



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 4, 2007

VIA FACSIMILE AND FIRST CLASS MAIL

Adam Bonin, Esq.
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103-3508

RE: MUR 5928
Kos Media, LLC
Markos Moulitsas Zuniga
DailyKos.com

Dear Mr. Bonin:

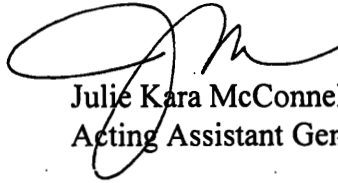
On August 3, 2007, the Federal Election Commission notified your clients, Kos Media, LLC, DailyKos.com, and Markos Moulitsas Zuniga, of a complaint alleging violations of certain sections of Federal Election Campaign Act of 1971, as amended. On September 4, 2007, the Commission found, on the basis of the information in the complaint and the response and publicly available information, there is no reason to believe that Kos Media, LLC violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and failing to report contributions and expenditures. The Commission also found no reason to believe that DailyKos.com and Markos Moulitsas Zuniga violated the Act.

Accordingly, the Commission closed its file in this matter. Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

27044173274

If you have any questions, please contact Jin Lee, the attorney assigned to this matter at (202) 694-1650.

Sincerely,



Julie Kara McConnell
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

27044173275

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 RESPONDENTS: Kos Media, LLC
6 DailyKos.com
7 Marcos Moulitsas Zuniga
8

MUR: 5928

9 **I. INTRODUCTION**

10 This matter concerns allegations that Kos Media, L.L.C. ("Kos Media"), which operates
11 the website DailyKos.com ("DailyKos"), is a political committee and has failed to register and
12 report with the Commission in violation of the Federal Election Campaign Act of 1971, as
13 amended ("the Act"). Marcos Moulitsas Zuniga ("Moulitsas") is the principal and registered
14 agent of Kos Media and is the founder and publisher of DailyKos.

15 According to publicly available information, Kos Media is a limited liability company
16 formed in Delaware, with its principal office located in California. Kos Media operates
17 DailyKos, which publishes a series of "blog" entries concerning current events. According to
18 DailyKos, it is "the premier political community in the United States, with traffic of about
19 600,000 daily visits."¹ The site is run by Moulitsas and a programmer.² DailyKos is accessible
20 to the general public. Its blog entries are authored by "front page posters," who include
21 Moulitsas.³ The entries provide links to "breaking news, original political commentary, calls to
22 action and other items."⁴ Although anyone can view the site, an individual must register to post
23 responsive comments and diaries, among other functions.⁵ Registration is free.⁶ DailyKos does

¹ DailyKos:: About DailyKos at <http://dailykos.com/special/about2>; Response at 2.

² *Id.*

³ See A User's Guide to DailyKos.com.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

1 feature advertising and apparently generates revenue from selling advertising space on its site.
2 According to the Liberal Blog Advertising Network, placing an advertisement on DailyKos can
3 cost between \$3,275 to \$9,000.⁷

4 In March 2006, the Commission voted to approve new regulations concerning
5 communications over the Internet. Among the rules that were promulgated, the Commission
6 revised the regulations concerning the media exemption, 11 C.F.R. §§ 100.73 and 100.132; to
7 clarify that the media exemption applies to media entities that cover or carry news stories,
8 commentary, and editorials on the Internet. *See Explanation and Justification to the Internet*
9 *Communications Regulations*, 71 Fed. Reg. 18,594, 18,608 (April 12, 2006). Kos Media's
10 operation of DailyKos is precisely the type of activity that falls within the media exemption.

11 Based upon the information discussed below, we conclude that the media exemption applies to
12 Kos Media such that expenses associated with DailyKos are not contributions or expenditures,
13 and Kos Media is not a political committee as defined by the Act.⁸ Accordingly, the
14 Commission finds no reason to believe that Kos Media, LLC violated 2 U.S.C. §§ 433 and 434
15 by failing to register as a political committee with the Commission and failing to report
16 contributions and expenditures. The Commission also finds no reason to believe that DailyKos
17 or Marcos Moulitsas Zuniga violated the Act.

⁷ See Liberal Blog Advertising Network at http://web.blogads.com/advertise/liberal_blog_advertising_network; Complaint at 1-2.

⁸ Kos Media's operation of DailyKos may be excluded from the definition of "contribution" or "expenditure" under either 11 C.F.R. §§ 100.94(a) and 100.155(a), which apply to uncompensated Internet activity, or 11 C.F.R. §§ 100.94(d) and 100.155(d), which apply to incorporated bloggers. Because Kos Media was formed as an LLC, application of the appropriate regulations depends upon how Kos Media elected to be treated by the Internal Revenue Service and whether Kos Media has issued publicly traded shares. See 11 C.F.R. § 110.1(g)(3). If Kos Media chose to be taxed as a corporation or if its shares are publicly traded, then Commission regulations would treat Kos Media as a corporation and the exception provided for incorporated bloggers, 11 C.F.R. §§ 100.94(d) and 100.155(d), would apply. Otherwise, 11 C.F.R. §§ 100.94(a) and 100.155(a) would apply. Because the Commission does not have information as to Kos Media's tax status at this stage of the enforcement process, applying the media exemption appears to be more appropriate at this time.

1 **II. DISCUSSION**

2 The complaint contends that Kos Media is a political committee because it has made
3 contributions and expenditures in excess of \$1,000.⁹ Specifically, because the site can charge
4 \$9,000 for advertising, the complaint alleges that Kos Media provides “a gift of free advertising
5 and candidate media services” by posting blog entries that support candidates. Complaint at 1-2.
6 The complaint also claims that Kos Media has demonstrated a purpose to influence federal
7 elections by posting blog entries that discuss electing Democrats for federal office.

8 Respondents argue that under the press exception, also known as media exemption, *see*
9 11 C.F.R. §§ 100.73 and 100.132, their activities relating to DailyKos.com neither qualify as
10 contributions nor expenditures under the Act, and, thus, their activities have not triggered
11 political committee status. Respondents also deny that DailyKos is owned or controlled by a
12 party, political committee, or candidate, supporting this assertion with an affidavit from
13 Moulitsas. *See* Response at 2; Affidavit of Marcos Moulitsas Zuniga at ¶ 4.

14 Under recently revised Commission regulations, “costs incurred in covering or carrying a
15 news story, commentary, or editorial by any broadcasting station . . . , Web site, newspaper,
16 magazine, or other periodical publication, including any Internet or electronic publication,” are
17 not a contribution or expenditure “unless the facility is owned or controlled by any political
18 party, political committee, or candidate” 11 C.F.R. §§ 100.73 and 100.132; *see also*
19 2 U.S.C. § 431(9)(B)(i). In promulgating these regulations, the Commission “clarif[ied] that the

⁹ The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions” or makes “expenditures” for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). The Act defines the terms “contributions” and “expenditure” to include any gift of money or “anything of value” for the purpose of influencing a federal election. *See* 2 U.S.C. § 431(8)(A) and (9)(A).

media exemption applies to media entities that cover or carry news stories, commentary, and editorials on the Internet” *Explanation and Justification to the Internet Communications Regulations*, 71 Fed. Reg. at 18,608. In fact, the Commission contemplated that bloggers could qualify for the media exemption as other media outlets would. *See id.* at 18,610 (“The Commission concludes that bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities.”).

Application of the media exemption is subject to a two-part test.¹⁰ First, the Commission asks whether the entity engaging in the activity is a media entity within the meaning of the Act and the Commission’s regulations. Second, the Commission, in determining the exemption’s scope, inquires: (a) whether the media entity is owned or controlled by a political party, committee, or candidate; and (b) whether the entity was 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 Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); Advisory Opinions 2005-16; 2004-07, 2000-13, 1996-48, and 1982-44. If the media entity is not owned or controlled by a political party, committee, or candidate, and if it was acting as a legitimate media entity in conducting the activity in question, it is exempt from the Act’s restrictions on corporate contributions and expenditures, and the Commission’s inquiry should end. *Phillips Publishing*, 517 F. Supp. at 1313. Two considerations in applying this analysis include whether the entity’s materials are available to the general public and are comparable in form to those ordinarily issued by the entity. *See Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 251 (1986); Advisory Opinion 2000-13 (concluding that a website covered by the

¹⁰ *See Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-1313 (D.D.C. 1981); *Explanation and Justification to the Internet Communications Regulations*, 71 Fed. Reg. at 18,607; AO 2005-16 (Fired Up! LLC).

1 press exception was “viewable by the general public and akin to a periodical or news program
2 distributed to the general public.”).

3 Kos Media qualifies as a media entity in its function of operating DailyKos. DailyKos is
4 available to the general public and is the online equivalent of a newspaper, magazine, or other
5 periodical publication as described in the Act and Commission regulations. Additionally,
6 DailyKos is precisely the type of online media presence the Commission contemplated when
7 revising the media exemption provided in 11 C.F.R. §§ 100.73 and 100.132.¹¹ An examination
8 of DailyKos and other supporting materials demonstrates that the site’s primary function is to
9 provide news and commentary to millions of viewers through its “blog” entries providing news
10 stories with links to “breaking news,” original political commentary, and calls to action. Like
11 traditional media outlets such as newspapers and magazines, DailyKos has a publisher,
12 Moulitsas, who appears to retain editorial control over the content of the site, and a list of
13 contributing editors, who along with Moulitsas appear to be “front page posters” and draft
14 stories. Further, registered users of DailyKos may post responsive comments, which are similar
15 to letters to the editors in traditional media outlets.

16 In addition, Kos Media’s creation and distribution of the DailyKos falls within the scope
17 of the exemption. First, the complaint does not allege, nor does publicly available information
18 indicate, that Kos Media is owned or controlled by a political party, committee, or candidate.
19 Second, by creating and distributing the DailyKos, containing news stories with links to
20 “breaking news,” original political commentary, and calls to actions akin to editorials, Kos
21 Media is acting within its legitimate press function that qualifies it as a press entity. As such,
22 Kos Media’s creation and distribution of the DailyKos falls within Kos Media’s legitimate press

¹¹ See *Explanation and Justification to the Internet Communications Regulations*, 71 Fed. Reg. at 18,609 (stating that the media exemption applies to entities with only an online presence such as Salon.com, Slate.com, and Drudgereport.com).

1 function. Moreover, Kos Media's operation of DailyKos is the type of activity contemplated by
2 the Commission during its rulemaking regarding the media exemption. *See Explanation and*
3 *Justification to the Internet Communications Regulations*, 71 Fed. Reg. at 18,610 (discussing
4 Advisory Opinion 2005-16 (Fired Up! LLC), in which the Commission applied the media
5 exemption to a blog that covered and carried news stories, commentaries, or editorials). While
6 the complaint asserts that DailyKos advocates for the election of Democrats to federal office, the
7 Commission has repeatedly stated that an entity that would otherwise qualify for the media
8 exemption does not lose its eligibility because it features news or commentary lacking
9 objectivity or expressly advocates in its editorials the election or defeat of a federal candidate.¹²

10 Because the alleged activity falls squarely within the media exemption, the Commission
11 finds no reason to believe that Kos Media, LLC violated 2 U.S.C. §§ 433 and 434 by failing to
12 register as a political committee with the Commission and failing to report contributions and
13 expenditures.

14 **III. CONCLUSION**

15 For all the foregoing reasons, the Commission finds no reason to believe that Kos Media,
16 LLC violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the
17 Commission and failing to report contributions and expenditures. The Commission also finds no
18 reason to believe that DailyKos.com or Marcos Moulitsas Zuniga violated the Act.

¹² *See Explanation and Justification to the Internet Communications Regulations*, 71 Fed. Reg. at 18,609 (citing AO 2005-16 (Fired Up! LLC)).