



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 30, 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2007-20

John C. Keeney, Jr., Esq.
Hogan & Hartson LLP
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Dear Mr. Keeney:

We are responding to your advisory opinion request on behalf of XM Satellite Radio Inc. ("XM") concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the provision of free air time to presidential candidates during the 2008 election cycle.

The Commission concludes that XM's provision of free airtime to presidential candidates is exempt from the Act's prohibitions on corporate contributions, expenditures, and electioneering communications under the press exemption. The Commission also concludes that communications supplied by participating presidential candidates must carry the disclaimers required by the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on September 5, 2007, a telephone conversation on September 7, 2007, and your electronic mail message received on September 10, 2007.

XM is a satellite radio company with more than 8 million subscribers. For a monthly fee, XM's subscribers can listen to more than 170 digital audio channels. XM is launching a national radio channel dedicated exclusively to the 2008 presidential election. This 24-hour, commercial-free channel, created in association with C-SPAN and other media outlets, will be called "POTUS '08." The channel's name derives from the

acronym frequently used for the President of the United States. POTUS '08 will be available to everyone with an XM radio, regardless of whether they are also XM subscribers.

POTUS '08 will feature news updates, candidate interviews, complete speeches, debate coverage, latest polling results, fundraising status, and live call-in shows. Non-traditional media outlets, such as bloggers and podcasters, will also provide content for the channel. POTUS '08 will also draw from C-SPAN's political archive to re-air archival audio of historic moments from past political campaigns.

As a separate and distinct part of POTUS '08, the channel will also provide free airtime for presidential candidates or their representatives to speak to voters ("Candidate Supplied Content"). Participating presidential candidates will have full editorial control over the content of the communications aired on POTUS '08 and the candidates' views will be broadcast to the audience in an unfiltered manner. Candidate Supplied Content will, however, be subject to certain access guidelines prescribed by XM. For example, XM will not air any advertisements that have been carried on a for-pay basis on any medium (including a commercial for that candidate). In addition, XM will reserve the right to reject any Candidate Supplied Content that exceeds the established time limit or contains profanity.¹

This free airtime for Candidate Supplied Content will be offered to all presidential candidates who have qualified for the ballot in ten or more States and meet other criteria set forth in XM's access guidelines. Initially, XM plans to devote one hour per day to Candidate Supplied Content (the "Candidate Supplied Content Block"). Each qualified presidential candidate will be allowed to supply content of up to 5 minutes per day for broadcasting during the Candidate Supplied Content Block. Over time, both the overall amount of time devoted to the Candidate Supplied Content Block and the amount of time offered to qualified presidential candidates for Candidate Supplied Content may change, depending on factors such as the number of qualified presidential candidates.

XM will maintain a list of all qualified presidential candidates who have expressed an interest in taking advantage of this free airtime, alphabetized by surname. XM will carry all of the Candidate Supplied Content received for each day's Candidate Supplied Content Block based on the alphabetized list, rotating the first candidate in the Content Supplied Content Block each day (starting the first day with the first candidate in the alphabet, the second day with the second candidate in the alphabet, etc.).

XM's broadcasts on the POTUS '08 channel are subject to regulation by the Federal Communications Commission. You represent that XM's broadcasts will be in full compliance with both the "reasonable access" and "equal opportunities" provisions of the Communications Act. 47 U.S.C. 312(a)(7) and 315(a). *See also In re Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the*

¹ Additional access guidelines concerning Candidate Supplied Content are contained in an attachment to the Requestor's advisory opinion request, which is available on the Commission's website at: <http://saos.nictusa.com/saos/searchao>.

2310-2360 MHz Frequency Band, 12 F.C.C.R. 5754, ¶ 92 (1997) (requiring satellite radio providers to comply with the same political broadcasting rules as terrestrial broadcasters).

Questions Presented

1. *Are XM's satellite radio broadcasts on the POTUS '08 channel, including Candidate Supplied Content, exempt from the Act's prohibitions on corporate contributions, expenditures, and electioneering communications under the press exemption?*
2. *Must communications supplied to XM by participating candidates for airing on the POTUS '08 channel carry the disclaimers required by the Act and Commission regulations?*

Legal Analysis and Conclusions

Question 1: Are XM's satellite radio broadcasts on the POTUS '08 channel, including Candidate Supplied Content, exempt from the Act's prohibitions on corporate contributions, expenditures, and electioneering communications under the press exemption?

Yes, XM's satellite radio broadcasts on the POTUS '08 channel, including the broadcast of Candidate Supplied Content, are exempt from the Act's prohibitions on corporate contributions, expenditures, and electioneering communications under the press exemption.

I. Contributions and Expenditures Press Exemption

The Act prohibits “any corporation whatever” from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act and Commission regulations define the terms “contribution” and “expenditure” to include any gift of money or “anything of value” for the purpose of influencing a Federal election, but exclude any cost “incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer, or producer), . . . unless the facility is owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. 431(8)(A)(i), (9)(A)(i), and (9)(B)(i); 11 CFR 100.52(a), 100.73, 100.111(a), and 100.132. The Act and Commission regulations also include a similar exemption at 2 U.S.C. 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2) with respect to electioneering communications, which would otherwise be prohibited by a corporation. This exclusion is known as the “press exemption” or “media exemption.”

The Commission has applied a two-step analysis to determine whether the press exemption applies. First, the Commission asks whether the entity engaging in the activity is a press entity. *See, e.g.*, Advisory Opinions 2005-19 (The Inside Track); 2005-

16 (Fired Up!), and 2004-07 (MTV). The analysis of whether an entity is a press entity does not necessarily turn on the presence or absence of any one particular fact. See Advisory Opinion 2005-19 (The Inside Track). Second, in determining the scope of the exemption, the Commission considers: (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”). See *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publ’g*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2005-19 (The Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV).

1. Press Entity Status

XM qualifies as a press entity. In determining whether an entity is a press entity, the Commission has focused on whether the entity in question is in the business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials. See Advisory Opinion 2005-19 (The Inside Track). XM’s POTUS ’08 channel will feature news updates, candidate interviews, complete speeches, debate coverage, latest polling results, fundraising status, and live call-in shows. It will also incorporate content provided by C-SPAN and non-traditional media outlets, such as bloggers and podcasters. Although the press exemption does not explicitly include satellite broadcasters, the Commission views such broadcasters as sufficiently similar to traditional radio broadcasters and cable television operators to conclude that satellite broadcasters are eligible for the exemption. Because XM is in the business of producing on a regular basis a radio program that disseminates news stories, commentary, and/or editorials, the Commission concludes that it is a press entity.

2. Ownership Criterion and Legitimate Press Function

Neither XM nor POTUS ’08 is owned or controlled by any political party, political committee, or candidate. Furthermore, because the Candidate Supplied Content is a form of “guest commentary,” the provision of free airtime to qualified presidential candidates constitutes “covering or carrying a news story, commentary, or editorial.” See Advisory Opinions 2005-19 (The Inside Track) and 1998-17 (Daniels Cablevision). Accordingly, XM’s POTUS ’08 channel will be acting as a press entity when it broadcasts Candidate Supplied Content.²

3. Conclusion

Because XM’s satellite radio broadcasts on the POTUS ’08 channel, including the broadcast of Candidate Supplied Content, satisfy the criteria outlined above, the Commission concludes that those broadcasts are exempt from the Act’s prohibition on

² The Commission notes that an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office. See Advisory Opinions 2005-19 (The Inside Track) and 2005-16 (Fired Up!).

corporate contributions and expenditures under the press exemption. Similarly, none of XM's POTUS '08 satellite radio broadcasts will constitute an electioneering communication. 2 U.S.C. 434(f)(3)(B)(i); 11 CFR 100.29(c)(2).

Question 2: Must communications supplied to XM by participating candidates for airing on the POTUS '08 channel carry the disclaimers required by the Act and Commission regulations?

Yes, communications supplied to XM by participating candidates for airing on the POTUS '08 channel must carry the disclaimers required by the Act and Commission regulations. *See* 2 U.S.C. 441d and 11 CFR 110.11.

All public communications made by a political committee must include certain disclaimers. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(a)(1), 110.11(b)(1). *See also* Advisory Opinion 2005-18 (Reyes). The costs for producing Candidate Supplied Content will be paid for by the participating presidential candidate's authorized committee. XM will then broadcast the Candidate Supplied Content, without any editorial control over its content. Under these circumstances, XM's broadcast of the Candidate Supplied Content constitutes a "public communication[] . . . made by a political committee." 11 CFR 110.11(a)(1). Therefore, Candidate Supplied Content must contain the appropriate disclaimers.

Specifically, Candidate Supplied Content must contain a disclaimer that clearly states that the communication was paid for by the candidate's authorized committee. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(b)(1). The disclaimer must be presented in a clear and conspicuous manner, to give the listener adequate notice of the identity of the political committee that made a disbursement for the communication. 11 CFR 110.11(c)(1). Examples of disclaimers that would satisfy this requirement include: (1) "Paid for by X for President"; (2) "Paid for by X for President and time provided free by XM Radio"; or (3) "Time for this message was provided free by XM Radio to help inform the public about the current Presidential campaign and other production costs were paid for by X for President." *See* Advisory Opinion 1998-17 (Daniels Cablevision).

In addition, because the Candidate Supplied Content will be a radio communication authorized by a candidate, it must also include an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication. *See* 2 U.S.C. 441d(d)(1)(A); 11 CFR 110.11(c)(3)(i). An example of a statement that would satisfy this requirement is: "I am Candidate X. I am running for President and I approved this message." *See* Advisory Opinion 2005-18 (Reyes).

The Commission expresses no opinion regarding the applicability of the Communications Act of 1934, or of regulations promulgated by the Federal Communications Commission, to the proposed activities because those questions are outside the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. All cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

Sincerely,

(signed)
Robert D. Lenhard
Chairman