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FEDERAL ELECTION COMMISSION
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AGENDA ITEM

For Meeting of 6-30-11

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *TCS by pch*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

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Attorney

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Attorney

Subject: Alternative Draft C of AO 2011-11 (Colbert)

Attached is a proposed alternative draft of the subject advisory opinion. We have been asked to place this alternative draft on the agenda for June 30, 2011.

Attachment

1 ADVISORY OPINION 2011-11

2

3 Trevor Potter, Esq.

DRAFT C

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Joseph Birkenstock, Esq.

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Matthew T. Sanderson, Esq.

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Caplin & Drysdale Chtd.

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One Thomas Circle, NW

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Suite 1100

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Washington, DC 20005

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Dear Messrs. Potter, Birkenstock, and Sanderson:

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We are responding to your advisory opinion request on behalf of Mr. Stephen

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Colbert concerning the application of the Federal Election Campaign Act of 1971, as

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amended (the “Act”), and Commission regulations to Mr. Colbert’s plans to establish and

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operate a political committee (the “Committee”). Mr. Colbert wishes to establish the

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Committee to solicit and accept contributions in unlimited amounts from the general

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public for the purpose of making independent expenditures. He also asks whether the

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press exemption would cover costs incurred by the U.S. subsidiaries of Viacom, Inc. and

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related entities (“Viacom”) for the following activities, or whether these costs must be

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disclosed as contributions to the Committee:

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- covering the Committee and its activities on *The Colbert Report* (the “Show”);

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- producing independent expenditure advertisements for the Committee; and

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- administering the Committee.

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The Commission concludes that Mr. Colbert may establish and operate the

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Committee if the Committee solicits and accepts contributions in unlimited amounts for

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the purpose of making independent expenditures, or other spending, from individuals,

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political committees, labor organizations, and corporations (but not foreign nationals,

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Federal contractors, national banks, or corporations organized by act of Congress). The

1 Commission further concludes that costs incurred by Viacom in connection with the
2 Committee's activities would be protected by the press exemption and would not need to
3 be reported by the Committee as in-kind contributions.

4 ***Background***

5 The facts presented in this advisory opinion are based on your letters received on
6 May 13, 2011 and June 14, 2011.

7 Since 2005, Mr. Colbert has hosted the Show, a half-hour television program that
8 is distributed on cable television and through associated Internet sites. The show is
9 owned, distributed, and produced by Viacom,¹ which is neither owned nor controlled by
10 any political party, political committee, or candidate. On the Show, Mr. Colbert
11 discusses political figures, issues, and news through on-air monologues and guest
12 interviews, as well as other "less conventional" methods. The Show has addressed
13 campaign finance rules and issues from time to time.

14 The off-set activities of Mr. Colbert have also served as material for the Show.
15 For example, in 2008, the Show used Mr. Colbert's attempt to run in the South Carolina
16 Democratic presidential primary election as a vehicle to discuss and provide commentary
17 on campaign-related issues, such as ballot access rules and paperwork. Similarly, Mr.
18 Colbert co-hosted the "Rally to Restore Sanity and/or Fear" in October 2010, which the
19 Show covered extensively to provide commentary on political discourse in the United
20 States. Other examples of the Show's coverage of Mr. Colbert's off-set activities
21 include: his congressional testimony on immigration, his U.S.O. Tour to Baghdad, his

¹ Staff of the Show are employees of Hello Doggie, a production company that produces the Show under contract to Viacom.

1 public dispute with the Associated Press about the word “truthiness,” and his sponsorship
2 of the U.S. Speedskating Team. In all instances, these activities have been funded by
3 Viacom.

4 Most recently, Mr. Colbert discussed on the Show the idea of creating his own
5 political committee. To date, the idea of this Committee, which has been referred to as
6 the “Colbert SuperPAC” on the Show, has been a vehicle for Mr. Colbert to discuss
7 campaign finance rules and new developments in politics.

8 Mr. Colbert now plans to establish the Committee, the activities of which will be
9 covered on the Show and used by Mr. Colbert as an on-air premise for discussing
10 campaign finance rules and other aspects of American politics. Neither Viacom nor its
11 corporate management will control or direct the Committee’s activities. The Show’s
12 production, current format, and distribution will not be altered in covering or commenting
13 on the Committee.

14 The Committee will file a Statement of Organization with the Commission as a
15 nonconnected committee. It will make only independent expenditures. It will not make
16 monetary or in-kind contributions to any candidate, political committee, or political party.
17 It also will not coordinate its expenditures with any candidate or political party. The
18 Committee will solicit and accept unlimited contributions from individuals, political
19 committees, corporations, and labor organizations. It will comply with all applicable
20 requirements of the Act and Commission regulations, including disclaimer and reporting
21 rules.

22 The Committee will have its own website, which will discuss political events,
23 offer opinions on political matters, and solicit contributions. The Committee will pay the

1 costs associated with this website, as well as the Committee's solicitation costs and some
2 of its other expenses, including, for example, the cost of Mr. Colbert's Committee-related
3 travel and Committee mementos. Much of the cost of operating the Committee, however,
4 including costs to produce some of its independent expenditure advertisements and to
5 prepare and file the Committee's reports with the Commission, will be incurred by
6 Viacom.

7 While hosting the Show, Mr. Colbert plans to refer to the Committee's website,
8 describe the Committee's operations, mention audience participation opportunities, and
9 air the Committee's independent expenditure advertisements. These independent
10 expenditure advertisements will be created by the Show's staff using the Show's
11 production resources.

12 These independent expenditure advertisements will be subject to Viacom's
13 regular review process. This review process is performed by lawyers and executives
14 from Viacom. It includes a review of scripts of the Show and, where appropriate,
15 specific proposals or subjects regarding content of the Show, to identify legal and
16 commercial issues and to ensure compliance with "standards and practices" for cable
17 shows. This process will also apply to the Show's coverage of the Committee. As
18 Executive Producer of the Show, however, Mr. Colbert is and will remain principally
19 responsible for formulation of the Show's content, subject to this review process.

20 Independent expenditure advertisements created by the Show's staff will be aired
21 on the Show (or posted on the Show's website) as part of the Show's coverage of the
22 Committee. Some of these independent expenditure advertisements will be provided to
23 the Committee to be distributed at its cost and discretion on other networks and shows.

1 All of the independent expenditure advertisements will remain the intellectual property of
2 Viacom.

3 The Show's production resources and staff will also be used to prepare and file
4 the Committee's reports with the Commission.

5 ***Questions Presented***

- 6 1. *May Mr. Colbert form an independent expenditure-only committee that accepts*
7 *unlimited contributions from individuals, political committees, corporations, and*
8 *labor organizations?*
- 9 2. *If the Committee is discussed on the Show, must airtime and related costs incurred by*
10 *Viacom be reported as in-kind contributions, or will these costs be exempt from*
11 *reporting requirements under the press exemption?*
- 12 3. *If the Committee receives in-kind contributions from Viacom, may it also solicit and*
13 *accept contributions from the general public?*

14 ***Legal Analysis and Conclusions***

15 *Question 1. May Mr. Colbert form an independent expenditure-only committee that*
16 *accepts unlimited contributions from individuals, political committees, corporations, and*
17 *labor organizations?*

18 Yes, Mr. Colbert may form a political committee that makes only independent
19 expenditures and does not make contributions. The Committee may accept unlimited
20 contributions from individuals, political committees, corporations, and labor
21 organizations but not from foreign nationals, Federal contractors, national banks, or
22 corporations organized by authority of any law of Congress.

1 A political committee that makes only independent expenditures may solicit and
2 accept unlimited contributions from individuals, corporations, labor organizations, and
3 other political committees, but not from foreign nationals, Federal contractors, national
4 banks, or corporations organized by act of Congress. *See Citizens United v. FEC*,
5 130 S. Ct. 876, 913 (2010) (corporate-funded independent expenditures are
6 constitutionally protected speech); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir.
7 2010) (*en banc*) (individuals may contribute without limit to political committees that
8 make only independent expenditures); *see also* Advisory Opinion 2010-11
9 (Commonsense Ten) (corporations and labor organizations may contribute without limit
10 to political committees that make only independent expenditures). A political committee
11 must register with the Commission² and comply with all applicable reporting rules. *See*
12 *SpeechNow*, 599 F.3d at 698.

13 In Advisory Opinion 2010-11 (Commonsense Ten), the Commission concluded
14 that a nonconnected political committee that made only independent expenditures could
15 solicit and receive unlimited contributions from individuals, political committees,
16 corporations, and labor organizations. Mr. Colbert's Committee will in all material
17 respects be identical to Commonsense Ten. Mr. Colbert plans to register the Committee
18 as a nonconnected political committee and the Committee will make only independent
19 expenditures. The Committee will not make contributions or coordinated
20 communications. It will comply with all applicable requirements of the Act and
21 Commission regulations, including disclaimer and reporting rules.

² The Committee has previously determined that such political committees may include a letter with their Form 1 Statements of Organization clarifying that they intend to accept unlimited contributions for the purpose of making independent expenditures. *See* Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten) and attachments thereto.

1 Accordingly, the Commission concludes that Mr. Colbert may establish and
2 operate the Committee. The Committee may solicit and accept unlimited contributions
3 from individuals, political committees, corporations, and labor organizations, but the
4 Committee may not solicit or accept contributions from foreign nationals, Federal
5 contractors, national banks, or corporations organized by authority of any law of
6 Congress. The Committee must comply with all applicable reporting and disclaimer
7 requirements.

8 *Question 2. If the Committee is discussed on the Show, must airtime and related costs*
9 *incurred by Viacom be reported as in-kind contributions, or will these costs be exempt*
10 *from reporting requirements under the press exemption?*

11 If the Committee is discussed on the Show, airtime and related costs incurred by
12 Viacom would be exempt from reporting requirements under the press exemption.

13 The Act and Commission regulations define the terms “contribution” and
14 “expenditure” to include any gift of money or “anything of value” for the purpose of
15 influencing a Federal election. 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a) and
16 100.111(a). The Act and Commission regulations require political committees to report
17 all contributions received, whether monetary or in-kind, and expenditures made during a
18 given reporting period. *See* 2 U.S.C. 434(b); 11 CFR 104.3.

19 Under the Act, “[t]he term ‘expenditure’ does not include . . . any news story,
20 commentary, or editorial distributed through the facilities of any broadcasting station,
21 newspaper, magazine, or other periodical publication, unless such facilities are owned or
22 controlled by any political party, political committee, or candidate.” 2 U.S.C.
23 431(9)(B)(i). Commission regulations further provide that neither a “contribution” nor an

1 “expenditure” results from “any cost incurred in covering or carrying a news story,
2 commentary, or editorial by any broadcasting station (including a cable television
3 operator, programmer or producer) . . . unless the facility is owned or controlled by any
4 political party, political committee, or candidate[.]” These exclusions are known as the
5 “press exemption” (or alternatively, the “media exemption”). 11 CFR 100.73 and
6 100.132. Congress enacted the so-called press exemption as part of the 1974
7 amendments to the Act in order to ensure that the Act did not “limit or burden in any way
8 the First Amendment freedoms of the press and of association.” H.R. REP. NO. 93-1239
9 at 4 (1974). The legislative history also makes clear that “[the exemption] assures the
10 unfettered right of the newspapers, TV networks, and other media to cover and comment
11 on political campaigns.” *Id.* In other words, the so-called “exemption” was really
12 enacted as a limit on the reach of the Act’s prohibition on corporate contributions and
13 expenditures, and was to be interpreted coextensive with the First Amendment.

14 Thus, under the Act, to the extent that Viacom is a broadcasting station that is not
15 owned or controlled by any political party, political committee, or candidate, and the
16 airtime and related costs incurred constitute “news story, commentary, or editorial,” they
17 are not subject to the reporting requirements of the Act or Commission regulations.

18 The Commission has previously determined that Viacom is not owned or
19 controlled by a political party, political committee, or candidate.³ *See* Advisory Opinion
20 2004-07 (MTV). Nothing in the facts presented by Mr. Colbert or otherwise available to

³ Hello Doggie is also not owned or controlled by a political party, political committee, or candidate.

1 the Commission would cause the Commission to reconsider this prior determination at
2 this time.⁴

3 Although the Commission has never defined “news story, commentary, or
4 editorial,” the Commission has traditionally “interpreted the media exemption broadly,”⁵
5 applying it to “news stories, commentaries, and editorials no matter in what medium they
6 are published. . . .”⁶ as well as to advertising activities, where the underlying activity
7 being promoted is itself protected by the press exemption.⁷ Furthermore, the
8 Commission has been responsive to developments in the means of dissemination of core
9 political speech; including expressly reading the press exemption to protect forms of

⁴ Mr. Colbert’s roles as the executive producer, managing director, and host of the Show, and as director of the Committee, do not mean that either Mr. Colbert or the Committee owns or controls Viacom. See MUR 6242 (J.D. Hayworth 2010) (The Commission has never found that the host of a show carried by a press entity “owned or controlled” the press entity for purposes of the press exemption merely because the host had a role in determining program content.).

⁵ MUR 4999 (A Lot of People Supporting Ed Bernstein), FGCR at 20 (“The Commission has interpreted the media exemption broadly, consistent with” its legislative history).

⁶ AO 2008-14 (Melothé, Inc.) at 3 (citing *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18589, 18608 (Apr. 12, 2006)). See also MUR 4999 (A Lot of People Supporting Ed Bernstein), FGCR at 21, n. 8 (“the Commission has effectively interpreted the exemption for newspapers, magazines, or other periodical publications as reaching entities that ‘act [] as a news and commentary provider via computer linkages, performing a newspaper or periodical publication function for computer users’ by creating editorial content in a manner similar to newspapers or periodicals.”) (citing AO 1996-16 (Bloomberg)). See, e.g., 11 C.F.R. §§ 100.73, 100.132 (providing that neither a “contribution” nor “expenditure” results from “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 CFR § 100.29(c)(2) (exempting from the definition of “electioneering communication,” any communication that “appears in a news story, commentary or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate.”). See also *Explanation and Justification for Final Rules on Electioneering Communications*, 67 FR 65190, 65197 (Oct. 23, 2002) (including documentaries and educational programming within the media exemption to the electioneering communication definition in 11 CFR § 100.29(c)(2)); *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18589, 18608 (Apr. 12, 2006).

⁷ See AO 2010-08 (Citizens United) at 7 (citing *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1307, 1313 (1981) (citing *Readers Digest Association, Inc. v. FEC*, 509 F. Supp. 1210, 1215 (1981))). See also MUR 5467 (Michael Moore), Statement of Reasons of Commissioners Bradley Smith and Michael Toner at 1 n.1.

1 media that did not exist or were not widespread when Congress enacted the statutory
2 press exemption, such as cable television,⁸ satellite radio,⁹ and the Internet.¹⁰ As the
3 Supreme Court recently recognized in *Citizens United v. FEC*:

4 Rapid changes in technology – and the creative dynamic inherent in the
5 concept of free expression – counsel against upholding a law that restricts
6 political speech in certain media or by certain speakers. Today, 30-second
7 television ads may be the most effective way to convey a political
8 message. Soon, however, it may be that Internet sources, such as blogs and
9 social networking Web sites, will provide citizens with significant
10 information about political candidates and issues.

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12 130 S. Ct. 876, 912-13 (2010).

13 Here, Mr. Colbert proposes to use Viacom’s resources to discuss the Committee
14 on the Show, which is both cablecast and available for viewing on Comedy Central’s
15 public website. The discussions would provide information about the Committee’s
16 website, descriptions of the Committee’s operations, audience participation opportunities,
17 and examples of the Committee’s independent expenditure advertisements.

⁸ See Explanation and Justification for Final Rules on Candidate Debates and News Stories, 61 FR 18049 (Apr. 24, 1996) (“Although the cable television industry was much less developed when Congress [enacted the media exemption], it is reasonable to conclude that cable operators, programmers and producers, when operating in their capacity as news producers and distributors, would be precisely the type of ‘other media’ appropriately included within [the media] exemption.”).

⁹ See AO 2007-20 (XM Radio).

¹⁰ Explanation and Justification for Final Rules on Internet Communications, 71 Fed. Reg. 18589, 18600-09 (Apr. 12, 2006) (Recognizing that the press exemption applies to entities that “cover or carry” news stories, commentaries, and editorials solely on the Internet, as well as those entities that “cover or carry” news stories, commentaries, and editorials in both “traditional media” and on the Internet.). See also AO 2005-16 (Fired Up!) (the Commission concluded that a website containing original news reporting as well as commentary on, quotes from, summaries of, and hyperlinks to news articles appearing on other entities’ websites was protected by the media exemption because its websites “are both available to the general public and are the online equivalent of a newspaper, magazine, or other periodical publication as described in the Act and Commission regulations”); AO 2004-07 (MTV, *et al.*) (applying the media exemption to MTV’s posting on its website of election-related materials including the results of a presidential preference poll); AO 2000-13 (iNEXT Corporation) (the Commission concluded that Internet video programming was “akin to a periodical or news program” and therefore gavel-to-gavel coverage of the Democratic and Republican conventions was protected by the media exemption).

1 Mr. Colbert also proposes to use Viacom’s staff and other resources to create
2 independent expenditure advertisements for the Committee. This is similar to prior
3 exempt activities of the Show, where Mr. Colbert has used Viacom’s staff and resources
4 to support his off-set activities, and has then used those activities as the basis for news,
5 commentary and editorials on the Show. For example, Viacom provided funding and
6 other resources for Mr. Colbert’s attempt to run in the South Carolina Democratic
7 presidential primary, his co-hosting of the “Rally to Restore Sanity and/or Fear,” his
8 congressional testimony on immigration, his U.S.O. Tour to Baghdad, his public dispute
9 with the Associated Press about the word “truthiness,” and his sponsorship of the U.S.
10 Speedskating Team. All of these activities were covered on the Show.

11 The Committee would be the latest in a long line of vehicles for the Show to use
12 in providing news, commentary, and editorials to the public. Like the activities
13 enumerated above, the activities of the Committee will provide a continuing premise for
14 the Show to comment on current events and American politics. As such, costs incurred
15 by Viacom in covering the Committee,¹¹ including costs associated with producing
16 independent expenditure advertisements for the Committee, would be protected by the
17 press exemption. A different conclusion would require the Commission to substitute its
18 judgment for that of the press entity on how best to deliver news, commentary, and
19 editorials. For the Commission to do so would be contrary to congressional intent to
20 ensure that the press exemption “assures the unfettered right of the newspapers, TV

¹¹ A news story, commentary, or editorial that lacks objectivity can still be considered part of a press entity’s legitimate press function, even if that news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office. *See* Advisory Opinions 2010-08 (Citizens United) and 2005-19 (Inside Track). Accordingly, costs incurred by Viacom to produce and air materials containing express advocacy on the Show will be protected by the press exemption.

1 networks, and other media to cover and comment on political campaigns.” *See* H.R. REP.
2 NO. 93-1239 at 4 (1974).

3 Costs incurred by Viacom to file the Committee’s reports with the Commission
4 are also part of Viacom’s legitimate press function. For the Committee to continue to
5 serve as a vehicle for a “news story, commentary, or editorial,” specifically the Show’s
6 coverage of campaign finance rules and other aspects of American politics, it must
7 remain operational. As such, the costs incurred by Viacom in establishing and
8 maintaining the Committee, including filing the Committee’s reports with the FEC, are
9 protected by the press exemption.

10 *Question 3. If the Committee receives in-kind contributions from Viacom, may it solicit*
11 *and accept contributions from the general public?*

12 Yes, if the Committee receives in-kind contributions from Viacom, it may solicit
13 and accept contributions from individuals, political committees, corporations, and labor
14 organizations (but not from foreign nationals, Federal contractors, national banks, or
15 corporations organized by act of Congress).

16 As discussed above, a political committee that makes only independent
17 expenditures may solicit and accept unlimited contributions from individuals,
18 corporations, labor organizations, and other political committees. *See* Advisory Opinion
19 2010-11 (Commonsense Ten); *see also* Advisory Opinion 2010-09 (Club for Growth).
20 The Committee’s acceptance of contributions from Viacom would thus not bar it from
21 soliciting and accepting unlimited contributions from other permissible sources.

22 This response constitutes an advisory opinion concerning the application of the
23 Act and Commission regulations to the specific transaction or activity set forth in your

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
2 of the facts or assumptions presented, and such facts or assumptions are material to a
3 conclusion presented in this advisory opinion, then the requestor may not rely on that
4 conclusion as support for its proposed activity. Any person involved in any specific
5 transaction or activity which is indistinguishable in all its material aspects from the
6 transaction or activity with respect to which this advisory opinion is rendered may rely on
7 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
8 conclusions in this advisory opinion may be affected by subsequent developments in the
9 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.
10 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
11 directly from the Commission's Advisory Opinion searchable database at
12 <http://saos.nictusa.com/saos/searchao>.

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14 On behalf of the Commission,

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Cynthia L. Bauerly
Chair