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AGENDA ITEM
For Meeting of: 11-13-08
SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD by RSS*
General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *N.S.*
Attorney

Subject: Draft AO 2008-14

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 13, 2008.

Attachment

1 ADVISORY OPINION 2008-14

2
3 Marc E. Elias, Esq.

4 Kate Andrias, Esq.

5 Perkins Coie LLP

6 607 Fourteenth Street, N.W.

7 Washington, D.C. 20005-2011

8

9 Dear Mr. Elias and Ms. Andrias:

DRAFT

10 We are responding to your advisory opinion request on behalf of Melothé, Inc.
11 concerning the application of the Federal Election Campaign Act of 1971, as amended (the
12 “Act”), and Commission regulations to Melothé, Inc.’s proposed Internet campaign-TV station.

13 The Commission concludes that most of Melothé, Inc.’s proposed activities relating to its
14 Internet campaign-TV station would not result in a contribution or expenditure and would
15 qualify for the press exemption under the Act. Under limited circumstances, solicitations on
16 behalf of featured candidates also may be included.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on August
19 11, 2008, emails received from you on September 12 and 14, 2008, and telephone conversations
20 with Commission attorneys.

21 Melothé, Inc. is a for-profit corporation in the business of developing technology and
22 providing technical capabilities to Internet Web sites. Melothé, Inc. currently is exploring
23 commercial opportunities for its technology, including building and operating Internet TV
24 stations for movies, music videos, and other content.

25 As part of its business strategy, Melothé, Inc. proposes to launch and operate an Internet
26 TV station covering the campaign(s) of one or more federal candidates. The Web site also may
27 devote itself exclusively to only one candidate over a period of days, weeks, or months.

1 Melothé, Inc. would produce and transmit both live and prerecorded programming daily
2 from the campaign's headquarters. This programming would be viewable for free by the general
3 public through an interactive multi-channel Internet TV Web site. Melothé, Inc. intends to fund
4 the venture with capital from the corporation¹ and it hopes to commercialize the Web site by, for
5 example, generating advertising revenues and selling merchandise.

6 The content of the campaign-TV Web site likely would feature and be supportive of
7 Democratic candidates only, and it would be of particular interest to those Democratic
8 candidate's campaign supporters and volunteers. Melothé, Inc., however, would prepare the
9 content, and it would exercise editorial control over all content displayed on its Web site.
10 Melothé, Inc. asserts that it is neither owned nor controlled by any political party, political
11 committee or candidate, nor would the proposed Web sites be owned or controlled by any
12 political party, political committee or candidate.

13 The campaign-TV Web site may include the following:

- 14 • Daily morning briefings for volunteers of the candidate's campaign
- 15 • Interviews with campaign staff
- 16 • Daily reports featuring campaign news
- 17 • Roundtable discussions on campaign news and issues
- 18 • Coverage of campaign events, including complete campaign speeches and rallies
- 19 • "Reports from the road," including recognition of outstanding "local volunteers" and
20 their activities
- 21 • Pro-Democratic/Anti-Republican commentaries

¹ Melothé, Inc. is privately owned by individual investors, and none of the investors are Federal candidates, foreign nationals, or government contractors.

1 The campaign-TV Web site may include interactive features such as blogging, surveys,
2 and contests. It also may contain links to other Web sites, including to those of the featured
3 candidate.

4 Melothe, Inc. would consider allowing solicitations to be conducted through the
5 campaign-TV Web site. It envisions that program hosts, interviewers, and news anchors would
6 solicit contributions by instructing viewers to send money directly to the candidate's campaign.
7 Hyperlinks to contribution pages also would appear on the Web site during programming.
8 Melothe, Inc., however, states that it would not act as a conduit or intermediary for those
9 contributions.

10 ***Questions Presented***

- 11 1. *Does Melothe, Inc.'s proposed Internet campaign-TV station qualify for the press*
12 *exemption?*
- 13 2. *If the answer to the first question is "yes," may the proposed Web site, as part of*
14 *news or commentary containing express advocacy, include solicitations on behalf of*
15 *the featured candidates?*

16 ***Legal Analysis and Conclusions***

17 *Question 1: Does Melothe, Inc.'s proposed Internet campaign-TV station qualify for the press*
18 *exemption?*

19 The Commission concludes that the facts presented indicate that most of Melothe, Inc.'s
20 proposed activities would not constitute contributions or expenditures and would qualify for the
21 press exemption under the Act because Melothe, Inc. would not be owned or controlled by a
22 political party, political committee, or candidate and would be engaging in press functions.

1 The Act prohibits “any corporation whatever” from making any contribution or
2 expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act and Commission
3 regulations define the terms “contribution” and “expenditure” to include any gift of money or
4 “anything of value” for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)
5 and (9)(A); 11 CFR 100.52(a) and 100.111(a).

6 Under the Act and Commission regulations the costs of covering or carrying news stories,
7 commentary, or editorials are exempt from the definitions of “contribution” and “expenditure.”
8 This is known as the “press exemption.”

9 Under the Act, “The term ‘expenditure’ does not include . . . any news story,
10 commentary, or editorial distributed through the facilities of any broadcasting station,
11 newspaper, magazine, or other periodical publication, unless such facilities are owned or
12 controlled by any political party, political committee, or candidate.” 2 U.S.C. 431(9)(B)(i).

13 The Commission’s regulations further provide that neither a “contribution” nor
14 “expenditure” results from “any cost incurred in covering or carrying a news story, commentary,
15 or editorial by any broadcasting station (including a cable television operator, programmer or
16 producer), Web site, newspaper, magazine, or other periodical publication, including any Internet
17 or electronic publication . . . unless the facility is owned or controlled by any political party,
18 political committee, or candidate[.]” 11 CFR 100.73, 100.132.

19 The legislative history of the press exemption indicates that Congress did not intend to
20 “limit or burden in any way the First Amendment freedoms of the press and of association. [The
21 exemption] assures *the unfettered right* of the newspapers, TV networks, and other media to
22 cover and comment on political campaigns.” H. Rep. No. 93-943, 93d Cong., 2d Sess. at 4
23 (1974) (emphasis added).

1 Moreover, the Commission has not limited the press exemption to traditional news
2 outlets, but rather has applied it to “news stories, commentaries, and editorials *no matter in what*
3 *medium they are published,*” and specifically has extended it to Internet Web sites and entities
4 that distribute their content exclusively on the Internet. *Explanation and Justification for the*
5 *Regulations on Internet Communications*, 71 FR 18589, 18608-09 (Apr. 12, 2006); *see also*
6 *Advisory Opinions 2005-16 (Fired Up!) and 2000-13 (iNEXTV).*

7 Thus, under the Act and the Commission’s regulations, the analysis is simple: unless an
8 entity’s facilities are owned or controlled by a political party, political committee, or candidate,
9 the costs of distributing any news story, commentary, or editorial distributed through the
10 enumerated media are neither contributions nor expenditures. The Commission has interpreted
11 the statutory language and regulations by applying the two-part analysis presented in *Reader’s*
12 *Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981) to determine whether the
13 press exemption applies:

14 (1) Whether the press entity is owned or controlled by a political party, political
15 committee, or candidate; and

16 (2) Whether the press entity is acting as a press entity in conducting the activity at issue
17 (*i.e.*, whether the press entity is acting in its “legitimate press function”).

18 *See also FEC v. Phillips Publishing*, 517 F.Supp. 1308, 1312-1313 (D.D.C. 1981); *Advisory*
19 *Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), 2004-07 (MTV).*

20 **A) Ownership or Control**

21 In the present case, Melothé, Inc. represents that neither the company nor its proposed
22 Web site is owned or controlled by any political party, political committee, or candidate.
23 Moreover, Melothé, Inc. apparently will exercise control over all content displayed on its Web

1 site, including interviews, news reports, roundtable discussions, campaign event coverage, and
2 broadcasts of campaign speeches and rallies. The Commission concludes that, under these
3 conditions, neither Melothé, Inc. nor its proposed Web site is or would be owned or controlled
4 by a political party, political committee, or candidate, and therefore neither a contribution nor
5 expenditure would result under the Act from Melothé, Inc.'s proposed activities.

6 **B) Press function**

7 The Commission previously has concluded that press functions include the "provision of
8 news stories, commentary, and editorials." Advisory Opinion 2005-16 (Fired Up!). Such
9 activities are distinguishable from active participation in core campaign or electioneering
10 functions. See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 251 n.6 (recognizing "the
11 distinction of campaign flyers from regular publications"); *FEC v. Reader's Digest Association,*
12 *Inc.*, 509 F. Supp. 1210, 1214 (S.D. N.Y. 1981) (suggesting that the press exemption would not
13 apply where, "for example, on Election Day a partisan newspaper hired an army of incognito
14 propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate
15 and sent sound trucks through the streets blaring the same denunciations, all in a manner
16 unrelated to the sale of its newspapers."). Moreover, the Commission considers whether the
17 entity's materials are available to the general public and whether such materials are comparable
18 in form to those ordinarily issued by the entity. Advisory Opinion 2005-16 (Fired Up!).

19 In the instant case, Melothé, Inc. represents that its proposed Web site will be viewable
20 by the general public and access will be free. Thus, Melothé, Inc. satisfies on its face the public
21 availability prong of the Commission's press exemption analysis. Melothé, Inc. also represents
22 that, generally, the normal course of its proposed activities is to provide through its Web site
23 interviews, daily news reports, roundtable discussions, event coverage, speech and rally

1 broadcasts, “reports from the road,” and commentary related to particular political campaigns.
2 The Commission concludes that most of Melothé’s proposed Internet content falls within the
3 broad ambit of the “normal press-business of covering and commenting on political campaigns.”

4 Melothé, Inc. also does not suggest that it will in any way deviate in form from its
5 ordinary planned activities by, for example, distributing special pamphlets, conducting or
6 coordinating get out the vote activities, or organizing rallies for particular candidates, elections,
7 party committees, or other political causes. Accordingly, Melothé, Inc.’s materials (i.e., Internet
8 media content) are legitimate press functions and are comparable in form to those that it
9 ordinarily intends to issue.

10 Although Melothé, Inc.’s content may be calculated to appeal especially to supporters,
11 volunteers, or activists aligned with a particular party, campaign, candidacy, or other political
12 cause, the Commission does not investigate an entity’s viewpoints in determining whether it
13 qualifies as a “press entity” under the press exemption:

14 The Commission notes that an entity otherwise eligible for the press
15 exception would not lose its eligibility merely because of a lack of objectivity in a
16 news story, commentary, or editorial, even if the news story, commentary, or
17 editorial expressly advocates the election or defeat of a clearly identified
18 candidate for Federal office.

19
20 Advisory Opinion 2005-16 (Fired Up!) (citing First General Counsel’s Report, MUR 5440 (CBS
21 Broadcasting, Inc.)); Advisory Opinion 2005-19 (Inside Track) (citing same).

22 Nonetheless, without additional information, the Commission is unable to render a
23 definitive opinion on Melothé, Inc.’s proposals to include in its content a “Daily Morning
24 Briefing: a daily 15-minute live segment, ‘briefing’ volunteers and interested viewers on what’s
25 happening in the campaign today” and “recognition of outstanding local volunteers and their
26 activities.” With respect to the volunteer “briefings,” it is unclear from Melothé, Inc.’s request

1 whether this proposal envisions providing coverage to the general public of briefings by
2 campaign staffers or whether Melothé, Inc. itself would prepare and provide the briefings. While
3 the former situation may be analogous to media coverage of a press conference given by
4 campaign officials, the latter situation would be tantamount to a corporation providing the
5 campaign with a volunteer coordinator and, in essence, conducting part of the campaign.
6 Because the provision of personnel to benefit a political campaign is not a legitimate press
7 function, if Melothé, Inc. staffers were to prepare and deliver daily briefings to campaign
8 volunteers, a prohibited in-kind contribution or expenditure would result from the corporation.
9 See 2 U.S.C. 441b, 2 U.S.C. 431(8)(A), 2 U.S.C. 431(9)(A), 11 CFR 100.52(d), 11 CFR
10 100.111.

11 A similar analysis applies to the proposed “recognition” of campaign volunteers. If
12 Melothé, Inc. were merely to provide coverage of awards or ceremonies given by campaigns to
13 their volunteers, that would resemble a news story. On the other hand, if Melothé, Inc. itself were
14 to give awards or other means of recognition to campaign volunteers, that also would be
15 tantamount to the corporation conducting part of the campaign, and would not constitute a press
16 function.

17 *Question 2: If the answer to the first question is “yes,” may the proposed sites, as part of news*
18 *or commentary containing express advocacy, include solicitations on behalf of the featured*
19 *candidates?*

20 Melothé, Inc.’s request also asks the Commission whether “the proposed sites, as part of
21 news or commentary containing express advocacy, [may] include solicitations on behalf of the
22 featured candidates.” In a supplementary submission, counsel for Melothé, Inc. represents that
23 the company “envisions program hosts, interviewers and news anchors will solicit contributions.

1 It also envisions links to contribution pages appearing on the screen during programming.”
2 Melothé, Inc., however, “would not serve as a conduit, but would instead allow commentators to
3 solicit viewers to send money directly to the campaign.” Without additional information
4 regarding the context of such solicitations, their frequency, or their character, the Commission is
5 unable to render a definitive opinion on this aspect of Melothé, Inc.’s proposal.

6 The Commission previously has concluded that, pursuant to the press exemption, an
7 “endorsement of, including a contribution solicitation on behalf of [the candidate] in a
8 commentary” in a subscription periodical does not itself result in a contribution under the Act
9 where the “commentary . . . appears as a regular feature in each issue,” and where the periodical
10 is not owned or controlled by any candidate, political party, or political committee. Advisory
11 Opinion 1980-109 (Ruff Times). Notably, Advisory Opinion 1980-109 held that such a
12 solicitation was permissible if it was made within the larger context of an endorsement contained
13 in commentary regularly featured in the publication. The Advisory Opinion did not conclude that
14 the *endorsements* or *solicitations themselves* could become a “regular feature” of the publication.

15 Under the Commission’s previous interpretations of the press exemption, nothing
16 prohibits Melothé’s commentators, guests, and hosts to make express advocacy endorsements of
17 certain candidates to viewers of its Web site content and, concurrently, to suggest that viewers
18 support such candidates with their contributions, so long as neither Melothé, Inc. nor its Web site
19 is owned or controlled by any candidate, political party, or political committee. Advisory
20 Opinion 1980-109 (Ruff Times).² Because individuals appearing in Melothé, Inc. media, under
21 the limited circumstances described above, may urge viewers to send contributions to certain

² As noted above, the press exemption applies equally to Internet Web sites as it does to the periodical at issue in Advisory Opinion 1980-109 (*Explanation and Justification for the Regulations on Internet Communications*, 71 FR 18589, *supra*).

1 candidates without such exhortations resulting in a contribution or an expenditure from Melothé,
2 Inc. under the Act, it logically follows that they also may inform viewers as to where and how to
3 send such contributions, and in the context of Internet Web sites, to provide via hyperlink the
4 appropriate Web site addresses where viewers may make contributions. The provision of a
5 hyperlink directing a media Web site's visitors to a campaign's contribution page under these
6 limited circumstances is not prohibited by the Act or any of the Commission's regulations or
7 advisory opinions.³

8 On the other hand, if Melothé, Inc. envisions unpaid solicitations for particular candidates
9 to become a regular feature of its content, then such activity would reach beyond the scope of
10 Advisory Opinion 1980-109 and would be tantamount to a corporation that makes a prohibited
11 independent expenditure or an in-kind contribution or expenditure in the form of providing the
12 campaign with fundraising staff. *See* 2 U.S.C. 441b, 2 U.S.C. 431(8)(A), 2 U.S.C. 431(9)(A), 11
13 CFR 100.16, 11 CFR 100.52(d), 11 CFR 100.111. However characterized, such activities would
14 not constitute a press function, and once Melothé, Inc. exceeds the parameters of the press
15 exemption, it also becomes subject to the prohibitions on corporate facilitation of contributions.
16 *See* 11 CFR 114.2(f).

17 This response constitutes an advisory opinion concerning the application of the Act and
18 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
19 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or

³ This specific issue is not expressly addressed by the Act or any of the Commission's regulations or advisory. The Commission's "Internet activities exemptions" at 11 CFR 100.94(e) and 100.155(e), which expressly exclude hyperlinks linking to candidate and party Web sites from the definitions of contributions and expenditures, do not apply to corporations such as Melothé, Inc.. In Advisory Opinions 1999-24 (EZone) and 1999-25 (DNet), the Commission concluded that, where a company provides hyperlinks to candidates' and political parties' Web sites, no expenditure results under 2 U.S.C. §431(9)(B)(ii) where the hyperlinks are provided on a nonpartisan basis and are designed to encourage individuals to vote. The proposed hyperlinks on Melothé, Inc.'s Web site appear to be designed to encourage individuals to contribute rather than to vote, and apparently would not be provided on a nonpartisan basis.

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

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On behalf of the Commission,

Donald F. McGahn II
Chairman