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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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October 26, 2007

AGENDA ITEM

For Meeting of: 10-30-07

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD (RCS)*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Ron Katwan *REK*
Assistant General Counsel

Robert M. Knop *REK & RMK*
Attorney

Subject: Draft AO 2007-20

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for, October 30, 2007.

Attachment

1 ADVISORY OPINION 2007-20

2

3 John C. Keeney, Jr., Esq.
4 Hogan & Hartson LLP
5 Columbia Square
6 555 Thirteenth Street, N.W.
7 Washington, D.C. 20004

DRAFT

8

9 Dear Mr. Keeney:

10 We are responding to your advisory opinion request on behalf of XM Satellite
11 Radio Inc. ("XM") concerning the application of the Federal Election Campaign Act of
12 1971, as amended (the "Act"), and Commission regulations to the provision of free air
13 time to presidential candidates during the 2008 election cycle.

14 The Commission concludes that XM's provision of free airtime to presidential
15 candidates is exempt from the Act's prohibitions on corporate contributions,
16 expenditures, and electioneering communications under the press exemption. The
17 Commission also concludes that communications supplied by participating presidential
18 candidates must carry the disclaimers required by the Act and Commission regulations.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 September 5, 2007, a telephone conversation on September 7, 2007, and your electronic
22 mail message received on September 10, 2007.

23 XM is a satellite radio company with more than 8 million subscribers. For a
24 monthly fee, XM's subscribers can listen to more than 170 digital audio channels. XM is
25 launching a national radio channel dedicated exclusively to the 2008 presidential election.
26 This 24-hour, commercial-free channel, created in association with C-SPAN and other
27 media outlets, will be called "POTUS '08." The channel's name derives from the

1 acronym frequently used for the President of the United States. POTUS '08 will be
2 available to everyone with an XM radio, regardless of whether they are also XM
3 subscribers.

4 POTUS '08 will feature news updates, candidate interviews, complete speeches,
5 debate coverage, latest polling results, fundraising status, and live call-in shows. Non-
6 traditional media outlets, such as bloggers and podcasters, will also provide content for
7 the channel. POTUS '08 will also draw from C-SPAN's political archive to re-air
8 archival audio of historic moments from past political campaigns.

9 As a separate and distinct part of POTUS '08, the channel will also provide free
10 airtime for presidential candidates or their representatives to speak to voters ("Candidate
11 Supplied Content"). Participating presidential candidates will have full editorial control
12 over the content of the communications aired on POTUS '08 and the candidates' views
13 will be broadcast to the audience in an unfiltered manner. Candidate Supplied Content
14 will, however, be subject to certain access guidelines prescribed by XM. For example,
15 XM will not air any advertisements that have been carried on a for-pay basis on any
16 medium (including a commercial for that candidate). In addition, XM will reserve the
17 right to reject any Candidate Supplied Content that exceeds the established time limit or
18 contains profanity.¹

19 This free airtime for Candidate Supplied Content will be offered to all presidential
20 candidates who have qualified for the ballot in ten or more States and meet other criteria
21 set forth in XM's access guidelines. Initially, XM plans to devote one hour per day to

¹ Additional access guidelines concerning Candidate Supplied Content are contained in an attachment to the Requestor's advisory opinion request, which is available on the Commission's website at: <http://saos.nictusa.com/saos/searchao>.

1 Candidate Supplied Content (the “Candidate Supplied Content Block”). Each qualified
2 presidential candidate will be allowed to supply content of up to 5 minutes per day for
3 broadcasting during the Candidate Supplied Content Block. Over time, both the overall
4 amount of time devoted to the Candidate Supplied Content Block and the amount of time
5 offered to qualified presidential candidates for Candidate Supplied Content may change,
6 depending on factors such as the number of qualified presidential candidates.

7 XM will maintain a list of all qualified presidential candidates who have
8 expressed an interest in taking advantage of this free airtime, alphabetized by surname.
9 XM will carry all of the Candidate Supplied Content received for each day’s Candidate
10 Supplied Content Block based on the alphabetized list, rotating the first candidate in the
11 Content Supplied Content Block each day (starting the first day with the first candidate in
12 the alphabet, the second day with the second candidate in the alphabet, etc.).

13 XM’s broadcasts on the POTUS ’08 channel are subject to regulation by the
14 Federal Communications Commission. You represent that XM’s broadcasts will be in
15 full compliance with both the “reasonable access” and “equal opportunities” provisions
16 of the Communications Act. 47 U.S.C. 312(a)(7) and 315(a). *See also In re*
17 *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the*
18 *2310-2360 MHz Frequency Band*, 12 F.C.C.R. 5754, ¶ 92 (1997) (requiring satellite
19 radio providers to comply with the same political broadcasting rules as terrestrial
20 broadcasters).

21 ***Questions Presented***

22 1. *Are XM’s satellite radio broadcasts on the POTUS ’08 channel, including*
23 *Candidate Supplied Content, exempt from the Act’s prohibitions on*

1 *corporate contributions, expenditures, and electioneering communications*
2 *under the press exemption?*

3 2. *Must communications supplied to XM by participating candidates for*
4 *airing on the POTUS '08 channel carry the disclaimers required by the*
5 *Act and Commission regulations?*

6 ***Legal Analysis and Conclusions***

7 *Question 1: Are XM's satellite radio broadcasts on the POTUS '08 channel, including*
8 *Candidate Supplied Content, exempt from the Act's prohibitions on corporate*
9 *contributions, expenditures, and electioneering communications under the press*
10 *exemption?*

11 Yes, XM's satellite radio broadcasts on the POTUS '08 channel, including the
12 broadcast of Candidate Supplied Content, are exempt from the Act's prohibitions on
13 corporate contributions, expenditures, and electioneering communications under the press
14 exemption.

15 **I. Contributions and Expenditures Press Exemption**

16 The Act prohibits "any corporation whatever" from making any contribution or
17 expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act and
18 Commission regulations define the terms "contribution" and "expenditure" to include any
19 gift of money or "anything of value" for the purpose of influencing a Federal election, but
20 exclude any cost "incurred in covering or carrying a news story, commentary, or editorial
21 by any broadcasting station (including a cable television operator, programmer, or
22 producer), . . . unless the facility is owned or controlled by any political party, political
23 committee, or candidate." 2 U.S.C. 431(8)(A)(i), (9)(A)(i), and (9)(B)(i); 11 CFR

1 100.52(a), 100.73, 100.111(a), and 100.132. The Act and Commission regulations also
2 include a similar exemption at 2 U.S.C. 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2) with
3 respect to electioneering communications, which would otherwise be prohibited by a
4 corporation. This exclusion is known as the “press exemption” or “media exemption.”

5 The Commission has applied a two-step analysis to determine whether the press
6 exemption applies. First, the Commission asks whether the entity engaging in the
7 activity is a press entity. *See, e.g.*, Advisory Opinions 2005-19 (The Inside Track); 2005-
8 16 (Fired Up!), and 2004-07 (MTV). The analysis of whether an entity is a press entity
9 does not necessarily turn on the presence or absence of any one particular fact. *See*
10 Advisory Opinion 2005-19 (The Inside Track). Second, in determining the scope of the
11 exemption, the Commission considers: (1) whether the press entity is owned or controlled
12 by a political party, political committee, or candidate; and (2) whether the press entity is
13 acting as a press entity in conducting the activity at issue (*i.e.*, whether the entity is acting
14 in its “legitimate press function”). *See Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210,
15 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publ’g*, 517 F. Supp. 1308, 1312-13 (D.D.C.
16 1981); Advisory Opinions 2005-19 (The Inside Track), 2005-16 (Fired Up!), and 2004-
17 07 (MTV).

18 **1. Press Entity Status**

19 XM qualifies as a press entity. In determining whether an entity is a press entity,
20 the Commission has focused on whether the entity in question is in the business of
21 producing on a regular basis a program that disseminates news stories, commentary,
22 and/or editorials. *See* Advisory Opinion 2005-19 (The Inside Track). XM’s POTUS ’08
23 channel will feature news updates, candidate interviews, complete speeches, debate

1 coverage, latest polling results, fundraising status, and live call-in shows. It will also
2 incorporate content provided by C-SPAN and non-traditional media outlets, such as
3 bloggers and podcasters. Although the press exemption does not explicitly include
4 satellite broadcasters, the Commission views such broadcasters as sufficiently similar to
5 traditional radio broadcasters and cable television operators to conclude that satellite
6 broadcasters are eligible for the exemption. Because XM is in the business of producing
7 on a regular basis a radio program that disseminates news stories, commentary, and/or
8 editorials, the Commission concludes that it is a press entity.

9 **2. Ownership Criterion and Legitimate Press Function**

10 Neither XM nor POTUS '08 is owned or controlled by any political party,
11 political committee, or candidate. Furthermore, because the Candidate Supplied Content
12 is a form of "guest commentary," the provision of free airtime to qualified presidential
13 candidates constitutes "covering or carrying a news story, commentary, or editorial." *See*
14 *Advisory Opinions 2005-19 (The Inside Track) and 1998-17 (Daniels Cablevision)*.
15 Accordingly, XM's POTUS '08 channel will be acting as a press entity when it
16 broadcasts Candidate Supplied Content.²

17 **3. Conclusion**

18 Because XM's satellite radio broadcasts on the POTUS '08 channel, including the
19 broadcast of Candidate Supplied Content, satisfy the criteria outlined above, the
20 Commission concludes that those broadcasts are exempt from the Act's prohibition on
21 corporate contributions and expenditures under the press exemption. Similarly, none of

² The Commission notes that an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in 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 for Federal office. *See Advisory Opinions 2005-19 (The Inside Track) and 2005-16 (Fired Up!)*.

1 XM's POTUS '08 satellite radio broadcasts will constitute an electioneering
2 communication. 2 U.S.C. 434(f)(3)(B)(i); 11 CFR 100.29(c)(2).

3 *Question 2: Must communications supplied to XM by participating candidates for airing*
4 *on the POTUS '08 channel carry the disclaimers required by the Act and Commission*
5 *regulations?*

6 Yes, communications supplied to XM by participating candidates for airing on the
7 POTUS '08 channel must carry the disclaimers required by the Act and Commission
8 regulations. *See* 2 U.S.C. 441d and 11 CFR 110.11.

9 All public communications made by a political committee must include certain
10 disclaimers. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(a)(1), 110.11(b)(1). *See also*
11 *Advisory Opinion 2005-18 (Reyes)*. The costs for producing Candidate Supplied Content
12 will be paid for by the participating presidential candidate's authorized committee. XM
13 will then broadcast the Candidate Supplied Content, without any editorial control over its
14 content. Under these circumstances, XM's broadcast of the Candidate Supplied Content
15 constitutes a "public communication[.] . . . made by a political committee." 11 CFR
16 110.11(a)(1). Therefore, Candidate Supplied Content must contain the appropriate
17 disclaimers.

18 Specifically, Candidate Supplied Content must contain a disclaimer that clearly
19 states that the communication was paid for by the candidate's authorized committee. *See*
20 2 U.S.C. 441d(a)(1); 11 CFR 110.11(b)(1). The disclaimer must be presented in a clear
21 and conspicuous manner, to give the listener adequate notice of the identity of the
22 political committee that paid for the communication. 11 CFR 110.11(c)(1). Examples of
23 disclaimers that would satisfy this requirement include: (1) "Paid for by X for

1 President”; (2) “Paid for by X for President and time provided free by XM Radio”; or (3)
2 “Time for this message was provided free by XM Radio to help inform the public about
3 the current Presidential campaign and other costs were paid for by X for President.” *See*
4 *Advisory Opinion 1998-17 (Daniels Cablevision).*”

5 In addition, because the Candidate Supplied Content will be a radio
6 communication authorized by a candidate, it must also include an audio statement by the
7 candidate that identifies the candidate and states that he or she has approved the
8 communication. *See 2 U.S.C. 441d(d)(1)(A); 11 CFR 110.11(c)(3)(i).* An example of a
9 statement that would satisfy this requirement is: “I am Candidate X. I am running for
10 President and I approved this message.” *See Advisory Opinion 2005-18 (Reyes).*

11 The Commission expresses no opinion regarding the applicability of the
12 Communications Act of 1934, or of regulations promulgated by the Federal
13 Communications Commission, to the proposed activities because those questions are
14 outside the Commission’s jurisdiction.

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

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. All cited advisory opinions are available
3 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

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Sincerely,

Robert D. Lenhard
Chairman