



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 30, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2011-11

Trevor Potter, Esq.
Joseph Birkenstock, Esq.
Matthew T. Sanderson, Esq.
Caplin & Drysdale Chtd.
One Thomas Circle, NW
Suite 1100
Washington, DC 20005

Dear Messrs. Potter, Birkenstock, and Sanderson:

We are responding to your advisory opinion request on behalf of Mr. Stephen Colbert concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to Mr. Colbert's plans to establish and operate a political committee (the "Committee"). Mr. Colbert wishes to establish the Committee to solicit and accept contributions in unlimited amounts from the general public for the purpose of making independent expenditures. He also asks whether the press exemption would cover costs incurred by the U.S. subsidiaries of Viacom, Inc. and related entities ("Viacom") for the following activities, or whether these costs must be disclosed as contributions to the Committee:

- covering the Committee and its activities on *The Colbert Report* (the "Show");
- producing independent expenditure advertisements for the Committee; and
- administering the Committee.

The Commission concludes that Mr. Colbert may establish and operate the Committee, which plans to solicit and accept contributions in unlimited amounts for the purpose of making independent expenditures from individuals, political committees, labor organizations, and corporations (but not foreign nationals, Federal contractors, national banks, or corporations organized by authority of any law of Congress). The Commission further concludes that while some of Viacom's activities would fall within the press exemption, others would not. The Show's coverage of the Committee, and its

production of independent expenditure advertisements used solely in the Show's coverage of the Committee, would fall within the press exemption. Thus, costs incurred by Viacom in connection with these activities would not need to be disclosed by the Committee as in-kind contributions. However, Viacom's production of independent expenditure advertisements provided to the Committee to distribute outside of the Show (including airing as paid advertisements on other shows and networks or as content for the Committee's website), and Viacom's administration and operation of the Committee, would not fall within the press exemption, because these activities are not legitimate press functions. Consequently, all costs incurred by Viacom for these activities would need to be disclosed by the Committee as in-kind contributions to the Committee.

Background

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

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

You state that Mr. Colbert's activities off the set have also served as material for the Show. For example, in 2008, the Show used Mr. Colbert's attempt to run in the South Carolina Democratic presidential primary election as a vehicle to discuss and provide commentary on campaign-related issues, such as ballot access rules and paperwork. Similarly, Mr. Colbert co-hosted the "Rally to Restore Sanity and/or Fear" in October 2010, which the Show covered extensively to provide commentary on political discourse in the United States. Other examples of the Show's coverage of Mr. Colbert's off-set activities include: his congressional testimony on immigration, his U.S.O. Tour to Baghdad, his public dispute with the Associated Press about the word "truthiness," and his sponsorship of the U.S. Speedskating Team. In all instances, these activities have been funded by Viacom.

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

Mr. Colbert now plans to establish the Committee, the activities of which will be covered on the Show and used by Mr. Colbert as an on-air premise for discussing campaign finance rules and other aspects of American politics. Neither Viacom nor its

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

corporate management will control or direct the Committee's activities. The Show's production, current format, and distribution will not be altered in covering or commenting on the Committee.

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

You state that the Committee will have its own website, which will discuss political events, offer opinions on political matters, and solicit contributions. The Committee will pay for the costs associated with this website, as well as the Committee's solicitation costs and some of its other expenses, including, for example, the cost of Mr. Colbert's Committee-related travel and Committee mementos. Much of the cost of operating the Committee, however, including costs to produce some of its independent expenditure advertisements and to prepare and file the Committee's reports with the Commission, will be incurred by Viacom either directly, or indirectly through payments to its vendors.

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

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

You state that independent expenditure advertisements created by the Show's staff will be aired on the Show (or posted on the Show's website) as part of the Show's coverage of the Committee. Some of these independent expenditure advertisements will be provided to the Committee to air as paid advertisements on other shows and networks. All of the independent expenditure advertisements will remain the intellectual property of Viacom.

You state that the Show's production resources and staff will also be used to prepare and file the Committee's reports with the Commission.

Questions Presented

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

Legal Analysis and Conclusions

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

Yes, Mr. Colbert may form a political committee that makes only independent expenditures² and does not make contributions. The Committee may accept unlimited contributions from individuals, political committees, corporations, and labor organizations but not from foreign nationals, Federal contractors, national banks, or corporations organized by authority of any law of Congress.

A political committee that makes only independent expenditures may solicit and accept unlimited contributions from individuals, corporations, labor organizations, and other political committees, but not from foreign nationals, Federal contractors, national banks, or corporations organized by authority of any law of Congress. *See* Advisory Opinion 2010-11 (Commonsense Ten) (corporations and labor organizations may contribute without limit to political committees that make only independent expenditures); *see also Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (corporate-funded independent expenditures are constitutionally protected speech); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*) (individuals may contribute without limit to political committees that make only independent expenditures). The political committee must register with the Commission³ and comply with all applicable reporting rules. *See SpeechNow*, 599 F.3d at 698.

² The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents. 2 U.S.C. 431(17); 11 CFR 100.16.

In Advisory Opinion 2010-11 (Commonsense Ten), the Commission concluded that a nonconnected political committee that made only independent expenditures could solicit and receive unlimited contributions from individuals, political committees, corporations, and labor organizations. Like Commonsense Ten, the Committee plans to register as a nonconnected political committee, plans to make only independent expenditures, and will not make contributions or coordinated communications. You state that it will comply with all applicable requirements of the Act and Commission regulations, including disclaimer and reporting rules.

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

Question 2. If the Committee is discussed on the Show, must airtime and related costs incurred by Viacom be reported as in-kind contributions,⁴ or will these costs be exempt from reporting requirements under the press exemption?

If the Committee is discussed on the Show, airtime and related costs incurred by Viacom for its coverage of the Committee on the Show will be exempt from reporting requirements under the press exemption. Costs incurred by Viacom to produce independent expenditure advertisements aired solely on the Show will also be exempt from reporting requirements under the press exemption. If Viacom produces these independent expenditure advertisements for the Show and also provides these independent expenditure advertisements to the Committee to distribute outside of the Show (including airing as paid advertisements on other shows and networks or as content for the Committee's website), then the costs of these independent expenditure advertisements will be in-kind contributions by Viacom to the Committee and must be reported as such. If Viacom produces independent expenditure advertisements directly for the Committee for distribution outside the show, the costs of these advertisements will

³ 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.

⁴ Nothing in the request indicates that an in-kind contribution from Viacom to the Committee would constitute a direct or indirect contribution or donation by a foreign national under 2 U.S.C. 441e.

also be reportable in-kind contributions by Viacom. Finally, any costs incurred by Viacom to administer the Committee will be reportable in-kind contributions.⁵

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

Under the Act, “[t]he term ‘expenditure’ does not include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. 431(9)(B)(i). Commission regulations further provide that neither a “contribution” nor an “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) . . . unless the facility is owned or controlled by any political party, political committee, or candidate[.]” These exclusions are known as the “press exemption.” 11 CFR 100.73 and 100.132. Costs coming within this exemption are not contributions or expenditures and are not subject to the reporting requirements of the Act or Commission regulations.

The legislative history of the press exemption indicates that Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.” H.R. REP. NO. 93-1239, at 4 (1974).

The Commission has historically conducted a two-step analysis to determine whether the press exemption applies. First, the Commission asks whether the entity engaging in the activity is a press entity. *See, e.g.,* Advisory Opinions 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission applies the two-part analysis presented in *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to determine:

⁵ As indicated above, Mr. Colbert, who plans to establish the Committee, is and will remain principally responsible for the formulation of the Show’s content. The Commission does not address how, if at all, the analysis would be different in the absence of this relationship.

Additionally, the Commission assumes for the purposes of this advisory opinion that all costs incurred by Hello Doggie to produce the Show or administer the Committee are attributable to Viacom. Therefore, the Commission need not determine whether Hello Doggie would be making in-kind contributions to the Committee.

(A) Whether the entity is owned or controlled by a political party, political committee, or candidate; and

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

See also FEC v. Phillips Publ’g, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV).

1) Is Viacom a Press Entity?

The Commission has previously determined that Viacom is a press entity. *See* Advisory Opinion 2004-07 (MTV). Nothing in the facts presented by Mr. Colbert or otherwise available to the Commission would cause the Commission to reconsider this prior determination at this time.

2) Ownership Criteria and Legitimate Press Function

A) Is Viacom Owned or Controlled by a Political Party, Political Committee, or Candidate?

The Commission has previously determined that Viacom is not owned or controlled by a political party, political committee, or candidate. *See* Advisory Opinion 2004-07 (MTV). Nothing in the facts presented by Mr. Colbert or otherwise available to the Commission causes the Commission to reconsider this prior determination at this time.

B) Is Viacom Acting in its Legitimate Press Function?

The Commission considers two factors in determining whether a press entity is acting in its legitimate press function. They are (1) whether the press entity’s materials are available to the general public, and (2) whether the materials are comparable in form to those ordinarily issued by the press entity. Advisory Opinions 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life (“MCFL”)*, 479 U.S. 238, 251 (1986)) and 2000-13 (iNEXTV) (concluding that a website was “viewable by the general public and akin to a periodical or news program distributed to the general public”).

In *MCFL*, the Supreme Court held that a “Special Edition” newsletter did not qualify for the press exemption because it differed in certain “considerations of form” from the press entity’s regular newsletter. *MCFL*, 479 U.S. at 250-51. Among those “considerations of form” enumerated by the Supreme Court were the fact that the Special Edition was not published through the facilities of the press entity’s regular newsletter but by a staff that had prepared no previous or subsequent newsletters, and that the Special Edition was distributed to a group far larger than the regular newsletter’s audience. *Id.*

In looking at these two factors, the Commission is also mindful that a press entity's press function is "distinguishable from active participation in core campaign or electioneering functions." Advisory Opinion 2008-14 (Melothé, Inc.). While the press exemption covers press activity, it does not cover campaign activity, even if the campaign activity is conducted by a press entity. *See MCFL*, 479 U.S. at 251 (recognizing "the distinction of campaign flyers from regular publications"); *Reader's Digest Ass'n*, 509 F. Supp. at 1214 (the press exemption would not apply where, "for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers"); *see also McConnell v. FEC*, 540 U.S. 93, 208 (2003) (commenting that the press exemption "does not afford *carte blanche* to media companies generally to ignore FECA's provisions").

As described further below, the Show's coverage of the Committee's activities is part of Viacom's legitimate press function. The other activities proposed by Mr. Colbert, however, would result in Viacom engaging in "active participation in core campaign or electioneering functions" and thus do not constitute Viacom acting in its "legitimate press function."

1. Costs to Cover the Committee on the Show

The Commission concludes that Viacom's coverage of the Committee on the Show, and its production of independent expenditure advertisements used solely in the Show's coverage of the Committee, are part of Viacom's legitimate press function. Thus, the costs of those activities need not be reported by the Committee as in-kind contributions.

Coverage of the Committee on the Show includes producing and airing segments of the Show that discuss the Committee's operations, the Committee's support for or opposition to Federal candidates, the Committee's website, audience participation opportunities, and the Committee's independent expenditure advertisements. These segments will consist of news stories, commentary, and editorials in the context of providing a continuing premise for the Show to cover and offer commentary on campaign finance laws and other aspects of American politics.

Under *MCFL*'s "considerations of form" analysis, the production and distribution of segments of the Show featuring discussions of the Committee and the Committee's independent expenditure advertisements will be comparable in form to previously produced segments appearing on the Show. For example, these segments will be produced through the regular production facilities of the Show. Thus, the staff that produces these segments of the Show will be the same staff that produces other segments of the Show that do not discuss the Committee. These segments will also be subject to the same review by Viacom as other segments of the Show. Further, these segments of the Show will be distributed on the same cable television channel, Comedy Central, and during the same time slot, and their content will be made available on the same website,

as other segments of the Show. The format of the Show, which currently “discusses political actors, issues, and news through on-air monologues and guest interviews,” will not be altered. Therefore, Viacom will be acting within its legitimate press function when it features on the Show discussions of the Committee, and costs incurred by Viacom will not be in-kind contributions from Viacom to the Committee.⁶

2. Costs Related to Independent Expenditure Advertisements Provided to the Committee to Distribute Outside of the Show

The Commission concludes that Viacom would not be acting within its legitimate press function by providing independent expenditure advertisements to the Show and also providing the independent expenditure advertisements to the Committee, or providing independent expenditure advertisements produced directly for the Committee to distribute outside of the Show (including airing as paid advertisements on other shows and networks or as content for its website). Thus, costs incurred by Viacom for this activity would need to be reported by the Committee as in-kind contributions from Viacom to the Committee.

As noted above, the press exemption covers press activity, not campaign activity by a press entity. *See MCFL*, 479 U.S. at 251; *Reader’s Digest Ass’n*, 509 F. Supp. at 1214. Here, Viacom’s provision of independent expenditure advertisements to the Committee would constitute “active participation [by Viacom] in core campaign or electioneering functions” outside the scope of the press exemption. Advisory Opinion 2008-14 (Melothe, Inc.). This result would stretch the boundaries of the press exemption far beyond those contemplated by Congress and the Supreme Court. *See, e.g., MCFL*, 479 U.S. at 251; *Reader’s Digest Ass’n*, 509 F. Supp. at 1214; *see also McConnell*, 540 U.S. at 208. Thus, based on the facts of this request, independent expenditure advertisements provided to the Committee to distribute outside of the Show would be in-kind contributions to the Committee.⁷

3. Committee’s Administration Costs

The Commission similarly concludes that the administration of the Committee by Viacom would constitute “active participation [by Viacom] in core campaign or electioneering functions” and would therefore not be part of Viacom’s legitimate press function. Thus, costs incurred by Viacom to administer the Committee would need to be reported by the Committee as in-kind contributions by Viacom.

⁶ A news story, commentary, or editorial that lacks objectivity or is satirical 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). Even if the materials produced and aired by Viacom contain express advocacy, Viacom’s coverage of them on the Show will be covered by the press exemption.

⁷ *See* footnote 5 above.

There is no basis on which to conclude that the administration of a political committee is part of the “legitimate press function” of a press entity. Accordingly, such activities are beyond the scope of the “press exemption” and must be reported by the Committee as in-kind contributions received from Viacom.

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

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

As discussed above, a political committee that makes only independent expenditures may solicit and accept unlimited contributions from individuals, corporations, labor organizations, and other political committees (but not from foreign nationals, Federal contractors, national banks, or corporations organized by act of Congress). *See* Advisory Opinion 2010-11 (Commonsense Ten); *see also* Advisory Opinion 2010-09 (Club for Growth). The Committee’s acceptance of contributions from Viacom would thus not bar it from soliciting and accepting unlimited contributions from other permissible sources.

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

On behalf of the Commission,

(signed)
Cynthia L. Bauerly
Chair