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May 22, 2019

MEMORANDUM

TO: The Commission

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Subject: Draft AO 2019-05 (System 73) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on May 23, 2019.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2019-05

2

3 Craig Engle, Esq.

4 Arent Fox LLP

5 1717 K Street, NW

6 Washington, DC 20006-5344

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9 Dear Mr. Engle:

DRAFT B

10 We are responding to your advisory opinion request on behalf of System73
11 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
12 (the “Act”), and Commission regulations to System73’s proposal to enter into a license
13 agreement with political committees for the exclusive right to livestream the committees’
14 events. The Commission concludes that System73’s proposal is permissible because the
15 proposed activity is within the media exemption to the Act’s prohibition on corporate
16 contributions.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 March 20, 2019, your email received on March 21, 2019, and the supplemental material
20 you provided on May 14, 2019.

21 System73 is an incorporated communications technology network. Advisory
22 Opinion Request (AOR) at AOR001. System73 provides internet livestream and linear
23 streaming video services to commercial clients, including several Fortune 500 companies,
24 and has created two streaming channels as part of its business arrangements with
25 commercial clients. AOR001-002. One channel focuses on business, finance, and
26 investment news and analysis of technology issues. AOR002. The other covers sporting

1 events. *Id.* Both channels involve a mix of original content, live events, and content
2 acquired from other creators. *Id.*

3 In its relationships with commercial clients, System73 earns revenue from its sale
4 to third parties of advertising time that appears during or between System73 programs.
5 *Id.* System73 also compensates its commercial clients for the rights to stream their
6 content. AOR0015.

7 System73 now wants to expand its business to political committees and enter into
8 license agreements with candidate and party committees to “broadcast their campaign
9 appearances, rallies, debates and related events” as the “exclusive livestream provider” of
10 a committee’s events. AOR002-003; Supplemental Material to AOR (“Supplement”)
11 at 1. System73 may either enter into a license agreement with the political committee for
12 the right to stream the committee’s events one at a time or enter into agreements for the
13 rights to a series of committee events. AOR003. For example, System73 may enter into
14 an agreement with a political committee to be the exclusive livestream provider of all of a
15 candidate’s events in New Hampshire or Iowa. *Id.*

16 System73 explains that it would provide “broadcast quality online streaming
17 services” to political committees so that the committees can “more broadly broadcast”
18 their events. AOR002. System73 states that it “has heard concerns raised by candidates
19 that traditional networks do not adequately cover their campaign events; that rallies of
20 national interest are only covered in the immediate geographic market; that the quality of
21 the video or streaming service is too low to make high quality continuous viewing
22 desirable; or that certain constituents, such as millennials, prefer to watch political events
23 on line, at the time they choose to, without paying a fee.” *Id.*

1 As with its commercial streaming arrangements, System73 would negotiate and
2 sell advertising time to third parties for ads to appear during streaming political
3 committee content. AOR003. Advertisers would pay System73 and would not pay the
4 political committee. *Id.* Unlike in its agreements with commercial clients, however,
5 System73 would not pay a political committee for the rights to livestream committee
6 events. Supplement at 1. System73 also plans to offer “a multitude of interactive
7 services,” Supplement at 1; *see also* AOR005, and, according to discussions between
8 FEC staff and counsel to System73, will charge political committees fair market value for
9 them.

10 System73 may arrange for the filming of a political committee event in any of the
11 following ways: 1) System73 may obtain video of the event directly from the committee,
12 2) System73 may acquire the rights to video filmed by an independent camera operator
13 unconnected to any political committee, or 3) System73 may use its own camera crew or
14 enter into an agreement with a third-party camera crew to film the event. AOR005.

15 System73 would not exert any editorial control over the content of a committee’s
16 event or assist committees in creating content for advertisers. AOR004. However,
17 System73 would permit political committees to “to reserve the right to reject any
18 particular advertiser on the basis of its taste, topic or morality.” AOR011. In addition,
19 System73 would create “promotional materials” for its political committee programming.
20 AOR004. Promotional materials would not advocate for or against any candidate, but
21 may include a title card for content, introductory music, an announcer to put the
22 upcoming event into context, and an online link where a viewer can go for more
23 information. *Id.* All promotional content would be owned by System73, and System73

1 would not provide its promotional materials to any political committee and would not
2 seek approval of promotional materials by any political committee. AOR003, AOR015.
3 In addition to conducting its own promotional efforts, System73 would encourage
4 political committee clients to promote the streaming of the committee's events, for
5 example, through tweets, website posts, or emails to supporters. AOR004. System73 has
6 not yet made a decision about whether it would license the use of its video footage of
7 committee events, but any license agreements that System73 enters into with political
8 committees or third parties for the use of System73's video footage would be consistent
9 with the terms and license rates used for System73's commercial clients. AOR015.

10 System73 is a privately-held company, is not owned or controlled by any
11 candidate or political party, and plans to make its services available on a non-partisan
12 basis. AOR004.

13 ***Question Presented***

14 *May System73 enter into a license agreement with a political committee for the*
15 *exclusive right to livestream the committee's event if System73 does not make any*
16 *payment to the political committee?*

17 ***Legal Analysis***

18 Yes. System73 may enter into a license agreement with a political committee for
19 the exclusive right to livestream the committee's event if System73 does not make any
20 payment to the committee. This activity is permissible because the proposal to livestream
21 a committee's campaign appearance, rally, debate, or related event is within the media
22 exemption to the Act's prohibition on corporate contributions.

1 Under the Act, corporations are generally prohibited from using general treasury
2 funds to make contributions to federal candidates, federal accounts of political party
3 committees, and other political committees.¹ 52 U.S.C. § 30118(a). Subject to certain
4 exclusions, a contribution is “any direct or indirect payment, distribution, loan, advance,
5 deposit, or gift of money, or any services, or anything of value” made to “any candidate,
6 campaign committee, or political party or organization, in connection with” a federal
7 election. 52 U.S.C. § 30118(b)(2). Commission regulations clarify that “anything of
8 value” includes “the provision of any goods or services without charge or at a charge that
9 is less than the usual and normal charge for the goods or services,” unless the transaction
10 is specifically permitted by regulation. 11 C.F.R. § 100.52(d)(1).

11 Commission regulations exclude from the definition of contribution “[a]ny cost
12 incurred in covering or carrying a news story, commentary, or editorial by any
13 broadcasting station (including a cable television operator, programmer or producer),
14 Web site, newspaper, magazine, or other periodical publication, including any Internet or
15 electronic publication . . . unless the facility is owned or controlled by any political party,
16 political committee, or candidate.” 11 C.F.R. § 100.73; *see also* 52 U.S.C.
17 § 30101(9)(B)(i) (excluding these types of activities from the definition of
18 “expenditure”); 11 C.F.R. § 100.132 (same). This is known as the “press exemption” or
19 “media exemption.” As reflected in the legislative history of the Act, this exemption was
20 intended to ensure that the Act would not “limit or burden in any way the first

¹ A corporation, however, may make independent expenditures and may make contributions to nonconnected political committees that make only independent expenditures or to separate accounts maintained by nonconnected political committees for making only independent expenditures. *Citizens United v. FEC*, 558 U.S. 310 (2010); *Spechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C. 2011).

1 amendment freedom[] of the press” and would protect “the unfettered right of the
2 newspapers, TV networks, and other media to cover and comment on political
3 campaigns.” H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974).

4 To determine whether the media exemption applies, the Commission uses a
5 two-step analysis, first asking whether the entity engaging in the activity is a media entity
6 within the meaning of the Act and Commission regulations, and if so, then asking
7 whether the media entity: a) is owned or controlled by a political party, political
8 committee, or candidate; and b) is acting in its capacity as a media entity in conducting
9 the activity at issue (*i.e.*, is the activity within the entity’s “legitimate press function”).
10 *See, e.g.*, Advisory Opinion 2016-01 (Ethiq) at 2-4 (applying two-step analysis
11 established by the United States District Court in *Reader’s Digest Ass’n v. FEC*, 509 F.
12 Supp. 1210, 1215 (S.D.N.Y. 1981)).

13 **A. Media Entity**

14 In the first step of its analysis, the Commission asks whether the entity engaging
15 in the activity is a media entity within the meaning of the Act and Commission
16 regulations.² *See, e.g.*, Advisory Opinion 2016-01 (Ethiq) at 2-3. To determine whether
17 an entity is a media entity, the Commission focuses on “whether the entity in question
18 produces on a regular basis a program that disseminates news stories, commentary,
19 and/or editorials.” *Compare* Advisory Opinion 2010-08 (Citizens United) at 5 (film
20 company that produced 14 films over six years, with substantial percentage of corporate
21 budget devoted to production and distribution, was a media entity) *with* Advisory

² Neither the Act nor Commission regulations use or define the term “press entity” or “media entity.” Those terms are used interchangeably in Commission opinions. For simplicity, this advisory opinion uses the term “media entity” and “media exemption” throughout except where quoting a source that uses the term “press entity” or “press exemption.”

1 Opinion 2004-30 (Citizens United) at 7 (finding same company did not qualify for
2 exemption years earlier in part because it had only produced two films). “Commentary”
3 is interpreted broadly to include not only commentary by the media entity and its staff,
4 but also guest commentary. Advisory Opinion 1982-44 (Democratic National Committee
5 *et al.*) at 3 (“[T]he Commission is of the view that commentary cannot be limited to the
6 broadcaster. The exemption already includes the term ‘editorial’ which applies
7 specifically to the broadcaster’s point of view. In the opinion of the Commission,
8 ‘commentary’ was intended to allow the third persons access to the media to discuss
9 issues.”); Advisory Opinion 1998-17 (Daniels Cablevision) at 5 (30 seconds of free
10 airtime provided to candidates on equal basis was “commentary” for purposes of the
11 media exemption).

12 In addition, the Commission has not limited the definition of “media entity” to
13 “traditional news outlets.” Advisory Opinion 2010-08 (Citizens United) at 4. For
14 example, the Commission found that a web company that operated a network of
15 specialized news and information websites with limited original content qualified as a
16 media entity. Advisory Opinion 2000-13 (Ampex *et al.*) at 3; *see also* Advisory Opinion
17 2008-14 (Melothe) at 4 (company that proposed to launch and operate an internet TV
18 station covering campaigns of one or more federal candidates through news reports,
19 roundtable discussions, coverage of campaign events, and commentary qualified as media
20 entity). Consistent with the Commission’s recognition that media activities may be
21 conducted by entities using evolving technologies, the longevity of the media company is
22 not a factor in determining whether an entity qualifies for the media exemption.

23 Advisory Opinion 2010-08 (Citizens United) at 5, fn. 9 (“The Commission has not

1 imposed a requirement that an entity seeking to avail itself of the press exemption first
2 demonstrate that it has a track record of engaging in media activities.”).

3 Under step one of the media exemption analysis, System73 is a media entity
4 because it operates two online channels that focus on business, finance, and investment
5 news and sporting events, producing original content, featuring live events, and
6 disseminating content acquired from other creators. AOR002. This conclusion is
7 consistent with the broad interpretation of “media entity” and “commentary” in previous
8 advisory opinions.

9 **B. Ownership and Control and Legitimate Media Function**

10 In the second step of the Commission’s analysis, the Commission considers
11 whether activity by a qualified media entity is within the scope of the exemption based on
12 whether: a) the media entity is owned or controlled by a political party, political
13 committee, or candidate, and b) the media entity is acting within its legitimate media
14 function in conducting the activity at issue. Advisory Opinion 2016-01 (Ethiq) at 3-4;
15 Advisory Opinion 2007-20 (XM Satellite Radio) at 3-5 (finding satellite radio company
16 featuring news updates, candidate interviews, speeches, debate coverage, polling results,
17 fundraising status, and live call-in shows within the media exemption in providing free
18 airing of candidate-supplied content); Advisory Opinion 2005-16 (Fired Up) at 4, 6
19 (determining cost of carrying content on website that provided commentary, summaries
20 and editorials of news stories created by others, as well as its own original reporting,
21 within entity’s legitimate media function). Two considerations relevant to this analysis
22 are whether the entity’s materials are: 1) available to the general public and 2)
23 comparable to those ordinarily issued by the entity. *See, e.g.*, Advisory Opinion 2000-13

1 (Ampex) at 3 (concluding costs of producing website “viewable by the general public and
2 akin to a periodical or news program” within media entity’s legitimate media function).

3 The Commission has previously determined that a media entity may provide free
4 airtime to candidates within the scope of the media exemption. *See* Advisory Opinion
5 2007-20 (XM Satellite Radio) at 4 (finding free airing of candidate-supplied content by
6 media entity within entity’s media function); Advisory Opinion 1998-17 (Daniels
7 Cablevision) at 1-2, 5 (providing 30 seconds free airtime to candidates on equal basis
8 within media function); Advisory Opinion 1982-44 at 3 (Democratic National Committee
9 *et al.*) (concluding cable company proposal to provide two hours of free time to both
10 major political parties to discuss issues, to attempt to show the differences between the
11 two parties, and to encourage support of political parties within company’s media
12 function).

13 Here, System73’s proposed activities satisfy both elements of this second step of
14 the media exemption analysis: a) System73 is not owned or controlled by a political
15 party, political committee, or candidate, AOR004; and b) System73 would act within the
16 scope of its legitimate media function in streaming a committee’s campaign appearances,
17 rallies, debates, and related events without charge to the political committee.

18 There are three reasons System73’s proposal falls within the scope of its
19 legitimate media function. First, System73’s proposal to livestream political committee
20 events without charge to the committee is similar to other circumstances in which the
21 Commission has found that providing free airtime to candidates was within a legitimate
22 media function and permissible “guest commentary.” *See* Advisory Opinion 2007-20
23 (XM Satellite Radio) at 4; Advisory Opinion 1998-17 (Daniels Cablevision) at 1-2, 5;

1 Advisory Opinion 1982-44 at 3. Second, System73’s streams of political committee
2 events would be available to the public on System73’s web channels. *See, e.g.*, Advisory
3 Opinion 2000-13 (Ampex) at 3 (concluding costs of producing website “viewable by the
4 general public and akin to a periodical or news program” within media entity’s legitimate
5 media function). Third, System73’s proposal to stream political committee events is
6 comparable to its existing streaming of other live events.

7 ***Conclusion***

8 The Commission concludes that System73’s proposal is permissible because the
9 proposed activity is within the media exemption to the Act’s prohibition on corporate
10 contributions. Given that System73’s proposal is within the media exemption, the
11 Commission need not consider System73’s alternative argument that the proposal is
12 permissible as a *bona fide* commercial activity. *See* Advisory Opinion 2010-08 (Citizens
13 United) at 8 (stating that because media exemption applied, question of whether activities
14 were permissible as *bona fide* commercial activities was “moot”).

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
18 in any of the facts or assumptions presented, and such facts or assumptions are material to
19 a conclusion presented in this advisory opinion, then the requestor may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the
22 transaction or activity with respect to which this advisory opinion is rendered may rely on
23 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the

2 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

3 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Ellen L. Weintraub
Chair