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By Email

November 28, 2016

Mr. Jeff Jordan
Federal Election Commission
Office of Complaints Examination and
Legal Administration
999 E Street, NW
Washington, DC 20463

Re: MUR 7153 (The Hill)

Dear Mr. Jordan:

Tony Dane's complaint makes an allegation that is both novel and baseless. He argues that a newspaper violates federal campaign finance law if it prints an op-ed by an author who has consulted with a candidate's campaign about the issue on which she or he will write. This theory ignores the statute, the FEC's regulations, and decades of case law that insure the Federal Election Campaign Act of 1971, as amended ("FECA") is interpreted consistent with the First Amendment. The complaint should be summarily dismissed.

Background

On October 2, 2015, The Hill published an op-ed written by Peter Huffman ("Huffman").¹ Huffman is a private citizen who was employed at Merrill Lynch at the time of publication.² In this op-ed, Huffman expressed his views on the Clinton Foundation's charitable giving.³ At the time, the operation of the Clinton Foundation was a controversial issue in the presidential election.

Subsequently, the website "Wikileaks" published an email allegedly from a Hillary for America staff person to campaign chairman, John Podesta, saying that the staffer had

¹ Peter Huffman, The Hill, *The Clinton Foundation does life changing work worldwide* (Oct. 2, 2015), <http://thehill.com/blogs/congress-blog/presidential-campaign/255654-the-clinton-foundation-does-life-changing-work>.

² See Merrill Lynch, *The Huffman Group*, https://www.ml.com/mlwm/system/viewfapage.aspx?pageurl=huffman_group (last visited Nov. 17, 2016).

³ Huffman, *supra* note 1.



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“connect[ed]” with Mr. Huffman who “wanted to draft an op-ed defending the [Clinton Foundation] from attacks.”⁴ Based on this allegation, Mr. Dane alleges that The Hill violated the law by not reporting the expense of printing Huffman’s op-ed as an in-kind contribution to Hillary for America, and that it was an excessive in-kind contribution, even if it had been reported.⁵

Analysis

Mr. Dane’s theory is fatally flawed. By statute and regulation, federal campaign finance law excludes newspaper editorials and commentary from the definition of a contribution or an expenditure. 52 U.S.C. §§ 30101(9)(B)(i) (an “expenditure” does not include “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication....”); 11 C.F.R. § 100.73 (a “contribution” does not include “[a]ny 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....”) There are legions of judicial and agency opinions recognizing the application of the “press exemption.”⁶

In determining the applicability of the press exemption, the FEC has often employed a three part test. As an initial matter, the FEC asks whether the publishing business is a “press entity.” *See* FEC AO 2011-11 (Colbert). If that answer is affirmative, the FEC then 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’).”⁷ FEC AO 2007-20 (XM Radio); *see also Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). The Hill satisfies each of these three conditions.

⁴ *See* MUR 7153, Complaint, at 13.

⁵ *See id.* at 1.

⁶ An illustrative, but by no means complete, list of opinions recognizing and applying the “press exemption” includes: *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. Phillips Publ’g*, 517 F. Supp. 1308, 1312–13 (D.D.C. 1981); FEC AO 2011-11 (Colbert); FEC AO 2010-08 (Citizens United); FEC AO 2007-20 (XM Radio); FEC AO 2005-19 (Inside Track); FEC AO 2006-16 (Fired Up!); FEC AO 2004-07 (MTV); FEC AO 1996-41 (Belo); FEC 1998-17 (Daniels Cablevision).

⁷ We recognize that a number of Commissioners have found that this last prong analyzing whether the press entity was acting as such is an unnecessary addition to the statutory test. MUR 4689 (Dornan), Additional Statement of Reasons of Commissioner David M. Mason (Feb. 14, 2000); *see also* MUR 6779 (Gilbert), Concurring Statement of Commissioner Lee E. Goodman. Because The Hill easily meets all three prongs of the test, we analyze each in this response.

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First, The Hill is quintessentially a “press entity.” In determining whether a publisher qualifies as a “press entity,” the FEC “focuse[s] on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials.” FEC AO 2010-08 (Citizens United). This includes entities whose “core business” is “providing a newspaper or periodical function.” FEC AO 1996-16 (Bloomberg). The Hill, which began operations in 1994, publishes both a print and online newspaper.⁸ In light of these publishing activities, The Hill is unquestionably a “press entity” for purposes of the press exemption. *See, e.g.*, FEC AO 2005-19 (Inside Track).

Second, The Hill is not owned or controlled by any political party, political committee, or candidate. To the contrary, The Hill is owned by Capitol Hill Publishing Corporation, a privately owned incorporated entity. Capitol Hill Publishing Corporation, in turn, is a subsidiary of News Communications, Inc., another privately owned corporation. Neither Capitol Hill Publishing Corporation nor News Communications, Inc., has any ownership interest that is controlled, directed, or affiliated with a political party, committee, or candidate. *Cf.* FEC AO 1996-41 (Belo) (recognizing that the exception applies only where the press entity is not owned or controlled by a political party, committee, or candidate).

Third, The Hill’s publication of Huffman’s op-ed was a “legitimate press function.” In determining whether a press entity is engaging in a legitimate press function, the FEC asks “(1) whether the press entity’s materials are available to the general public, and (2) whether the materials are comparable in form to those ordinarily issued by the press entity.” FEC AO 2011-11 (Colbert). Here, both answers are affirmative. As to the first factor, The Hill widely published Huffman’s op-ed. Indeed, Huffman’s opinion piece appears on The Hill’s website and is available to any member of the public who conducts an online search.⁹ As to the second factor, The Hill frequently publishes opinion pieces from a variety of influential figures, politicians, and topical experts. Indeed, because The Hill’s core focus is on politics and political events, The Hill’s op-ed contributors usually, if not always, provide commentary on items of political interest, including the activities and positions of candidates currently running for office. All of these opinion pieces are distributed in precisely the same manner as Huffman’s op-ed: through the Hill’s print and digital publications.¹⁰ The publication of Huffman’s opinion piece, therefore, necessarily qualifies as part of The Hill’s “legitimate press function” because it is “comparable in form” to The Hill’s regular press activities. *See* FEC AO 2010-08 (Citizens United) (finding a film “comparable in form” to past films produced by the same entity or its affiliates).

⁸ *See* The Hill, *Subscriptions*, <http://thehill.com/contact/subscriptions> (last visited Nov. 17, 2016).

⁹ *See* Huffman, *supra* note 1.

¹⁰ A review of The Hill’s Opinion page amply supports this point. *See* The Hill, *Opinion*, <http://thehill.com/opinion> (last visited Nov. 17, 2016).

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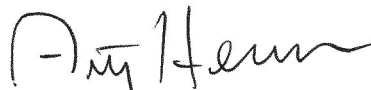
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Conclusion

Publication of Huffman's op-ed falls squarely within the widely recognized "press exemption" and does not constitute a "contribution" or "expenditure" as defined in FECA. Because publication of this opinion piece was not a contribution to Hillary for America, no reporting requirements were triggered and no violation of law occurred. Accordingly, we respectfully request that the Commission find that there is no reason to believe a violation of FECA has occurred and close the file in this matter.

Thank you in advance for your consideration.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Anthony Herman", with a stylized flourish at the end.

Anthony Herman
Robert Lenhard