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MEMORANDUM

AGENDA ITEM
For Meeting of: 11-13-08

TO: The Commission

FROM: Thomasenia P. Duncan *pch/pe*
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Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: Draft B AO 2008-14

SUBMITTED LATE

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

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:

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 because they
15 would qualify for the press exemption under the Act. Under limited circumstances, solicitations
16 on behalf of featured candidates also may be permissible.

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 qualify for the press exemption and thus would not constitute
21 contributions or expenditures under the Act because Melothe, Inc. would not be owned or
22 controlled by a political party, political committee, or candidate and would be engaging in press
23 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). Under the Act, “The term ‘expenditure’ does not
6 include . . . any news story, commentary, or editorial distributed through the facilities of any
7 broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities
8 are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C.
9 431(9)(B)(i). This exclusion is known as the “press exemption.” The Commission’s regulations
10 further provide that neither a “contribution” nor “expenditure” results from “any cost incurred in
11 covering or carrying a news story, commentary, or editorial by any broadcasting station
12 (including a cable television operator, programmer or producer), Web site, newspaper, magazine,
13 or other periodical publication, including any Internet or electronic publication . . . unless the
14 facility is owned or controlled by any political party, political committee, or candidate[.]” 11
15 CFR 100.73, 100.132.

16 The legislative history of the press exemption indicates that Congress did not intend to
17 “limit or burden in any way the First Amendment freedoms of the press and of association. [The
18 exemption] assures the unfettered right of the newspapers, TV networks, and other media to
19 cover and comment on political campaigns.” H. Rep. No. 93-943, 93d Cong., 2d Sess. at 4
20 (1974). The Supreme Court recently explained, however, that the press exemption “does not
21 afford carte blanche to media companies generally to ignore FECA’s provisions.” *McConnell v.*
22 *FEC*, 540 U.S. 93, 208 (2003).

1 The Commission has not limited the press exemption to traditional news outlets, but
2 rather has applied it to “news stories, commentaries, and editorials *no matter in what medium*
3 *they are published,*” and specifically has extended it to Internet Web sites and entities that
4 distribute their content exclusively on the Internet. *Explanation and Justification for the*
5 *Regulations on Internet Communications (“Internet Rulemaking”),* 71 FR 18589, 18608-09
6 (Apr. 12, 2006); *see also* Advisory Opinions 2005-16 (Fired Up!) and 2000-13 (iNEXTV). The
7 Commission has also recognized “the Internet as a unique and evolving mode of mass
8 communication and political speech that is distinct from other media in a manner that warrants a
9 restrained regulatory approach.” *Internet Rulemaking,* 71 FR at 18589. Here, the requestor has
10 stated that all of its activities will be conducted on the Internet.

11 Thus, under the Act and the Commission’s regulations, unless a press entity’s facilities
12 are owned or controlled by a political party, political committee, or candidate, the costs of
13 distributing any news story, commentary, or editorial distributed through the enumerated media
14 are neither contributions nor expenditures. To determine whether the press exemption applies,
15 the Commission first asks whether the entity engaging in the activity is a press or media entity.
16 *See* Advisory Opinions 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic
17 Richfield). Second, the Commission has applied the two-part analysis presented in *Reader’s*
18 *Digest Association v. FEC,* 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to
19 establish:

20 (A) That the entity is not owned or controlled by a political party, political committee, or
21 candidate; and

22 (B) That the entity is acting as a press entity in conducting the activity at issue (*i.e.,*
23 whether the press entity is acting in its “legitimate press function”).

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

3 **1) Press Entity Status**

4 In determining whether an entity is a press or media entity, the Commission has focused
5 on whether the entity in question is in the business of producing on a regular basis a program that
6 disseminates news stories, commentary, and/or editorials. *See, e.g.*, Advisory Opinions 2007-20
7 (XM Radio) and 2005-19 (The Inside Track). The Commission has concluded in previous
8 advisory opinions that entities disseminating news, commentary, and editorials through a Web
9 site qualify for the press exemption. *See, e.g.*, Advisory Opinions 2005-16 (Fired Up!); 2004-07
10 (MTV); and 2000-13 (iNEXTV). However, not every entity that operates a Web site on the
11 Internet is a press or media entity.

12 In the instant case, Melothé, Inc. represents that, generally, the normal course of its
13 proposed activities will be to provide through its Web site interviews, daily news reports,
14 roundtable discussions, coverage of campaign events, speeches and rallies, “reports from the
15 road,” and commentary related to particular political campaigns. The Commission concludes
16 that most of Melothé’s proposed Internet content falls within the broad ambit of the “normal
17 press-business of covering and commenting on political campaigns.” Advisory Opinion 1989-28
18 (Maine Right to Life Committee) (citing Advisory Opinions 1987-8, 1982-58, 1980-109, and
19 1980-90).

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

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

6
7 Advisory Opinion 2005-16 (Fired Up!) (citing First General Counsel’s Report, MUR 5440 (CBS
8 Broadcasting, Inc.)); Advisory Opinion 2005-19 (Inside Track) (citing same).

9 **2) Ownership Criteria and Legitimate Press Function**

10 **A) Ownership or Control**

11 In the present case, Melothé, Inc. represents that neither the company nor its proposed
12 Web site is owned or controlled by any political party, political committee, or candidate.
13 Moreover, Melothé, Inc. asserts that it will exercise control over all content displayed on its Web
14 site, including interviews, news reports, roundtable discussions, coverage of campaign events,
15 speeches and rallies. The Commission accepts this representation and assumes for the purpose
16 of this opinion that neither Melothé, Inc. nor its proposed Web site is or would be owned or
17 controlled by a political party, political committee, or candidate.

18 **B) Legitimate Press Function**

19 The Commission previously has concluded that press functions include the “provision of
20 news stories, commentary, and editorials.” Advisory Opinion 2005-16 (Fired Up!). Such
21 activities are distinguishable from active participation in core campaign or electioneering
22 functions. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 251 n.6 (recognizing “the
23 distinction of campaign flyers from regular publications”); *FEC v. Reader’s Digest Association,*
24 *Inc.*, 509 F. Supp. 1210, 1214 (S.D. N.Y. 1981) (suggesting that the press exemption would not
25 apply where, “for example, on Election Day a partisan newspaper hired an army of incognito
26 propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate

1 and sent sound trucks through the streets blaring the same denunciations, all in a manner
2 unrelated to the sale of its newspapers”). Moreover, the Commission considers whether the
3 entity’s materials are available to the general public and whether such materials are comparable
4 in form to those ordinarily issued by the entity as a press entity. Advisory Opinion 2005-16
5 (Fired Up!).

6 Melothé, Inc. represents that its proposed Web site will be viewable by the general public
7 and access will be free. Thus, Melothé, Inc. satisfies on its face the public availability prong of
8 the Commission’s press exemption analysis. Further, Melothé, Inc. does not suggest that it will
9 in any way deviate in form from its ordinary planned activities by, for example, distributing
10 special pamphlets, conducting or coordinating get out the vote activities, or organizing rallies for
11 particular candidates, elections, party committees, or other political causes. Accordingly,
12 Melothé, Inc.’s activities (i.e., Internet media content) are legitimate press functions and are
13 comparable in form to those that it ordinarily intends to issue. Nonetheless, without additional
14 information, the Commission is unable to render a definitive opinion on Melothé, Inc.’s
15 proposals to include in its content a “Daily Morning Briefing: a daily 15-minute live segment,
16 ‘briefing’ volunteers and interested viewers on what’s happening in the campaign today” and
17 “recognition of outstanding local volunteers and their activities.” With respect to the volunteer
18 “briefings,” it is unclear from Melothé, Inc.’s request whether this proposal envisions providing
19 coverage to the general public of briefings by campaign staffers or whether Melothé, Inc. itself
20 would prepare and provide the briefings. While the former situation may be analogous to media
21 coverage of a press conference given by campaign officials, the latter situation would be
22 tantamount to a corporation providing the campaign with a volunteer coordinator and, in essence,
23 conducting part of the campaign. Because the provision of personnel to benefit a political

1 campaign is not a legitimate press function, if Melothé, Inc. staffers were to prepare and deliver
2 daily briefings to campaign volunteers, a prohibited in-kind contribution or expenditure would
3 result from the corporation. *See* 2 U.S.C. 441b, 2 U.S.C. 431(8)(A), 2 U.S.C. 431(9)(A), 11
4 CFR 100.52(d), 11 CFR 100.111.

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

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

14 Melothé, Inc.’s request also asks the Commission whether “the proposed sites, as part of
15 news or commentary containing express advocacy, [may] include solicitations on behalf of the
16 featured candidates.” In a supplementary submission, counsel for Melothé, Inc. represents that
17 the company “envisions program hosts, interviewers and news anchors will solicit contributions.
18 It also envisions links to contribution pages appearing on the screen during programming.”
19 Melothé, Inc., however, “would not serve as a conduit, but would instead allow commentators to
20 solicit viewers to send money directly to the campaign.” Without additional information
21 regarding the context of such solicitations, their frequency, or their character, the Commission is
22 unable to render a definitive opinion on this aspect of Melothé, Inc.’s proposal.

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

10 Under the Commission’s previous interpretations of the press exemption nothing
11 prohibits Melothe’s commentators, guests, and hosts to make express advocacy endorsements of
12 certain candidates to viewers of its Web site content and, concurrently, to suggest that viewers
13 support such candidates with their contributions, so long as neither Melothe, Inc. nor its Web site
14 is owned or controlled by any candidate, political party, or political committee. Advisory
15 Opinion 1980-109 (Ruff Times). Accordingly, as with verbal solicitations, where it does not
16 become a regular feature, the intermittent provision of a hyperlink directing a media Web site’s
17 visitors to a campaign’s contribution page, consistent with the reasoning set forth in Advisory
18 Opinion 1980-109, would not be prohibited. However, providing a mechanism for raising funds
19 for candidates is not a typical press function, so adding a contribution page or providing a
20 permanent hyperlink to the appropriate Web site addresses where viewers may make
21 contributions would not be covered by the press exemption.

22 Moreover, if Melothe, Inc. envisions unpaid solicitations for particular candidates to
23 become a regular feature of its content, then such activity would reach beyond the scope of

1 Advisory Opinion 1980-109 and would be tantamount to a corporation that makes a prohibited
2 independent expenditure or an in-kind contribution in the form of providing the campaign with
3 fundraising staff. *See* 2 U.S.C. 441b, 2 U.S.C. 431(8)(A), 2 U.S.C. 431(9)(A), 11 CFR 100.16,
4 11 CFR 100.52(d), 11 CFR 100.111. However characterized, such activities would not
5 constitute a press function, and once Melothé, Inc. exceeds the parameters of the press
6 exemption, it also becomes subject to the prohibitions on corporate facilitation of contributions.
7 *See* 11 CFR 114.2(f).

8 This response constitutes an advisory opinion concerning the application of the Act and
9 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
10 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or
11 assumptions presented, and such facts or assumptions are material to a conclusion presented in
12 this advisory opinion, then the requester may not rely on that conclusion as support for its
13 proposed activity. Any person involved in any specific transaction or activity which is
14 indistinguishable in all its material respects from the transaction or activity with respect to which
15 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).
16 Please note the analysis or conclusions in this advisory opinion may be affected by subsequent
17 developments in the law, including, but not limited to, statutes, regulations, advisory opinions
18 and case law. The cited advisory opinions are available on the Commission's Web site at
19 <http://saos.nictusa.com/saos/searchao>.

20 On behalf of the Commission,
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22

23
24 Donald F. McGahn II
25 Chairman