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November 13, 2008

AGENDA ITEM

For Meeting of: 11-13-08

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *pch for*
General Counsel

Rosemary C. Smith *RCS by PMK*
Associate General Counsel

Robert M. Knop *PMK*
Assistant General Counsel

Neven F. Stipanovic *N.S.*
Attorney

Subject: Draft C 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 C

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 Melothé, Inc.’s proposed activity is not encompassed by
14 the press exemption. The facts presented indicate that Melothé, Inc. proposes to engage in
15 activities that are not within the legitimate press function of a media entity.

16 ***Background***

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

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

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

1 campaign's headquarters, carrying news coverage, commentaries, features, and editorials. It
2 would feature both live and prerecorded programming. The Internet TV site would be viewable
3 by the general public and access would be free. Melothé, Inc. intends to fund the venture with
4 capital from the corporation¹ and it hopes to commercialize the Web site by, for example,
5 generating advertising revenues and selling merchandise. Through this venture, Melothé, Inc.
6 hopes to become a media entity.

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

14 The campaign-TV Web site may include the following programming:

- 15 • Daily morning briefings for volunteers of the candidate's campaign and other interested
- 16 viewers.
- 17 • Interviews with campaign staff members.
- 18 • Daily news reports featuring campaign news.
- 19 • Round-table discussions on campaign news and issues.
- 20 • Coverage of campaign events.
- 21 • Broadcasts of full campaign speeches, rallies or other events.

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

1 • “Reports from the road,” including recognition of outstanding “local volunteers” and
2 their activities.

3 • Pro-Democratic/Anti-Republican commentaries.

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

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

12 ***Questions Presented***

13 1. *Does Melothe Inc. 's proposed Internet campaign-TV station qualify for the press*
14 *exemption?*

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

18 ***Legal Analysis and Conclusions***

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

21 No, the facts presented indicate that Melothe, Inc. ’s proposed activities would not fall
22 under the press exemption because those activities would not be legitimate press functions.

1

2 **I. Press Exemption**

3 The Act prohibits “any corporation whatever” from making any contribution or
4 expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act and Commission
5 regulations define the terms “contribution” and “expenditure” to include any gift of money or
6 “anything of value” for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)
7 and (9)(A); 11 CFR 100.52(a) and 100.111(a). An exception, however, applies for “any cost
8 incurred in covering or carrying a news story, commentary, or editorial by any broadcasting
9 station (including a cable television operator, programmer or producer), newspaper, magazine, or
10 other periodical publication . . . unless the facility is owned or controlled by any political party,
11 political committee, or candidate[.]” 11 CFR 100.73, 100.132; 2 U.S.C. 431(9)(B)(i). This
12 exclusion is known as the “press exemption.”

13 The Commission has concluded that the press exemption applies to media entities that
14 cover or carry news stories, commentary, and editorials on the Internet, even if those entities
15 only have an Internet presence. *See Explanation and Justification to the Internet*
16 *Communications*, 71 FR 18589, 18608-09 (Apr. 12, 2006); *see also* Advisory Opinions 2005-16
17 (Fired Up!); and 2000-13 (iNEXTV). The Commission’s regulations include “Web site” and
18 “any Internet publication” in the press exemption. 11 CFR 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 or 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.R.Rep. No. 93-1239, p.4 (1974). The press

1 exemption, however, is “narrow” and “does not afford carte blanche to media companies
2 generally to ignore FECA’s provisions.” *McConnell v. FEC*, 540 U.S. 93, 208 (2003).

3 Not every corporation is a media company. The Supreme Court stated that “media
4 corporations differ significantly from other corporations in that their resources are devoted to the
5 collection of information and its dissemination to the public,” and “[a] valid distinction thus
6 exists between corporations that are part of the media industry and other corporations that are not
7 involved in the regular business of imparting news to the public.” *Austin v. Michigan Chamber
8 of Commerce*, 494 U.S. 652, 667-68 (1990). In *Federal Election Commission v. Massachusetts
9 Citizens for Life (“MCFL”)*, 479 U.S. 238 (1986), the Supreme Court rejected an argument that
10 corporate publications are automatically exempt from the statutory prohibition on corporate and
11 labor organization expenditures in connection with Federal elections under the press exemption.
12 The Supreme Court concluded that “a contrary position would open the door for those
13 corporations and unions with in-house publications to engage in unlimited spending directly
14 from their treasuries to distribute campaign materials to the general public, thereby eviscerating
15 [the statutory] prohibition.” *MCFL*, 479 U.S. at 251.

16 To determine whether the press exemption applies, the Commission first asks whether the
17 entity engaging in the activity is a press entity. *See e.g.*, Advisory Opinions 2007-20 (XM
18 Radio); 2005-19 (Inside Track); 2005-16 (Fired Up!); and 2004-07 (MTV). The Commission
19 then asks whether the entity satisfies the two-part test presented in *Reader’s Digest Association
20 v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981): (1) Whether the press entity is owned or
21 controlled by a political party, political committee, or candidate; and (2) Whether the press entity
22 is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is
23 acting in its “legitimate press function”). *See also FEC v. Phillips Publishing*, 517 F. Supp.

1 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio); 2005-19 (Inside Track);
2 2005-16 (Fired Up!); 2004-07 (MTV).

3 By its own admission, Melothé, Inc. is not currently a press entity, although the request
4 indicates it would like to become one. The Commission concludes that Melothé, Inc.'s proposed
5 activities do not qualify it as a press entity and these activities are not within the scope of a
6 legitimate press function under the *Reader's Digest* test.

7 **A. Ownership or Control**

8 Melothé, Inc. is not owned by any candidate. The Commission, however, notes that the
9 facts discussed below indicate that Melothé, Inc. may be effectively controlled by one or more
10 candidates. Melothé, Inc.'s proposed activities would include, in essence, organizing a
11 campaign's volunteer effort, serving as a campaign's media spokesman, and running a
12 significant campaign fundraising operation. These core campaign functions could not be done
13 without significant involvement by, and direction from, campaign officials. Nevertheless, the
14 Commission does not definitively conclude here whether Melothé, Inc. is effectively controlled
15 by the candidate because, in any case, the press exemption would not apply under the second part
16 of the *Reader's Digest* test.

17

18 **B. Legitimate Press Function**

19 The Commission concludes that Melothé, Inc.'s proposed activities would not be
20 legitimate press functions.

21 Melothé, Inc. acknowledges that currently it is not a media entity, but rather a for-profit
22 corporation in the business of developing technology and providing technical capabilities to
23 Internet Web sites. As the Supreme Court indicated, a valid distinction exists between media

1 entities and other companies not engaged in the regular news business. *Austin v. Michigan*
2 *Chamber of Commerce*, 494 U.S. 652, 667-68 (1990). Although Melothé, Inc. hopes, through
3 this venture, to become a media entity, the facts indicate that Melothé, Inc. is not, and would not
4 be, engaged in the normal business activity of a press entity.

5 In *Reader's Digest*, the court considered whether the press exemption applied to a
6 magazine publisher disseminating a video tape to television stations. The court explained that "if
7 [the magazine] was acting in its magazine publishing function, if, for example, the dissemination
8 of the tape to television stations was to publicize the issue of the magazine containing the . . .
9 article, then it would seem that the exemption is applicable." *Reader's Digest*, 509 F. Supp. at
10 1214-15. But the press exemption would not protect the publisher if the dissemination of the
11 tape was unrelated to the publisher's press function. *Id.* In contrast, in *Phillips Publishing*, a
12 mailing soliciting subscriptions to a biweekly newsletter contained a one-page combination
13 subscription form and "opinion poll" that referred to a clearly identified candidate for Federal
14 office. The court concluded that, because "the purpose of the solicitation letter was to publicize
15 [the newsletter] and obtain new subscribers, both of which are normal, legitimate press functions,
16 the press exemption applie[d]." *Phillips Publishing*, 517 F. Supp. At 1313.

17 The Supreme Court has indicated that "considerations of form," such as how a
18 publication or program was produced and to whom it was disseminated, are essential in this
19 analysis because "it is precisely such factors that in combination permit the distinction of
20 campaign flyers from regular publications." *MCFL*, 479 U.S. 238 at 251. In *MCFL*, the Court
21 concluded that the publication of a "Special Edition" of a newsletter was not the "normal
22 business activity" of the press entity because its form was not comparable to a single issue of the
23 regular newsletter. *Id.*

1 Melothé, Inc. states that it would broadcast news, commentary, and editorials on its
2 chosen candidate through its Internet site. The Commission has concluded in previous advisory
3 opinions that entities disseminating news, commentary, and editorials through a Web site qualify
4 for the press exemption. *See, e.g.*, Advisory Opinions 2005-16 (Fired Up!); 2004-07 (MTV);
5 and 2000-13 (iNEXTV). However, not every dissemination through a Web site falls within the
6 press exemption, just as not every published newsletter is covered by the exemption. *See, e.g.*,
7 *MCFL*, 479 U.S. at 251.

8 In Advisory Opinion 2000-13 (iNEXTV), the Commission concluded that iNEXTV, in
9 broadcasting video coverage of the Republican and Democratic national conventions over the
10 Internet, would be a press entity both as to its “purpose and function.” In Advisory Opinion
11 2004-07 (MTV), the Commission found that providing election-related educational materials
12 through MTV’s web site was covered by the press exemption, but that providing such materials
13 at community events was not. The Commission reasoned that dissemination of information at
14 community events was not an activity typically performed by a press entity. *See also* Advisory
15 Opinion 2004-30 (Citizens United) (concluding that the press exemption did not apply to a
16 proposed documentary because Citizens United did not regularly produce documentaries).

17 The facts here indicate that Melothé, Inc. would engage in core campaign functions and
18 would be an active participant in its chosen candidate's campaign activities. For example,
19 Melothé, Inc. proposes to disseminate comprehensive coverage of the candidate directly from the
20 campaign headquarters on a daily basis. Not only would Melothé, Inc.’s web site be accessible
21 to the general public, but its dissemination of information would be designed to assist the
22 campaign and its staff, including volunteers. Melothé, Inc. would even recognize outstanding
23 “local volunteers” and their activities. Indeed, Melothé, Inc. proposes to brief those volunteers

1 from the campaign headquarters, and intends to prepare those briefings. These facts indicate that
2 Melothé, Inc.'s programming would serve as a vehicle for the candidate's campaign to get its
3 message out to voters.

4 Melothé, Inc. proposes to work with the campaigns of only Democratic candidates and,
5 potentially, only one candidate of that party. The Commission recognizes that lack of objectivity
6 in news and commentary does not automatically disqualify an entity from coming within the
7 press exemption. *See, e.g.,* Advisory Opinion 2005-16 ("an entity otherwise eligible for the
8 press exemption would not lose its eligibility merely because of lack of objectivity in a news
9 story, commentary, or editorial"). Here, however, the featured campaign's message would be
10 indistinguishable from that of Melothé, Inc. itself, indicating it would function not as a press
11 entity but a press arm of the candidate's campaign.

12 Melothé, Inc. also proposes to raise money for the featured campaign. Melothé, Inc. asks
13 the Commission whether it can solicit contributions only if the Commission finds that the press
14 exemption applies. Melothé, Inc.'s proposal, however, further indicates that Melothé, Inc.
15 intends to engage in core campaign activities that are not legitimate press functions. Melothé,
16 Inc. envisions that program hosts, interviewers and news anchors will regularly solicit
17 contributions, with links to the candidate's contribution page appearing on the screen during
18 programming. While Melothé, Inc. would not collect or forward the contributions it generates,
19 this aspect of its plan suggests that the purpose behind the venture, in part, would be to help raise

20

1 money and support the featured campaign.² In these respects Melothé, Inc. would be functioning
2 not as a press entity but as a fundraising arm of its chosen campaign.

3 Melothé Inc.'s circumstances differ substantially, for example, from those in Advisory
4 Opinions 2005-16 (Fired Up!) and 2000-13 (iNEXTV). Although Fired Up! described itself as
5 "unabashedly progressive" and promoted certain political ideas, it did not promote any specific
6 candidate. Nor was there any indication that Fired Up! would have been an active participant in
7 any one campaign. iNEXTV, likewise, was not actively involved in any one campaign, nor was
8 its purpose aimed at promoting a particular candidate. Melothé, Inc.'s proposal is more akin to
9 the one the Commission declined to approve in Advisory Opinion 1988-22 (Republican
10 Associates). There the Commission found that the press exemption did not apply to a newsletter
11 that would have discussed political events and activity of interest to supporters of the Republican
12 Party. The Commission concluded that the newsletter, although published regularly, was a free
13 communication that the requestor proposed to send out to encourage continued or potential
14 financial and organizational support from members of the general public. *See also* Advisory
15 Opinion 1989-28 (Maine Right to Life Committee) (concluding that a non-profit corporation
16 publicly distributing a bimonthly newsletter without charge was "not engaged in the news media
17 business, and [was] not the type of entity contemplated by Congress when it adopted the cited
18 press exemption in 1974.") Here, the Commission finds that the purpose of the venture would be
19 to actively participate in the chosen campaign's activities, to promote the chosen candidate and

² Although Melothé, Inc. states it would not act as a conduit or intermediary, its proposal is very different than the solicitation allowed by the Commission in Advisory Opinion 1980-109 (Ruff Times). There the Commission concluded that solicitations on behalf of a candidate made by Mr. Ruff in a newspaper commentary that appeared as a regular feature was within the press exemption. The Commission noted that the press exemption would apply "only if individual contributors were merely instructed to forward their contributions directly to the candidate or his committee."

1 the campaign's message, and to solicit money and support on behalf of that candidate. This
2 purpose and function cannot be viewed as normal business activity of a press entity. Moreover,
3 briefing volunteers of a campaign, and recognizing outstanding "local volunteers," cannot be
4 viewed as a normal business activity of a press entity. Were the Commission to conclude
5 otherwise, it "would open the door for those corporations . . . to engage in unlimited spending
6 directly from their treasuries to distribute campaign material to the general public, thereby
7 eviscerating § 441b's prohibition." *MCFL*, 479 U.S. at 251.

8

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

12 Because the Commission answers the first question in the negative, the second question
13 regarding solicitations is moot.

14 This response constitutes an advisory opinion concerning the application of the Act and
15 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
16 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or
17 assumptions presented, and such facts or assumptions are material to a conclusion presented in
18 this advisory opinion, then the requester may not rely on that conclusion as support for its
19 proposed activity. Any person involved in any specific transaction or activity which is
20 indistinguishable in all its material respects from the transaction or activity with respect to which
21 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).
22 Please note the analysis or conclusions in this advisory opinion may be affected by subsequent
23 developments in the law, including, but not limited to, statutes, regulations, advisory opinions

1 and case law. The cited advisory opinions are available on the Commission's website at

2 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Donald F. McGahn II
Chairman