



FEDERAL ELECTION COMMISSION
Washington, DC 20463

**ADVISORY OPINION 2010-08
(CITIZENS UNITED)**

**STATEMENT OF
COMMISSIONER STEVEN T. WALTHER**

The Federal Election Campaign Act of 1971 (the Act) prohibits corporations from making “expenditures”¹ and “electioneering communications.”² However, the Act also provides an exemption from the definitions of both “expenditure” and “electioneering communication” for any “news story, commentary, or editorial distributed through the facilities of any broadcasting station.”³ These exemptions are commonly referred to as the “press exemption.”

The legislative history of the press exemption indicates that despite the Act’s broad prohibition on corporate “expenditures,” Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”⁴

¹ See 2 U.S.C. § 441b(a). An “expenditure” is “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i).

² See 2 U.S.C. §§ 441b(a) and 441b(b)(2). An “electioneering communication” is any broadcast, cable or satellite communication targeted to the relevant electorate that refers to a clearly identified Federal candidate either 60 days before a general election or 30 days before a primary election. 2 U.S.C. § 434(f)(3).

³ 2 U.S.C. § 431(9)(B)(i) (exemption to the definition of “expenditure,” which also applies to newspapers, magazines and other periodical publications); 2 U.S.C. § 434(f)(3)(B)(i) (exemption to the definition of “electioneering communication”).

⁴ H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974) (brackets added for clarity).

Consistent with Congress’s intent to safeguard the press from the Act’s corporate expenditure prohibition, and in light of the myriad of new technologies that have developed since Congress first added the press exemption to the Act in 1974, the Commission has not limited the press exemption to traditional news outlets. Instead, the Commission has applied the press exemption broadly to news stories, commentaries, and editorials “no matter in what medium they are published,”⁵ and has appropriately extended the exemption to Internet websites and entities that distribute their content exclusively on the Internet.⁶

In the past, I have supported a broad interpretation of the press exemption⁷ in large part because concluding that a communication was not eligible for the press exemption had the consequence that costs related to the communication were treated as a prohibited corporate expenditure. This no longer the case, however, as a result of the Supreme Court’s recent decision in *Citizens United v. Federal Election Commission*.⁸

In this advisory opinion request, the Commission is being asked to extend the press exemption to the requestor’s documentary films, even when these films are distributed in DVD format and through theatrical release though neither of these forms of distribution is mentioned the Act’s press exemption or in the Commission’s regulations.⁹

This is the first advisory opinion request that the Commission has received asking the Commission to apply the press exemption since the Supreme Court delivered its *Citizens United* decision in January of this year. In *Citizens United*, the Supreme Court held that the Act’s prohibition on the use of corporate funds for “independent expenditures”¹⁰ and “electioneering communications” was unconstitutional and concluded that corporations

⁵ See *Explanation and Justification for the Regulations on Internet Communications*, 71 FR 18589, 18608-09 (Apr. 12, 2006);

⁶ See Advisory Opinions 2008-14 (Melotheé, Inc.), 2005-16 (Fired Up!) and 2000-13 (iNEXTV).

⁷ See e.g. *Explanation and Justification for the Regulations on Internet Communications*, 71 FR 18589; Advisory Opinion 2008-14 (Melotheé, Inc.).

⁸ *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

⁹ See 2 U.S.C. § 431(9)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i); 11 CFR § 100.132; 11 CFR § 100.29(c)(2).

¹⁰ An “independent expenditure” is “. . . an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate” 2 U.S.C. § 431(17).

could spend as much as they like on such activities so long *as they reported their spending to the Commission consistent with the disclosure requirements in the Act.*

Before the *Citizens United* decision, if a corporate independent expenditure or electioneering communication was not eligible for the press exemption, it was, in the Supreme Court's words, subject to an "outright ban" on speech.¹¹ But that is no longer the case as a result of the Supreme Court's ruling. Since *Citizens United*, the consequence of not being eligible for the press exemption is that the speaker must disclose information related to the communication and must report that information to the Commission.¹²

Because the consequence of not extending the press exemption is no longer a complete silencing of the speaker, but rather the consequence is disclosure of information about the flow of funds that are being spent for the purpose of influencing an election, I believe that it is no longer appropriate to apply the press exemption as broadly as before. When the press exemption applies, transparency is denied and, after all, transparency is one of the hallmark policy goals of the Act.

In fact, any enlargement of the scope of the press exemption will only serve to undermine the policy objectives of the Act by concealing valuable information from the public and frustrating the transparency policies embedded in the Act. In the Supreme Court's words in *Citizens United*, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."¹³

In light of the *Citizen United* decision, it would be my hope that the Commission will revisit the breadth of the Act's press exemption, and its policy underpinnings, as part of

¹¹ *Citizens United*, 130 S.Ct. at 897.

¹² The disclosure requirements of the Act were upheld by the Supreme Court. *See Citizens United v. FEC*, 130 S.Ct. at 914.

¹³ *Citizens United*, 130 S.Ct. at 916.

our rulemaking proceeding – a proceeding that will be open to public comment – to promulgate the many regulatory changes necessitated as a result of the *Citizen United* decision. Until then, I do not think it would be appropriate, in an advisory opinion, to extend the scope of the press exemption any further than we have already.