



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
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ADVISORY OPINION 2008-14

Marc E. Elias, Esq.
Kate Andrias, Esq.
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Washington, D.C. 20005-2011

Dear Mr. Elias and Ms. Andrias:

We are responding to your advisory opinion request on behalf of Melothé, Inc. concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to Melothé, Inc.’s proposed Internet campaign-TV station.

The Commission concludes that most of Melothé, Inc.’s proposed activities relating to its Internet campaign-TV station would not result in a contribution or expenditure because they would qualify for the press exemption under the Act. Under limited circumstances, solicitations on behalf of featured candidates also may be permissible.

Background

The facts presented in this advisory opinion are based on your letter received on August 11, 2008, emails received from you on September 12 and 14, 2008, and telephone conversations with Commission attorneys.

Melothé, Inc. is a for-profit corporation in the business of developing technology and providing technical capabilities to Internet Web sites. Melothé, Inc. currently is exploring commercial opportunities for its technology, including building and operating Internet TV stations for movies, music videos, and other content.

As part of its business strategy, Melothé, Inc. proposes to launch and operate an Internet TV station covering the campaign(s) of one or more federal candidates. The Web site also may devote itself exclusively to only one candidate over a period of days, weeks, or months.

Melothé, Inc. would produce and transmit both live and prerecorded programming daily from the campaign's headquarters. This programming would be viewable for free by the general public through an interactive multi-channel Internet TV Web site. Melothé, Inc. intends to fund the venture with capital from the corporation¹ and it hopes to commercialize the Web site by, for example, generating advertising revenues and selling merchandise.

The content of the campaign-TV Web site likely would feature and be supportive of Democratic candidates only, and it would be of particular interest to those Democratic candidate's campaign supporters and volunteers. Melothé, Inc., however, would prepare the content, and it would exercise editorial control over all content displayed on its Web site. Melothé, Inc. asserts that it is neither owned nor controlled by any political party, political committee or candidate, nor would the proposed Web sites be owned or controlled by any political party, political committee or candidate.

The campaign-TV Web site may include the following:

- Daily morning briefings for volunteers of the candidate's campaign
- Interviews with campaign staff
- Daily reports featuring campaign news
- Roundtable discussions on campaign news and issues
- Coverage of campaign events, including complete campaign speeches and rallies
- "Reports from the road," including recognition of outstanding "local volunteers" and their activities
- Pro-Democratic/Anti-Republican commentaries

The campaign-TV Web site may include interactive features such as blogging, surveys, and contests. It also may contain links to other Web sites, including to those of the featured candidate.

Melothé, Inc. would consider allowing solicitations to be conducted through the campaign-TV Web site. It envisions that program hosts, interviewers, and news anchors would solicit contributions by instructing viewers to send money directly to the candidate's campaign. Hyperlinks to contribution pages also would appear on the Web site during programming. Melothé, Inc., however, states that it would not act as a conduit or intermediary for those contributions.

Questions Presented

1. *Does Melothé, Inc.'s proposed Internet campaign-TV station qualify for the press exemption?*

¹ Melothé, Inc. is privately owned by individual investors, and none of the investors are Federal candidates, foreign nationals, or government contractors.

2. *If the answer to the first question is “yes,” may the proposed Web site, as part of news or commentary containing express advocacy, include solicitations on behalf of the featured candidates?*

Legal Analysis and Conclusions

Question 1: Does Melothé, Inc.’s proposed Internet campaign-TV station qualify for the press exemption?

The Commission concludes that the facts presented indicate that most of Melothé, Inc.’s proposed activities would qualify for the press exemption and thus would not constitute contributions or expenditures under the Act because Melothé, Inc. would not be owned or controlled by a political party, political committee, or candidate and would be engaging in press functions.

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. 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a) and 100.111(a). Under the Act, “The term ‘expenditure’ does not include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. 431(9)(B)(i). This exclusion is known as the “press exemption.” The Commission’s regulations further provide that neither a “contribution” nor “expenditure” results from “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), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate[.]” 11 CFR 100.73, 100.132.

The legislative history of the press exemption indicates that 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.” H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974). The Supreme Court recently explained, however, that the press exemption “does not afford *carte blanche* to media companies generally to ignore FECA’s provisions.” *McConnell v. FEC*, 540 U.S. 93, 208 (2003).

The Commission has not limited the press exemption to traditional news outlets, but rather has applied it to “news stories, commentaries, and editorials *no matter in what medium they are published,*” and specifically has extended it to Internet Web sites and entities that distribute their content exclusively on the Internet. *Explanation and Justification for the Regulations on Internet Communications (“Internet Rulemaking”)*, 71 FR 18589, 18608-09 (Apr. 12, 2006); *see also* Advisory Opinions 2005-16 (Fired Up!) and 2000-13 (iNEXTV). The Commission has also 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.” *Internet Rulemaking*, 71 FR at 18589. Here, the requestor has stated that all of its activities will be conducted on the Internet.

Thus, under the Act and the Commission’s regulations, unless a press entity’s facilities are owned or controlled by a political party, political committee, or candidate, the costs of distributing any news story, commentary, or editorial distributed through the enumerated media are neither contributions nor expenditures. To determine whether the press exemption applies, the Commission first asks whether the entity engaging in the activity is a press or media entity. *See* Advisory Opinions 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission has applied the two-part analysis presented in *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to establish:

- (A) That the entity is not owned or controlled by a political party, political committee, or candidate; and
- (B) That the entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is acting in its “legitimate press function”). *See also* *FEC v. Phillips Publishing*, 517 F.Supp. 1308, 1312-1313 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), 2004-07 (MTV).

1) Press Entity Status

In determining whether an entity is a press or media 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, e.g.*, Advisory Opinions 2007-20 (XM Radio) and 2005-19 (The Inside Track). The Commission has concluded in previous advisory opinions that entities disseminating news, commentary, and editorials through a Web site qualify for the press exemption. *See, e.g.*, Advisory Opinions 2005-16 (Fired Up!); 2004-07 (MTV); and 2000-13 (iNEXTV). However, not every entity that operates a Web site on the Internet is a press or media entity.

In the instant case, Melothé, Inc. represents that, generally, the normal course of its proposed activities will be to provide through its Web site interviews, daily news reports, roundtable discussions, coverage of campaign events, speeches and rallies, “reports from the road,” and commentary related to particular political campaigns. The Commission concludes that most of Melothé, Inc.’s proposed Internet content falls within the broad ambit of the “normal press-business of covering and commenting on political campaigns.” Advisory Opinion 1989-28 (Maine Right to Life Committee) (citing Advisory Opinions 1987-8, 1982-58, 1980-109, and 1980-90).

Although Melothé, Inc.’s content may be calculated to appeal especially to supporters, volunteers, or activists aligned with a particular party, campaign, candidacy, or other political cause, the Commission does not investigate an entity’s viewpoints in determining whether it qualifies as a “press entity” under the press exemption:

The Commission notes that an entity otherwise eligible for the press exception would 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.

Advisory Opinion 2005-16 (Fired Up!) (citing First General Counsel's Report, MUR 5440 (CBS Broadcasting, Inc.)); Advisory Opinion 2005-19 (Inside Track) (citing same).

2) Ownership Criteria and Legitimate Press Function

A) Ownership or Control

In the present case, Melothé, Inc. represents that neither the company nor its proposed Web site is owned or controlled by any political party, political committee, or candidate. Moreover, Melothé, Inc. asserts that it will exercise control over all content displayed on its Web site, including interviews, news reports, roundtable discussions, coverage of campaign events, speeches and rallies. The Commission accepts this representation and assumes for the purpose of this opinion that neither Melothé, Inc. nor its proposed Web site is or would be owned or controlled by a political party, political committee, or candidate.

B) Legitimate Press Function

The Commission previously has concluded that press functions include the "provision of news stories, commentary, and editorials." Advisory Opinion 2005-16 (Fired Up!). Such activities are distinguishable from active participation in core campaign or electioneering functions. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 251 (recognizing "the distinction of campaign flyers from regular publications"); *FEC v. Reader's Digest Association, Inc.*, 509 F. Supp. 1210, 1214 (S.D. N.Y. 1981) (suggesting that the press exemption would not apply where, "for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers"). Moreover, the Commission considers whether the entity's materials are available to the general public and whether such materials are comparable in form to those ordinarily issued by the entity as a press entity. Advisory Opinion 2005-16 (Fired Up!).

Melothé, Inc. represents that its proposed Web site will be viewable by the general public and access will be free. Thus, Melothé, Inc. satisfies on its face the public availability prong of the Commission's press exemption analysis. Further, Melothé, Inc. does not suggest that it will in any way deviate in form from its ordinary planned activities by, for example, distributing special pamphlets, conducting or coordinating get out the vote activities, or organizing rallies for particular candidates, elections, party committees, or other political causes. Accordingly, Melothé, Inc.'s activities (*i.e.*, Internet media content) are legitimate press functions and are comparable in form to those that it ordinarily intends to issue. Nonetheless, without additional information, the Commission is unable to render a definitive opinion on Melothé, Inc.'s

proposals to include in its content a “Daily Morning Briefing: a daily 15-minute live segment, ‘briefing’ volunteers and interested viewers on what’s happening in the campaign today” and “recognition of outstanding local volunteers and their activities.” With respect to the volunteer “briefings,” it is unclear from Melothé, Inc.’s request whether this proposal envisions providing coverage to the general public of briefings by campaign staffers or whether Melothé, Inc. itself would prepare and provide the briefings. While the former situation may be analogous to media coverage of a press conference given by campaign officials, the latter situation would be tantamount to a corporation providing the campaign with a volunteer coordinator and, in essence, conducting part of the campaign. Because the provision of personnel to benefit a political campaign is not a legitimate press function, if Melothé, Inc. staffers were to prepare and deliver daily briefings to campaign volunteers, a prohibited in-kind contribution or expenditure would result from the corporation. *See* 2 U.S.C. 441b, 2 U.S.C. 431(8)(A), 2 U.S.C. 431(9)(A), 11 CFR 100.52(d), and 11 CFR 100.111.

A similar analysis applies to the proposed “recognition” of campaign volunteers. If Melothé, Inc. were merely to provide coverage of awards or ceremonies given by campaigns to their volunteers, that would resemble a news story. On the other hand, if Melothé, Inc. itself were to give awards or other means of recognition to campaign volunteers, that also would be tantamount to the corporation conducting part of the campaign, and would not constitute a press function.

Question 2: If the answer to the first question is “yes,” may the proposed sites, as part of news or commentary containing express advocacy, include solicitations on behalf of the featured candidates?

Melothé, Inc.’s request also asks the Commission whether “the proposed sites, as part of news or commentary containing express advocacy, [may] include solicitations on behalf of the featured candidates.” In a supplementary submission, counsel for Melothé, Inc. represents that the company “envisions program hosts, interviewers and news anchors will solicit contributions. It also envisions links to contribution pages appearing on the screen during programming.” Melothé, Inc., however, “would not serve as a conduit, but would instead allow commentators to solicit viewers to send money directly to the campaign.” Without additional information regarding the context of such solicitations, their frequency, or their character, the Commission is unable to render a definitive opinion on this aspect of Melothé, Inc.’s proposal.

The Commission previously has concluded that, pursuant to the press exemption, an “endorsement of, including a contribution solicitation on behalf of [the candidate] in a commentary” in a subscription periodical does not itself result in a contribution under the Act where the “commentary . . . appears as a regular feature in each issue,” and where the periodical is not owned or controlled by any candidate, political party, or political committee. Advisory Opinion 1980-109 (Ruff Times). Notably, Advisory Opinion 1980-109 held that such a solicitation was permissible if it was made within the larger context of an endorsement contained in commentary regularly featured in the publication. The Advisory Opinion did not conclude that the *endorsements* or *solicitations themselves* could become a “regular feature” of the publication.

Under the Commission's previous interpretations of the press exemption nothing prohibits Melothé, Inc.'s commentators and guests to make express advocacy endorsements of certain candidates to viewers of its Web site content and, concurrently, to suggest that viewers support such candidates with their contributions, so long as neither Melothé, Inc. nor its Web site is owned or controlled by any candidate, political party, or political committee. Advisory Opinion 1980-109 (Ruff Times). Accordingly, as with verbal solicitations, where it does not become a regular feature, the intermittent provision of a hyperlink directing a media Web site's visitors to a campaign's contribution page, consistent with the reasoning set forth in Advisory Opinion 1980-109, would not be prohibited. However, providing a mechanism for raising funds for candidates is not a typical press function, so adding a contribution page or providing a permanent hyperlink to the appropriate Web site addresses where viewers may make contributions would not be covered by the press exemption.

Moreover, if Melothé, Inc. envisions unpaid solicitations for particular candidates to become a regular feature of its content, then such activity would reach beyond the scope of Advisory Opinion 1980-109 and would be tantamount to a corporation that makes a prohibited independent expenditure or an in-kind contribution in the form of providing the campaign with fundraising staff. *See* 2 U.S.C. 441b, 2 U.S.C. 431(8)(A), 2 U.S.C. 431(9)(A), 11 CFR 100.16, 11 CFR 100.52(d), and 11 CFR 100.111. However characterized, such activities would not constitute a press function, and once Melothé, Inc. exceeds the parameters of the press exemption, it also becomes subject to the prohibitions on corporate facilitation of contributions. *See* 11 CFR 114.2(f).

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 requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material respects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinions are available on the Commission's Web site at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Steven T. Walther
Vice Chairman