



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BY EMAIL ONLY

April 14, 2022

Ki Hong
Charles Ricciardelli
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005
ki.hong@skadden.com
charles.ricciardelli@skadden.com

RE: MUR 7919
MSNBC
NBCUniversal News Group

Dear Messrs. Hong and Ricciardelli:

On August 10, 2021, the Federal Election Commission ("Commission") notified your clients, MSNBC and NBCUniversal News Group, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time. Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on April 13, 2022, decided to exercise its prosecutorial discretion and voted to dismiss this matter. The Commission then closed its file in this matter. The General Counsel's Report, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). If you have any questions, please contact Don Campbell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lisa J. Stevenson
Acting General Counsel

Roy Q. Luckett

BY: Roy Q. Luckett
Acting Assistant General Counsel

Enclosure:
General Counsel's Report

BEFORE THE FEDERAL ELECTION COMMISSION
ENFORCEMENT PRIORITY SYSTEM
DISMISSAL REPORT

MUR: 7919

Respondents: MSNBC

NBCUniversal News Group

Complaint Receipt Date: Aug. 4, 2021

Response Date: Oct. 15, 2021

EPS Rating:

Alleged Statutory

52 U.S.C. § 30118

Regulatory Violations:

11 C.F.R. § 114.2(b)

The Complaint alleges that MSNBC and its parent company NBCUniversal News Group made prohibited corporate in-kind contributions to 2020 presidential candidate Joe Biden in the form of express advocacy in Biden's favor.¹ The Complaint further contends that MSNBC also expressly advocated against presidential candidate Donald Trump.² The Complaint concludes that MSNBC "clearly and unmistakably does not operate as [a] bona fide news organization," and thus does not fall under the press exemption, and therefore MSNBC's coverage of the news, commentary, and editorials amount to illegal and undisclosed corporate in-kind contributions to Biden.³

In Response, MSNBC and NBCUniversal News Group assert that covering, commenting on, and editorializing about the 2020 presidential election is consistent with the Commission's interpretation of a legitimate press function, and therefore any costs associated with such coverage incurred by MSNBC fit within the press exemption and do not result in a prohibited contribution or

¹ Compl. at 1 (July 22, 2021). The Complaint also alleges that MSNBC's "flattering reports" of Biden "failed to meet the Federal Election Commission's standard of a 'bona fide news organization.'" *Id.*

² *Id.* at 4.

³ *Id.* at 5.

1 expenditure.⁴ The Response further contends that the Complaint mischaracterizes and misapplies
 2 the press exemption, stating that the Complaint fails to recognize that the press exemption permits
 3 news organizations such as MSNBC to provide commentary, analysis, and editorials even if such
 4 content were to otherwise constitute express advocacy.⁵ Finally, the Response states that MSNBC
 5 is not owned or controlled by a candidate or political organization; and that MSNBC provides in-
 6 depth news and analysis, political commentary, and documentary programming.⁶

7 The Federal Election Campaign Act of 1971, as amended (the “Act”) and Commission
 8 regulations exclude from the definitions of “contribution” and “expenditure” the cost incurred in
 9 covering or carrying a news story, commentary, or editorial by any broadcasting station,
 10 newspaper, Web site, magazine, or other periodical publication, including any Internet or electronic
 11 publication, unless such facilities are owned or controlled by any political party, political
 12 committee, or candidate.⁷ This exemption is called the “press exemption” or “media exemption.”⁸
 13 Costs covered by the exemption are also exempt from the Act’s disclosure and reporting
 14 requirements.⁹

⁴ MSNBC and NBCUniversal News Group Resp. at 2-3 (Oct. 15, 2021). The Response further asserts that the Complaint fails to present any example of a communication that would disqualify MSNBC for the press exemption. *Id.* at 2.

⁵ *Id.* at 2. The MSNBC Response further states that the Commission has affirmed that “an entity otherwise eligible for the press exemption would not lose its eligibility merely because of . . . 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.” *Id.* (citing Advisory Opinion 2005-16 (Fired Up!)).

⁶ *Id.* at 2.

⁷ See 52 U.S.C. § 30101(9)(B)(i); see also 11 C.F.R. §§ 100.73 (excluding *bona fide* news coverage from the definition of “contribution”); 100.132 (same as to the definition of “expenditure”).

⁸ Advisory Op. 2011-11 (Colbert) at 6 (“AO 2011-11”); Advisory Op. 2008-14 (Melothe) at 3 (“AO 2008-14”).

⁹ AO 2011-11 at 6, 8-10 (discussing costs that are within this exemption and also costs that are not).

1 To assess whether the press exemption applies, the Commission uses a two-part test.¹⁰ The
2 first inquiry is whether the entity engaging in the activity is a “press entity.”¹¹ Second, the
3 Commission determines the scope of the exemption by applying the two-part analysis presented in
4 *Reader’s Digest Association v. FEC*: (1) whether the entity is owned or controlled by a political
5 party, political committee, or candidate; and (2) whether the entity is acting within its “legitimate
6 press function” in conducting the activity.¹² An entity otherwise eligible for the press exemption
7 “would not lose its eligibility merely because of a lack of objectivity in a news story, commentary,
8 or editorial, even if the news story, commentary, or editorial expressly advocates the election or
9 defeat of a clearly identified candidate for Federal office.”¹³

10 It is unrefuted, and the record indicates, that MSNBC produces news stories on a regular
11 basis; MSNBC is not owned or operated by a political party, political committee, or candidate; and
12 it appears that when MSNBC disseminated the news stories at issue, it was operating within a
13 legitimate press function.

14 Based on its experience and expertise, the Commission has established an Enforcement
15 Priority System using formal, pre-determined scoring criteria to allocate agency resources and
16 assess whether particular matters warrant further administrative enforcement proceedings. These

¹⁰ Advisory Op. 2005-16 (Fired Up!) at 4 (“AO 2005-16”).

¹¹ *Id.*

¹² See *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981); AO 2011-11 at 6-7. When determining whether the entity was acting within the scope of a legitimate press function at the time of the alleged violation, the Commission considers two factors: (1) whether the entity’s materials are available to the general public; and (2) whether they are comparable in form to those ordinarily issued by the entity. See *Reader’s Digest Ass’n*, 509 F. Supp. at 1215; Factual & Legal Analysis at 4, MUR 7231 (CNN); Advisory Op. 2016-01 (Ethiq) at 3.

¹³ Factual & Legal Analysis at 5, MUR 7206 (Bonneville Int’l Corp.) (quotation marks omitted) (quoting Advisory Opinion 2005-16 at 6); Factual & Legal Analysis at 3, MUR 6579 (ABC News, Inc.).

1 criteria include (1) the gravity of the alleged violation, taking into account both the type of activity
2 and the amount in violation; (2) the apparent impact the alleged violation may have had on the
3 electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in
4 potential violations and other developments in the law. This matter is rated as low priority for
5 Commission action after application of these pre-established criteria. Given that low rating and the
6 apparent applicability of the press exemption, we recommend that the Commission dismiss the
7 Complaint consistent with the Commission's prosecutorial discretion to determine the proper
8 ordering of its priorities and use of agency resources.¹⁴ We also recommend that the Commission
9 close the file and send the appropriate letters.

10 Lisa J. Stevenson
11 Acting General Counsel
12

13 Charles Kitcher
14 Associate General Counsel
15

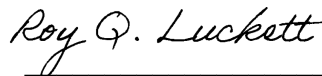
16
17
18 March 31, 2022

19 Date

20 BY:



21 Claudio J. Pavia
22 Acting Deputy Associate General Counsel
23 for Enforcement

24 

25 Roy Q. Lockett
26 Acting Assistant General Counsel
27

28 
29

30 Donald E. Campbell
31 Attorney
32

¹⁴ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).