsel

Amy L. Rothstein *ALR*
Attorney

Subject: Petition for Rulemaking on Exempting Advertisements for Political Documentary Films from "Electioneering Communications": Notice of Availability

On July 20, 2004, the Commission received a Petition for Rulemaking ("Petition") from Mr. Robert F. Bauer ("Petitioner"), acting on his own behalf and not on behalf of any client or third party. See Attachment 1. Petitioner asks the Commission to revise its regulations regarding electioneering communications, 11 CFR 100.29, "to provide a separate exception for the promotion of political documentary films that may otherwise meet the requirements of an 'electioneering communication' within the meaning of" the Federal Election Campaign Act of 1971, as amended. Petitioner also seeks to have the same protections apply to the promotion of books, plays, and other forms of political expression.

The Office of General Counsel has examined the Petition and determined that it meets the requirements of 11 CFR 200.2(b). Therefore, we have drafted a Notice of Availability ("Notice") for publication in the *Federal Register*, pursuant to 11 CFR 200.3(a)(1). See Attachment 2.

The draft Notice states that the Petition is available for inspection in the Commission's Public Records Office and that comments on the Petition may be submitted until 30 days after publication of the Notice in the *Federal Register*. We note that the Commission has already received one comment, from Mr. Donald J. Simon, writing on behalf of Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics, which was circulated to the Commission on August 4, 2004.

In keeping with the Commission's usual procedure, the draft Notice does not address the merits of the Petition. Instead, it states that consideration of the merits will be deferred until the close of the comment period.

Recommendation

The Office of General Counsel recommends that the Commission approve the draft Notice of Availability for publication in the *Federal Register*.

Attachments

July 20, 2004

Lawrence Norton, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington DC 20463

Re: Petition for Rulemaking Pursuant 11 C.F.R. § 200.2

Dear Mr. Norton:

The undersigned is filing this Petition for a Rulemaking, seeking Commission amendment of 11 C.F.R. § 100.29 of its regulations (“Electioneering Communication”), to provide a separate exception for the promotion of political documentary films that may otherwise meet the requirements of an “electioneering communication” within the meaning of the Act.

Background

There has developed substantial uncertainty about the application of the Act’s electioneering communication prohibition to the promotion of “political” documentary films. This uncertainty has taken on broad significance, with adverse impact on political debate and expression, as the country witnesses “an explosion of political documentaries.” “Summer documentaries join in political debate,” *The Daily Advertiser* (June 25, 2004).¹

News organizations have reported that “[F]ilm historians can’t recall an election year with such intense cinematic activism,” Lynn Smith, “Documentaries: Cinema Activism Hits Fever Pitch,” *Los Angeles Times* (July 2, 2004). With “thousands of cinemas across the United States...showing a number of high-voltage political movies”—and still more pending distribution—Americans “are discussing these

¹ Of course, as noted infra, the resolution of this question by amendment to the Commission’s regulations should and likely would extend comparable protections to the promotion in the ordinary course of books, plays and other forms of political expression that may involve references to Federal candidates.

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Perkins Coie LLP (Perkins Coie LLC in Illinois)

ATTACHMENT 1
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movies and their possible impact on public opinion about the war and the outcome of November's elections." Haider Rizvi, "Documentaries Become Election Year Weapons," *Inter Press Service* (July 6, 2004). It now "seems that film, video and digital media have become the 21st century version of the pamphlets, broadsides and theses" that spread political information and controversial views in earlier eras. Ann Hornaday, "The Modern silver screen: Politics invade the 'plexes," *Contra Costa Times*, June 30, 2004.

The Regulatory Issue

The "electioneering communication" prohibition applies broadly to any "broadcast, cable, or satellite communication" that

- a) "refers to a clearly identified candidate for Federal office;
- b) Is made within sixty (60) days of a general election, or thirty (30) days of a primary; and
- c) when referring to an office other than President or Vice President, is targeted to the relevant electorate. This "targeting" requirement does not apply to communications referring to the President and Vice President, since the entire electorate is the relevant one.

2 U.S.C. § 434(f)(3)(A)(i). Any communication meeting these requirements constitutes an electioneering communication, and if paid directly or indirectly by a corporation or labor organization, is prohibited. 2 U.S.C. § 441b(b)(2). Electioneering communications paid by entities other than corporations or unions, using only individual funds, are subject to other requirements, including special reporting requirements. 2 U.S.C. § 434(f).

The statute contains certain exceptions, none of which apply, or have been held to apply, to the promotion of political documentaries by corporations and other entities established and operating for such purposes in the ordinary course of their businesses. 2 U.S.C. § 434(f)(3)(b)(i)-(iv). The statute does provide for Commission authority to promulgate by rule additional exceptions, 2 U.S.C. § 434(f)(3)(b)(iv), but the exceptions found in Commission regulations do not apply, or have not been held to apply, to the promotion of political documentaries.

Thus, in Advisory Opinion 2004-15, the Commission recently held that the "electioneering communication" provision would prohibit a corporation, exempt from

tax under section 501(c)(4) of the Internal Revenue Code, from financing advertisements for a documentary that included references to President Bush. In so holding, the Commission found that none of the exemptions in current rules applied to protect this advertising, while also noting that it had not been called upon to address directly the application of the exemption for a “news story, commentary, or editorial distributed through the facilities of any broadcasting stations....” 2 U.S.C. § 434(f)(3)(B)(i); 11 C.F.R. § 100.29 (c)(2). Moreover, in the course of its consideration of proposed regulations implementing the Bipartisan Campaign Reform Act of 2002, the Commission considered an exemption for a communication that

promotes a book, movie, play, magazine, television program, or radio program, provided that the communication is within the ordinary course of business of the person that pays for such communications.²

See Agenda Document No. 02-68-E (September 26, 2002) at 4. The Commission declined to adopt this exception by a vote of 3-3. Agenda Document No. 02-71 (October 10, 2002) (Minutes of the Open Meeting of September 26, 2002).

Required Resolution of the Issue: An Exception by Amendment to 11 C.F.R. § 100.29.

Since the Commission’s consideration of this issue in late 2002, it has become clear that, unless subject to an additional exception, the electioneering communication provisions may place into legal question the funds spent by corporations—and even the unreported spending of other entities—to promote political documentaries in the ordinary course of their businesses. One such film is already the subject of a complaint filed with the Commission. See Jessica E. Vascellaro, “Movie Tests Campaign Rule: ‘Fahrenheit 911’ Might Run Afoul of Law, Group Says,” *The Boston Globe* (June 27, 2004).

These legal questions are precisely the kind that Congress did not anticipate and that the Commission is authorized to settle decisively by promulgation of an exception to the general rule. Legal sanctions should not loom over, much less be pursued against, the promotion of political documentary films—however controversial or, even to

² The proposed exception would also not apply where the advertisement referred to a federal candidate and “promoted, supported, attacked or opposed” that candidate within the meaning of the definition of “Federal election activity” under 2 U.S.C. § 431(20(A)(iii).

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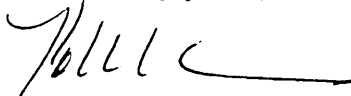
some, distasteful, these films may be.³ There is no justification for the application of the law in these cases, nor any indication that Congress intended such an astonishing and disturbing result. Any attempt to invoke the "electioneering communication" prohibitions against the promotion of these films, failing to advance legitimate purposes of the Act, offends also core constitutional guarantees and values.

Conclusion

For these reasons, the undersigned, acting on his behalf and not on behalf of any client or other interested person, respectfully requests that the Commission institute an immediate rulemaking to provide an appropriate exception under 11 C.F.R. § 100.29, protecting the exhibition and promotion of documentary films.

The Commission is urged to act now, with dispatch, to assure the unfettered promotion of political filmmaking in this election year. To this end, the Commission may proceed with the consideration and promulgation of a temporary rule, without regard to notice and comment procedures and advance publication, pursuant to the "good cause" exemptions of the Administrative Procedure Act, 5 U.S.C. §§ 553(b)(B) and 553(d)(3). This approach would not, of course, preclude the concurrent institution of a rulemaking conducted with all applicable procedures.

Very truly yours,



Robert F. Bauer

³ The same protections by rule should be provided for the promotion, in the ordinary course, of books, plays and others forms of political expression. While this Petition requests particular attention to the issues currently presented by the promotion of political documentaries, the policy, legal and constitutional considerations apply with equal force to the treatment of other political expression and its public promotion.

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[NOTICE 2004 -]**

4 **Rulemaking Petition: Exception for the Promotion of Political Documentary Films**
5 **from “Electioneering Communications”**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Rulemaking petition: notice of availability.

8 **SUMMARY:** On July 20, 2004, the Commission received a Petition for
9 Rulemaking (“Petition”) from Mr. Robert F. Bauer
10 (“Petitioner”). The Petition asks the Commission to revise its
11 regulations by exempting the promotion of political
12 documentary films that may otherwise meet the requirements of
13 an electioneering communication within the meaning of the
14 Federal Election Campaign Act of 1971, as amended (the
15 “Act”). The Petition is available for inspection in the
16 Commission’s Public Records Office, through its Faxline
17 service, and on its website, www.fec.gov. Further information
18 is provided in the supplementary information that follows.

19 **DATES:** Statements in support of, or in opposition to, the Petition must
20 be submitted on or before [INSERT DATE 30 DAYS AFTER
21 THE DATE OF PUBLICATION IN THE FEDERAL
22 REGISTER].

1 **ADDRESSES:**

All comments should be addressed to Mr. Brad C. Deutsch,
Assistant General Counsel, and must be submitted in either
electronic or written form. Commenters are strongly
encouraged to submit comments electronically to ensure timely
receipt and consideration. Electronic mail comments should be
send to ECADSNOA@fec.gov and must include the full name,
electronic mail address, and postal service address of the
commenter. Electronic mail comments that do not contain the
full name, electronic mail address, and postal service address of
the commenter will not be considered. If the electronic mail
comments include an attachment, the attachment must be in the
Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed
comments should be sent to (202) 219-3923, with printed copy
follow-up to ensure legibility. Written comments and printed
copies of faxed comments should be sent to the Federal Election
Commission, 999 E Street, N.W., Washington, D.C. 20463.
The Commission will post public comments on its web site.

18 **FOR FURTHER**
19 **INFORMATION**
20 **CONTACT:**

Mr. Brad C. Deutsch, Assistant General Counsel, or Ms. Amy
L. Rothstein, Attorney, 999 E Street, N.W., Washington, D.C.
20463, (202) 694-1650 or (800) 424-9530.

ATTACHMENT 2
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1 **SUPPLEMENTARY**
2 **INFORMATION:**

3 The Federal Election Commission (“Commission”) has received a Petition for
4 Rulemaking from Mr. Robert F. Bauer, acting on his own behalf and not on behalf of any
5 client or other interested party. Petitioner asks the Commission to revise
6 11 CFR 100.29(c) to exempt from the term “electioneering communications” any
7 communication appearing in a promotion for a political documentary film “by
8 corporations and other entities established and operating for such purpose in the ordinary
9 course of their businesses,” provided that the promotion does not “promote, support,
10 attack or oppose” a candidate for federal office within the meaning of 2 U.S.C.
11 431(20)(A)(iii). Petitioner seeks to have any such protections also apply to the
12 promotion, in the ordinary course of business, of “books, plays, and other forms of
13 political expression that may involve references to Federal candidates.”

14 The Commission seeks comments on whether the Commission should initiate a
15 rulemaking on “electioneering communications” and on whether there are other issues
16 regarding the electioneering communications rules that should also be addressed in a
17 rulemaking at this time.¹

18 Copies of the Petition are available for public inspection at the Commission’s
19 Public Records Office, 999 E Street, N.W., Washington, D.C. 20463, Monday through
20 Friday between the hours of 9 a.m. and 5 p.m., and on the Commission’s website,
21 www.fec.gov. Interested persons may also obtain a copy of the Petition at any time by

¹ Certain aspects of the Commission’s regulations regarding electioneering communications are the subject of a pending lawsuit in the United States District Court for the District of Columbia. Shays and Meehan v. FEC, Civ. Act. 02-CV-1984.

1 dialing the Commission's Faxline service at (202) 501-3413 and requesting document #
2 257.

3 Consideration of the merits of the Petition will be deferred until the close of the
4 comment period. If the Commission decides that the Petition has merit, it may begin a
5 rulemaking proceeding. Any subsequent action taken by the Commission will be
6 announced in the Federal Register.

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Bradley A. Smith
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U