FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: November 16, 2005

SUBJECT: COMMENT: DRAFT AO 2005-16

Transmitted herewith is a timely submitted comment by Mr. Donald J. Simon on behalf of Democracy 21, Campaign Legal Center, and Center for Responsive Politics regarding the above-captioned matter.

Proposed Advisory Opinion 2005-16 is on the agenda for Thursday, November 17, 2005.

Attachment

November 16, 2005

By Electronic Mail

Ms. Mary Dove
Secretary
Federal Election Commission
999 E Street NW
Washington DC 20463

Re: Comments on OGC Draft of AO 2005-16

Dear Ms. Dove:

Our three organizations submitted joint comments to the Office of General Counsel on AOR 2005-16. We have reviewed the general counsel's draft advisory opinion, and we disagree with the analysis and conclusions for the reasons set forth in our earlier comments. Rather than repeat those comments here, we attach a copy for the record.

Respectfully,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

/s/ Lawrence M. Noble

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Counsel to the Campaign Legal Center

cc: Lawrence H. Norton, Esq.
Each Commissioner

76573.1

September 26, 2005

By Electronic Mail

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments on Advisory Opinion Request 2005-16

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics in regard to AOR 2005-16, an advisory opinion request submitted by Fired Up! LLC ("Fired Up"), seeking "affirmation that its publication of a network of progressive blogs across the country qualifies for the press exemption at 2 U.S.C. § 431(9)(B)(i)." AOR 2005-16 at 1.

For the reasons set forth below, we believe the Commission should decline to answer the hypothetical question posed by Fired Up. Should the Commission decide to reach the merits, we urge the Commission to find that Fired Up does not qualify for the press exemption at 2 U.S.C. § 431(9)(B)(i).

I. Fired Up poses a hypothetical question, which the Commission should not answer.

Commission regulations state: "Requests presenting a general question of interpretation, or posing a hypothetical situation . . . do not qualify as advisory opinion requests." 11 C.F.R. § 112.1(b).

Fired Up is a limited liability corporation under Missouri law, and has elected to be taxed as a partnership.[1] As such, Commission regulations provide that Fired Up is not prohibited from making federal political contributions and expenditures. *See* 11 C.F.R. §§ 110.1(g)(2)-(3). Accordingly, Fired Up can engage in its proposed activities whether or not it is exempt as a press entity. The question it poses, thus, is largely hypothetical, and not appropriate for an advisory opinion.

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[1] *See* Letter of September 12, 2005 from Marc E. Elias to Brad Deutsch, at 1.

II. Fired Up is a partisan political organization and, as such, does not qualify for the press exemption.

If the Commission chooses to answer the AOR, it should advise Fired Up that it does not qualify for the press exemption since, by its own description, Fired Up has an overtly partisan purpose to support Democratic candidates, and intends, among other partisan activities, to actually solicit campaign contributions solely on a partisan basis – characteristics inconsistent with "the press."

Since its enactment, FECA has included an exemption from the definition of "expenditure" for any "news story, commentary, or editorial" distributed by "any broadcasting station, newspaper, magazine, or other periodical publication...." 2 U.S.C. § 431(9)(B)(i).

The Commission through numerous advisory opinions has developed a body of law that construes and applies the news media exemption. The Commission has repeatedly said that "several factors must be present for the press exemption to apply." Ad. Op. 2004-07 (April 1, 2004) (citing advisory opinions). These are:

> First, the entity engaging in the activity must be a press entity described by the Act and Commission regulations. Second, an application of the press exemption depends upon the two-part framework presented in *Reader's Digest Association v. FEC,* 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981): (1) Whether the press entity is owned or controlled by a political party, political committee or candidate; and (2) Whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its "legitimate press function").

Id. (citations omitted).

As the Supreme Court has noted, "[M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public....A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 667-8 (1990); *see also McConnell v. FEC,* 540 U.S. 93, 208 (2003).

While some Internet-based entities provide a function identical or similar to classic media activities, and thus reasonably can be said to fall within the press exemption,[2] others surely do not. But the test is the same for online entities as it is for off-line entities: is the entity a "press entity" and is it acting in its "legitimate press function"?

Here, the requestor has stated that "Fired Up intends to endorse, expressly advocate, and urge readers to donate funds to the election of Democratic candidates for federal, state, and local office." AOR 2005-16 at 2. It also states that its Web site will contain links to "Democratic and progressive organizations." *Id.* It "intends aggressively to support progressive candidates and causes at all levels." *Id.* at 7.

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[2] *See, e.g.,* Ad.Op. 2004-7 (MTV); Ad.Op. 2000-13 (iNEXTV); Ad.Op. 1996-16 (Bloomberg).

In short, Fired Up's self-avowed purpose is to elect Democratic candidates to office, and indeed, to solicit campaign contributions for Democratic candidates. These purely partisan goals may be appropriate for a political organization, but they do not qualify a group as a "press entity."

There is no precedent among the many prior Commission advisory opinions on the press exemption – including those that apply it in the Internet context – for applying the exemption to an entity so overtly political and partisan in its core mission.

Requestor cites a Statement of Reasons by two commissioners (Commissioner Mason and former Commissioner Smith) for the proposition that the press is not required to "be fair or be balanced," AOR 2005-16 at 5, and a General Counsel Report that states, "Even seemingly biased stories or commentary by a press entity can fall within the media exemption." *Id.* These citations miss the point. The issue is not whether a press entity can have a point of view on matters of public policy. The issue here is whether a group whose self-declared purpose is to endorse, support and solicit funds for Democratic candidates is a press entity at all. Nothing in Commission precedent suggests that it is.[3]

We submit that an organization whose stated purpose is to be the functional equivalent of a partisan campaign organization—to elect Democratic candidates and to solicit contributions for such candidates—does not qualify for the press exemption.

Conclusion

For the reasons set forth above, we urge the Commission to decline to answer the hypothetical question posed by Fired Up. Should the Commission decide to respond on the merits, we urge the Commission to find that Fired Up does not qualify for the press exemption at 2 U.S.C. § 431(9)(B)(i).

Respectfully,

/s/ Fred Wertheimer	*/s/ J. Gerald Hebert*	*/s/ Lawrence M. Noble*
Fred Wertheimer Democracy 21	J. Gerald Hebert Paul S. Ryan Campaign Legal Center	Lawrence M. Noble Center for Responsive Politics

[3] Indeed, the precedent is to the contrary. In Ad.Op. 1998-17A (Daniels Cablevision), for example, the Commission approved a request by a cablecaster to give free time to Federal candidates, but "caution[ed]" that "activities by Daniels which reflect an intent to advance one candidate over another, or to give any preference to any candidate, will be deemed to fall outside the Act's media exemption." *See also* Ad.Op. 1996-48 (C-SPAN).

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