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August 11, 2010 OFFICE OF GENERAL  
COUNSEL

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**BY HAND**

Ms. Thomasenia P. Duncan  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: MUR 6320 (Clear Channel Communications, Inc. & Premiere Radio  
Networks, Inc.)

Dear Ms. Duncan:

This office represents Clear Channel Communications, Inc. ("Clear Channel") and Premiere Radio Networks, Inc. ("Premiere") in the above-captioned Matter Under Review ("MUR"). This letter responds to the Complaint received by the Federal Election Commission ("FEC" or "Commission") on June 24, 2010. The Complaint alleges that Clear Channel and Premiere made a prohibited in-kind corporate contribution to the campaign of John Gomez by sending an email from The Sean Hannity Show regarding Mr. Gomez.

Because the violation alleged in the Complaint is based on activity that qualifies for the press exemption, the Commission should find no reason to believe that Clear Channel and Premiere violated the Federal Election Campaign Act of 1971, as amended ("Act").

**FACTS**

Clear Channel is a media and entertainment company specializing in radio programming and outdoor advertising. It is not owned or controlled by a candidate or political party. Premiere, a wholly owned subsidiary of Clear Channel, syndicates approximately 90 radio programs and services to more than 5,000 radio station affiliates that reach over 190 million listeners weekly. Premiere has contracted with Mr. Hannity to syndicate The Sean Hannity Show.

The Sean Hannity Show began national syndication on September 10, 2001, and has been syndicated by Premiere since December 30, 2008. Mr. Hannity is known for his commentary on politics and the American agenda. See The Sean Hannity Show/Premiere Radio Networks, Inc., [http://www.premiereradio.com/shows/view/sean\\_hannity.html](http://www.premiereradio.com/shows/view/sean_hannity.html) (last visited July 16,

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2010). Mr. Hannity and the media entities that contract for his services use multiple forms of media to disseminate Mr. Hannity's commentary. As explained in Mr. Hannity's biographical information from the above-cited website, Mr. Hannity appears "on radio, television, and the internet" and has authored two books.

Mr. Hannity's website, [www.hannity.com](http://www.hannity.com), is licensed to and hosted by Premiere. Anyone can go to the website and sign-up for free email updates from Mr. Hannity. There are approximately 43,000 subscribers for these email updates. The email update subscriber list has been developed by Premiere for its media-related purposes. The email updates are sent by a vendor of Premiere called Presslaff Interactive Revenue.<sup>1</sup> However, the "From" line of each email update clearly indicates that the emails are from "The Sean Hannity Show" at the email address "headlines@hannity.com."

As noted in the Complaint, the email updates often "recap the topics discussed earlier in the day on the Hannity Show, and provide a preview the [sic] topics and speakers that Hannity will feature on his night-time television program." Many times, quotes from newsworthy individuals are reproduced as verbatim commentary in the email updates. In addition, the email updates can include quoted commentary from others that has been posted as a "Hot Topic" on the [www.hannity.com](http://www.hannity.com) website.

On occasion, the email updates advocate electoral action. Mr. Hannity has recently focused on what he has called "Conservative Victory 2010." For example, attached as Exhibit 1 is content from a May 7, 2010, email update which states:

Sean was joined by "The Architect" Karl Rove to discuss his thoughts on how the Conservative Victory 2010 is going. "So where do you think the Republicans fall in the House," asked Sean. "Can the Republicans win the House," asked Rove, "You bet especially after that health care bill but really I think they can gain 35 seats but this will be a weird election and they'll need 41 to take control." With your help, we can still pull this off. Visit Hannity.com for more information on how you can help.

<sup>1</sup> Premiere contracts with Presslaff Interactive Revenue to provide email marketing services for the syndicated radio programs produced by Premiere.

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At the time, [www.hannity.com](http://www.hannity.com) included links to information about "Tea Party" rallies and still includes Mr. Hannity's "Political Map" which is available at <http://www.hannity.com/politicalmap>.

On May 8, 2010, Pressclaff Interactive Revenue sent the email update attached as Exhibit 2 on behalf of Premiere. Like the May 7 email update, Mr. Hannity continued his advocacy for "Conservative Victory in 2010" in the opening sentence and by giving his endorsement of John Gomez, a candidate for federal office. The email update continued with commentary by Mark Levin which gave context to Mr. Hannity's endorsement.<sup>2</sup> Mr. Levin's commentary ended with a fundraising request and a link to Mr. Gomez's website that read: "DONATE NOW."

#### THE ACT, REGULATIONS, AND ADVISORY OPINIONS

The Act regulates spending for any "contribution" or "expenditure," but the Act and implementing regulations exempt from the definitions of those terms:

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 C.F.R. §§ 100.73, 100.132 (hereinafter "the press exemption").

The Commission recently addressed the press exemption in Advisory Opinion 2008-14 (Melothe, Inc.) which provided the following analytical framework:

To determine whether the press exemption applies, the Commission first asks whether the entity engaging in the activity is a press or media entity. Second, the Commission has applied the two-part analysis presented in *Reader's Digest Association v. FEC*, 509

<sup>2</sup> Mr. Levin is also a radio show host, but does not host programming for Premiere or any other Clear Channel company.

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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") (internal citations omitted).

With regard to subpart B, the Commission has stated "that the media is increasingly using electronic mails and text messages" which has become "established industry practice and therefore within the press exemption." Advisory Opinion 2004-7 (MTV). After the Commission issued this advisory opinion, it amended the press exemption implementing regulations to their current form to specifically apply to "any Internet or electronic publication," which includes email. See 71 Fed. Reg. 18589, 18608 n.52 (Apr. 12, 2006). Furthermore, the Commission has expressly permitted media personalities and entities to occasionally solicit campaign contributions and to include a hyperlink to a candidate's website:

Under the Commission's previous interpretations of the press exemption nothing prohibits ... commentators and guests to make express advocacy endorsements of certain candidates to viewers ... and, concurrently, to suggest that viewers support such candidates with their contributions.... Analogously, as with verbal solicitations, where it does not become a regular feature, the intermittent provision of a hyperlink directing ... visitors to a campaign's contribution page ... would not be prohibited.

Advisory Opinion 2008-14 (Melothe, Inc.).

#### THE COMPLAINT

Over the years, numerous complaints have been filed against Clear Channel, its subsidiaries, and Mr. Hannity, all of which have resulted in dismissal because all of the aforementioned engaged in exempt press activity. See, e.g., MUR 6242 (The

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J.D. Hayworth Show, Clear Channel Communications, Inc.) (June 4, 2010); MUR 5569 (The John and Ken Show, KFI AM-640) (Feb. 2, 2006); MUR 4863 (Sean Hannity) (June 3, 1999). This Complaint should be dismissed on the same grounds.

The crux of the Complaint is whether Clear Channel, Premiere, and Mr. Hannity qualify for the press exemption. Specifically, the Complaint alleges that sending the email update attached as Exhibit 2 was not part of a "legitimate press function." The Complaint offers the following assertions to support its allegation:

1. "The email does not purport to be a news story, a commentary or an editorial endorsement."
2. "Furthermore, the solicitation email is different in form and substance from the usual 'Hannity's Headlines' newsletter that is distributed to Hannity's list."
3. "Lastly, the email was not distributed generally to the public, it was distributed to individuals on Hannity's list."

As will be shown below, these assertions are both factually and legally unsupportable.<sup>3</sup>

### DISCUSSION

The email update qualifies for the press exemption and is therefore not subject to regulation under the Act. The Complaint misstates the facts and applies legal criteria that are unsupported by law or precedent.

1. The email update includes Mr. Hannity's endorsement of Mr. Gomez and commentary to support the endorsement, all of which is protected by the press exemption.

Contrary to the statement in the Complaint, the very first sentence of the email update makes clear that it constitutes an editorial endorsement of Mr. Gomez by Mr. Hannity: "If you haven't seen this yet, you really need to take a look. This is a great American who's working hard for a Conservative Victory in 2010." The email update then includes the letter from Mr. Levin with commentary that explains

<sup>3</sup> The Complaint also includes factually and legally irrelevant assertions. For example, the Complaint states at the outset that Mr. Hannity and Mr. Gomez are childhood friends. The press exemption does not require a media personality and a federal candidate to be strangers.

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the basis for the endorsement and concludes with a fundraising request and a link to Mr. Gomez's campaign website.

It is precisely this type of endorsement and commentary that the press exemption protects. Media personalities have always expressed their support for candidates through various media channels pursuant to the press exemption. In particular, the Commission has already concluded that Mr. Hannity's previous expressions of candidate support – and support by other media personalities under contract with Clear Channel subsidiaries – qualify for the press exemption. See MUR 6242 (The J.D. Hayworth Show, Clear Channel Communications, Inc.) (June 4, 2010); MUR 5569 (The John and Ken Show, KFI AM-640) (Feb. 2, 2006); MUR 4863 (Sean Hannity) (June 3, 1999).

The Complaint suggests that this situation is different because the email update included a fundraising request and a contribution link to a candidate's website. The press exemption does not proscribe or regulate content. Moreover, the Commission expressly permitted solicitations in Advisory Opinion 2008-14 (Melothe, Inc.). The Complaint concedes this fact, but quotes the advisory opinion to suggest that any such solicitation must be "made within the larger context of an endorsement contained in commentary regularly featured in the publication." That is exactly the situation here. The solicitation was made in the context of Mr. Hannity's regular commentary on "Conservative Victory in 2010" and his specific endorsement of Mr. Gomez.

2. The endorsement of Mr. Gomez was comparable to the other email updates that qualify for the press exemption.

The email update endorsing Mr. Gomez's candidacy included the same substance that has appeared in other email updates and on Mr. Hannity's show, namely, Mr. Hannity's advocacy for "Conservative Victory in 2010." It is, therefore, comparable to Mr. Hannity's other media that is protected by the press exemption.

The Complaint, however, mistakenly relies on *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("MCFL"), to argue that the email update did not qualify for the press exemption because it (1) did not contain a "Hannity Headlines" banner or advertisements like the other updates, (2) included commentary from someone else, and (3) ended with a fundraising solicitation. However, MCFL does not purport to establish a test requiring that all communications follow the same format to qualify for the press exemption. Such a test would contravene the clearly

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expressed congressional intent to "assure[] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." 479 U.S. at 250 (quoting the Act's legislative history).

Rather, *MCFL* was comparing a semi-regularly published newsletter of a nonprofit organization to a "Special Edition" to determine whether the "Special Edition" can be "considered comparable to any single issue of the newsletter." *Id.* (emphasis added). Though the Complaint correctly notes that *MCFL* examined whether the organization's masthead appeared on both the newsletter and the "Special Edition," the Complaint fails to state the other problematic characteristics of the "Special Edition," none of which are present here:

It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal *MCFL* publication. The *MCFL* masthead did not appear on the flyer, and, despite an apparent belated attempt to make it appear otherwise, the Edition contained no volume or issue number identifying it as one in a continuing series of issues.

*Id.* at 250-51.

These factors clearly demonstrate that the email update endorsement of Mr. Gomez is "considered comparable" to Mr. Hannity's other email updates pursuant to *MCFL*. First, the email update was produced and sent by the same personnel and vendor to Premiere that have prepared and sent the other email updates. Second, the email update was sent to the same recipients that received the other email updates. Third, the email update contained characteristics like those of other email updates such as Mr. Hannity's advocacy for "Conservative Victory in 2010" and quoted

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commentary from others.<sup>4</sup> Fourth, the "From" line of the email updates all indicate that they are from the "The Sean Hannity Show" and that they are each part of a continuing series of blast emails from "headlines@hannity.com."

It is also worth noting what *MCFL* was guarding against: spending by non-press corporations to promote the candidates of their choice. See 479 U.S. at 251 ("A contrary position would open the door for these corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, ....");<sup>5</sup> see also Complaint at B.5. ("To find that the press exemption applied here would mean that Sony, Viacom, or Disney may distribute fundraising solicitations for candidates, in full coordination with those candidates, without violating the Act.").

The press exemption has always protected the ability of a media entity to disseminate any content including that which promotes candidates endorsed by the media entity itself, e.g., editorials in newspapers. Furthermore, the press exemption permits media entities to disseminate commentaries by media personalities, e.g., television and radio show hosts, newspaper columnists, etc., including criticisms or endorsements of the candidates they choose. These communications may also include solicitations of contributions. See Advisory Opinion 2008-14 (*Melothé, Inc.*). In addition, press activity is protected regardless of whether it is coordinated with a candidate. If coordination nullified the press exemption, no editorial board of a newspaper could meet with or interview candidates prior to endorsement. The email at issue here is entirely consistent with the allowances of the press exemption.

### 3. The email update was available to the general public.

The email update was available to any member of the general public who signed up at [www.hannity.com](http://www.hannity.com) to receive Mr. Hannity's email updates. If members of the public can easily add their names to a list, distribution of content to that list must be considered public for these purposes. How else is a press entity to send the emails and text messages contemplated and approved by the Commission in Advisory

<sup>4</sup> As explained previously, the fact that the email update also contained a fundraising request does not affect the analysis because the Commission has stated that such requests are not inconsistent with the press exemption. See Advisory Opinion 2008-14 (*Melothé, Inc.*).

<sup>5</sup> This rationale subsequently was repudiated by *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

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Opinion 2004-7 (MTV) and in its amended regulations other than by sending them to a list?

Though the Commission has stated that "whether the entity's materials are available to the general public" is one of the "considerations in applying this analysis," this consideration cannot apply when the press activity is by mail, email, or any other format that requires individually delivered communications. Distribution of this type of media cannot be accomplished other than by sending content to finite lists of people. Furthermore, *MCFL* itself noted that public distribution of a mailed newsletter beyond such a list was a factor that weighed against applying the press exemption. 479 U.S. at 250 ("It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter.")

The assertion in the Complaint that the email update "was not distributed to the public, it was distributed to individuals on Hannity's list" and, therefore, is not within the press exemption is wrong as a matter of fact and law.

### CONCLUSION

This Complaint erroneously alleges a violation of the Act for activity that is comfortably within both the traditional understanding of the press exemption and the Commission's recent interpretations that account for new and evolving types of media. For all the foregoing reasons, the Commission should find no reason to believe that Clear Channel and Premiere violated the Act.

Sincerely,



Jan Witold Baran  
Caleb P. Burns

Attachments

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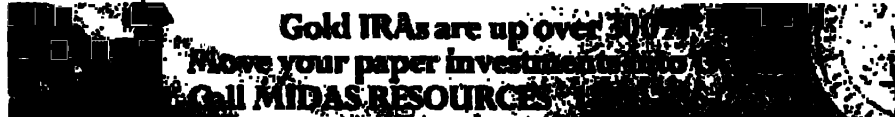
## **EXHIBIT 1**

## On Today's Show...

May 7th, 2010

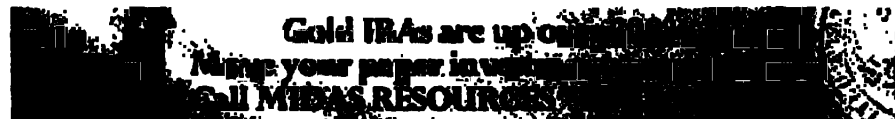
### Mayor Rudy Giuliani

Sean was joined by "America's Mayor", former New York City Mayor Rudy Giuliani to discuss the latest terrorist attacks in New York City. "Getting lucky doesn't seem to be a very good national policy to prevent terrorism," suggested a thankful Hannity. "The reality is that we're seeing a lot more of this," warned Giuliani. "We're not going to defeat our enemies until we confront who they are," argued the former mayor. "For the life of me I don't understand why President Obama can't utter the words 'Islamic extremist.'" Thankfully the events in New York's Times Square can remind us that we need to be continually vigilant and hopefully it will be a wakeup call to Washington that more needs to be done to secure our borders and protect our citizens.



### Jay Sekulow and Linda Chavez: Solutions For Our Immigration Crisis

Sean was joined by Jay Sekulow, Chief Council at the American Center for Law and Justice and Linda Chavez, the Chairman of the Center for Equal Opportunity, joined together to talk about the immigration crisis. "Violent crime on our borders has never been higher," argued Hannity, "the chaos has never been this out of control." Sekulow offered, "The Federal government hasn't done anything and the fact is there's a real problem down there and there's been no involvement to help them." Chavez retorted, "What we need is legal immigration reform that allows people to become legal citizens." Hannity closed the argument saying, "we can only accept so many people each year and we really need to give preference to those immigrants who respect our borders, laws and sovereignty." Wow, what a concept.



### Karl Rove: The Conservative Victory 2010

Sean was joined by "The Architect" Karl Rove to discuss his thoughts on how the Conservative Victory 2010 is going. "So where do you think the Republicans fall in the House," asked Sean. "Can the Republicans win the House," asked Rove. "You bet especially after that health care bill but really I think they can gain 35 seats but this will be a weird election and they'll need 41 to take control." With your help, we can still pull this off. Visit [Hannity.com](http://Hannity.com) for more information on how you can help.

### Today's "Hot Topic" From The Hannity Forums:

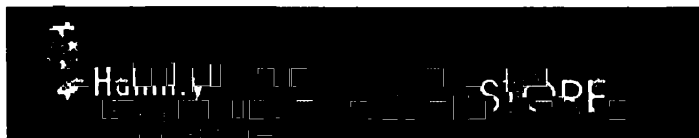
I'm 52 and I have never heard so much animosity -- posted by Kethmk56

I can't remember a time when people have really stopped so low to call out names so much and bash each others political views. I know every administration has had its share of bashing, but this past year and a half, it has grown ten-fold. I do respect others peoples views on issues, I just don't like the name calling and such.

{Mine}

### >> TV Tonight (Hannity FOXNews 9pm EST):

More cops, safer streets, and the deficit eliminated just from *legalizing pot*? Fmr. Gov. Gary Johnson sparks up a debate!



THE SEAN HANNITY STORE IS OPEN!

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Now you can get your very own Sean Hannity Conservative Victory 2010 logo gear!! We have fantastic quality ~~embroidered~~ golf shirts, t-shirts, hats, hoodies, coffee mugs, and lots of more really cool stuff... in every size...and it's all made in the USA!! We even have those mini Nerf footballs too!

Great for Mother's Day and Father's Day!

Go to [Hannity.com](http://Hannity.com) and click on the Hannity Store link and grab your very own Conservative Victory 2010 stuff while supplies last! </> font>

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