

May 27, 2011

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2011 MAY 31 AM 10:45  
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**By Electronic Mail**

Christopher Hughey, Esq.  
Acting General Counsel  
Federal Election Commission  
999 E Street NW  
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**Re: Comments on Advisory Opinion Request 2011-11 (Colbert)**

Dear Mr. Hughey:

These comments are filed on behalf of the Campaign Legal Center<sup>1</sup> and Democracy 21 with regard to Advisory Opinion Request (AOR) 2011-11, a request submitted on behalf of Mr. Steven Colbert seeking the Commission's opinion as to the following questions:

1. "May Mr. Colbert Form an Independent Expenditure-Only Committee that Accepts Unlimited Corporate Contributions, Unlimited Individual Contributions, Unlimited Political-Committee Contributions, and Unlimited Labor Contributions?" AOR 2011-11 at 3.
2. "If Colbert Super PAC is Discussed on The Colbert Report, Should Airtime and Related Costs Be Reported as a Lawful In-kind Contribution or Will the Costs Be Exempt from Reporting Requirements under the "Press Exemption"?" AOR 2011-11 at 4.

Mr. Colbert's proposed establishment of "Colbert Super PAC," as described in AOR 2011-11, would "in all material respects, be identical to Commonsense Ten" and, therefore, would be permissible under the Commission's advisory opinion to Commonsense Ten. AOR 2011-11 at 3; *see also* AO 2010-11 (Commonsense Ten). For this reason, we limit our comments to Mr. Colbert's second question.

Mr. Colbert explains that he hosts *The Colbert Report*, a half-hour television program owned, distributed, and produced by U.S. subsidiaries of Viacom, Inc. *The Colbert Report* is distributed on cable television and through associated Internet sites. AOR 2011-11 at 1. Mr. Colbert lists a variety of activities he proposes to have Viacom pay for and that he believes should fall within the scope of the "press exemption."

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<sup>1</sup> Campaign Legal Center President Trevor Potter recused himself in this matter and thus took no part in the Campaign Legal Center's consideration of this matter.

While some of these proposed activities would fall within the scope of the “press exemption,” some clearly would not. For the reasons set forth below, we urge the Commission to make clear to Mr. Colbert that neither (1) Viacom’s costs associated with producing independent expenditure ads “air[ed] as paid advertisements on other shows and networks,” nor (2) Viacom’s costs “necessary for the PAC to remain operational” (e.g., PAC administration costs for “filing the reports, and the design and production of a website”) would fall within the “press exemption.” See AOR 2011-11 at 7-8. These activities do not constitute legitimate press functions and, consequently, are beyond the scope of the “press exemption.”

### I. Legal Requirements of the “Press Exemption.”

The Federal Election Campaign Act (FECA) defines “contribution” to include “anything of value” given for the purpose of influencing a federal election. See 2 U.S.C. § 431(8)(A)(i). The Commission’s regulations make clear that “the provision of any goods or services without charge . . . is a contribution.” 11 C.F.R. § 100.52(d). Federal political committees, including the Super PAC Mr. Colbert intends to establish, are required by FECA to disclose all contributions received, as well as the identity of any contributor whose contributions have an aggregate amount or value in excess of \$200 in a calendar year. See 2 U.S.C. § 434(b)(2)-(3).

However, the Commission’s regulations exempt from the definition of “contribution” “[a]ny cost incurred in covering or carrying any news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer,) Web site, newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidates . . . .” 11 C.F.R. § 100.73. Federal law includes similar exemptions from the definitions of “expenditure” and “electioneering communication.” See 2 U.S.C. §§ 431(9)(B)(i) and 434(f)(3)(B)(i). These exemptions are collectively known as the “press exemption” or “media exemption.” See AO 2010-08 at 3.

The Commission has a developed body of law through advisory opinions that construe and apply the “press exemption.” 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 AO 2010-08 at 4 (Citizens United) (citing AOs 2005-16 (Fired Up!), 1996-16 (Blomberg), 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): (1) Whether the press entity is owned or controlled by a political party, political committee or candidate; and (2) Whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its “legitimate press function”). See AO 2010-08 at 5 (citing *FEC v. Phillips Publ’g*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); AOs 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV)).

Mr. Colbert acknowledges this test in AOR 2011-11. *See* AOR 2011-11 at 4. Mr. Colbert seeks the Commission's opinion as to whether, if Colbert Super PAC is discussed on *The Colbert Report*, airtime and related costs should be reported by the PAC as contributions to it, or whether the costs would be exempt from reporting requirements under the "press exemption." AOR 2011-11 at 4.

## **II. Applying the "Press Exemption" to Colbert Super PAC, Viacom and Mr. Colbert's Proposed Activities.**

### **A. Is Viacom a Press Entity?**

Applying the "press exemption" first requires determining whether the entity engaging in the activity is a press entity. *See* AO 2010-08 at 4 (Citizens United) (citing AOs 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield)).

As Mr. Colbert notes in AOR 2011-11, the Commission has held on a prior occasion that Viacom is a press entity. *See* AOR 2011-11 at 4. In 2003, while considering an advisory opinion request by Viacom and its subsidiary, Showtime Networks, Inc., regarding the application of the "press exemption" to a proposed fictional political television show, the Commission concluded that Viacom is a press entity. *See* AO 2003-34 at 3 (Viacom/Showtime). The Commission may permissibly conclude for the purposes of this AOR that Viacom remains a press entity.

### **B. Is Viacom Owned or Controlled by a Political Party, Political Committee or Candidate?**

Applying the "press exemption" next requires the Commission to determine whether Viacom is owned or controlled by a political party, political committee or candidate. *See* 11 C.F.R. § 100.73. The Commission recognized in AO 2003-34 that Viacom is not owned or controlled by a political party, political committee or candidate and may recognize the same in this AOR.

### **C. Would Viacom Be Acting in Its Legitimate Press Function?**

Finally, application of the "press exemption" requires the Commission to consider the specific activities proposed by Mr. Colbert and determine whether, by paying for the activities, Viacom would be acting in its "legitimate press function." *See* AO 2010-08 at 5 (citing *Reader's Digest Ass'n*, 509 F. Supp. at 1215, *Phillips Publ'g*, 517 F. Supp. at 1312-13, AOs 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV)).

This test stems from the U.S. district court decision in *Reader's Digest Ass'n*, in which the Reader's Digest Association (RDA), a magazine publisher, sued to enjoin the Commission from investigating whether RDA violated federal law by exceeding the scope of the "press exemption" and "making expenditures to disseminate to other media outlets video tapes of a computer reenactment of Senator Kennedy's accident at Chappaquiddick . . ." *Reader's Digest Ass'n*, 509 F. Supp. at 1211. In 1980, RDA had made a video as part of its research for an article

about an auto accident involving Senator Kennedy. *Id.* at 1211-12. RDA then distributed copies of its magazine, along with copies of its video tape, "to major television networks, local television stations, and other media outlets." *Id.* at 1212. The article was then discussed on network news shows, "and the NBC broadcast included a 12-second segment of the video tape." *Id.*

In August 1980, the Commission received a complaint alleging that RDA had made an illegal corporate expenditure by producing and distributing the video tapes to major media outlets. *Id.* Considering RDA's argument that its distribution of the video tapes was within the scope of the "press exemption," the district court explained:

The press exemption has certain limitations. First, in exempting the "distribut(ion)" of news or commentary "through the facilities of any broadcasting station, newspaper, magazine or other periodical publication . . .", the statute would seem to exempt only those kinds of distribution that fall broadly within the press entity's legitimate press function. It would not seem to exempt any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function. If, 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, this activity would not come within the press exemption even though it might comply with a technical reading of the statutory exemption, being a "news story . . . distributed through the facilities of . . . (a) newspaper."

*Id.* at 1214 (emphasis added). The district court in *Reader's Digest Ass'n* denied RDA's request for an injunction of the Commission's investigation, concluding that "so long as the FEC is investigating whether RDA was acting in its magazine publisher capacity in distributing the tape, so as to determine whether the press exemption is applicable, . . . there is no basis to grant the injunction sought by RDA." *Id.* at 1215.

The U.S. Supreme Court also analyzed this "legitimate press function" aspect of the "press exemption" in *Massachusetts Citizens for Life (MCFL) v. FEC*, 479 U.S. 238 (1986), where the Court rejected MCFL's claim that a "Special Edition" of its newsletter containing express advocacy was within the scope of the "press exemption." The Court explained:

[T]he "Special Edition" cannot be considered comparable to any single issue of the newsletter. It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal MCFL publication. The MCFL masthead did not appear on the flyer, and, despite an apparent belated attempt to make it appear otherwise, the Edition contained no volume and issue number identifying it as one in a

continuing series of issues.

MCFL protests that determining the scope of the press exemption by reference to such factors inappropriately focuses on superficial considerations of form. However, it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications. We regard such an inquiry as essential, since we cannot accept the notion that the distribution of such flyers by entities that happen to publish newsletters automatically entitles such organizations to the press exemption. A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition.

*MCFL*, 479 U.S. at 250-51.

*Reader's Digest Ass'n* and *MCFL* make clear that not all expenditures by a press entity are entitled to the press exemption. The "press exemption" does not "exempt any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function." *Reader's Digest Ass'n*, 509 F. Supp. at 1214. Considerations of form are "essential," since "we cannot accept the notion that the distribution" of one form of communication by press entities that publish another form of communication "automatically entitles such organizations to the press exemption." *MCFL*, 479 U.S. at 251. A contrary position would open the door for press entities to make unlimited undisclosed contributions to federal political committees in the name of their "press exemption," notwithstanding how unrelated those contributions are to its functioning as a press entity, thereby eviscerating the disclosure requirements of 2 U.S.C. § 434. *See id.*

1. **Viacom's costs associated with producing independent expenditure ads "air[ed] as paid advertisements on other shows and networks" are beyond the scope of the "press exemption" and must be reported by Colbert Super PAC as in-kind contributions received.**

Mr. Colbert proposes to have a wide variety of activities of the Colbert Super PAC and his discussion of the Colbert Super PAC on *The Colbert Report* paid for by Viacom, without Colbert Super PAC disclosing these Viacom payments as in-kind contributions to the PAC—arguing that the activities fall within the scope of the "press exemption."

Some of Mr. Colbert's proposed activities arguably do fall within the scope of the "press exemption"—e.g., "Viacom's normal expenses associated with creating, producing, and distributing *The Colbert Report* . . . if Mr. Colbert talks about the PAC on his show." AOR 2011-11 at 7. However, other activities proposed by Mr. Colbert clearly do not fall within the scope of the "press exemption" because they do not constitute Viacom acting in its "legitimate press function." Allowing the "press exemption" to apply in these circumstances would open a gaping loophole in the disclosure laws.

Mr. Colbert proposes to have Viacom staff create “independent expenditure ads produced for the PAC.” AOR 2011-11 at 7 (emphasis added). Some of these ads would be shown only as content on *The Colbert Report*, while others would “air as paid advertisements on other shows and networks.” *Id.* Mr. Colbert’s proposal to have Viacom produce independent expenditure ads for his federal PAC and to distribute those ads on behalf of his PAC, including on other shows and networks, goes far beyond Viacom’s legitimate press function and thus beyond the scope of the “press exemption.”

While it is certainly the case that Viacom has for years produced *The Colbert Report*, which has entailed Mr. Colbert’s discussion of political issues, the proposed production by Viacom of independent expenditure ads for a federal PAC, for distribution on other shows and networks, is not “comparable in form to those broadcasts of the Show ordinarily issued by” Viacom. See AOR 2011-11 at 6 (discussing and quoting FEC MUR 6242, First General Counsel’s Report at 6 (Hayworth)).

Indeed, Mr. Colbert does not cite a single precedent in his AOR in which the Commission or a court has recognized a press entity’s production of independent expenditure ads on behalf of a federal PAC as a legitimate press function of the entity. It is one thing for a press entity’s employees to provide news, editorial and commentary about politics and the activities of a PAC during a news broadcast or a comedy news show, such as *The Colbert Report*; it is another thing altogether for a press entity to create and distribute independent expenditure ads for a PAC on other shows and networks. The former may fall within the scope of the “press exemption.” The latter most certainly does not.

To conclude otherwise would entitle any press entity, for instance, to pay for the production and distribution of express advocacy ads in any form on any media, without any obligation to disclose its expenditures, because all such payments would be exempt from the definition of “expenditure” under the “press exemption.” This would stretch the boundaries of the “press exemption” far beyond those recognized by the Commission to date, and far beyond any legitimate purpose of the exemption.

We urge the Commission to advise Mr. Colbert that Viacom’s costs associated with producing independent expenditure ads “air[ed] as paid advertisements on other shows and networks” are beyond the scope of the “press exemption” and must be reported by Colbert Super PAC as in-kind contributions received from Viacom.

- 2. Viacom’s costs “necessary for the PAC to remain operational” (e.g., PAC administration costs for “filing the reports, and the design and production of a website”) are beyond the scope of the “press exemption” and must be reported by Colbert Super PAC as in-kind contributions received.**

Mr. Colbert notes that “[o]nce Mr. Colbert creates Colbert Super PAC, certain activities (including the filing of reports, and the design and production of a website) will be necessary for the PAC to remain operational and visible so that it can continue to provide material for *The Colbert Report*.” AOR 2011-11 at 8. Mr. Colbert proposes to have Viacom staff “undertake these tasks as part of their work for *The Colbert Report*.” *Id.* Paying the administrative costs of

a federal PAC is not a legitimate press function and, consequently, does not fall within the scope of the “press exemption.”

Again, Mr. Colbert does not cite a single precedent in which the Commission or a court has recognized a press entity’s payment of the administrative costs of a federal PAC as a legitimate press function of the entity.<sup>2</sup> The Commission should not set such a precedent here. There is no basis on which to conclude that payment of a PAC’s administrative costs are entailed in the “legitimate press functions” of a press entity. Instead, we urge the Commission to advise Mr. Colbert that payment by Viacom of costs “necessary for the PAC to remain operational” (e.g., PAC administration costs for “filing the reports, and the design and production of a website”) are beyond the scope of the “press exemption” and must be reported by Colbert Super PAC as in-kind contributions received from Viacom.

**III. Expanding the Scope of the “Press Exemption” to Encompass Viacom’s Production and Distribution of Independent Expenditure Ads and Payment of the Colbert Super PAC’s Administrative Expenses Would Eviscerate the “Legitimate Press Function” Prong of the “Press Exemption” Test and Undermine FECA Contribution Disclosure Requirements.**

An opinion by the Commission advising Mr. Colbert that it is within Viacom’s “press exemption” (and therefore not a reportable contribution) for Viacom to pay the expenses of Colbert Super PAC’s production and distribution of independent expenditure ads on other shows and networks, and Colbert Super PAC’s administrative expenses, would eviscerate the “legitimate press function” prong of the “press exemption” and would undermine FECA’s contribution disclosure requirements. Indeed, if the “legitimate press function” test can be stretched so far, there is little, if anything, it would not cover.

Although we recognize that Mr. Colbert submitted his advisory opinion in the spirit of political comedy, an advisory opinion by the Commission permitting all that Mr. Colbert requests would have a sweeping and damaging impact on disclosure laws and the public’s right to know about campaign finance activities. Many television show hosts who are serious politicians have political committees that could reap great financial benefit from an advisory opinion that expands the scope of the “press exemption” to cover the production and distribution costs of independent expenditure ads made for their federal PACs and the payment of such PACs’ administrative expenses.

For example, Sarah Palin has Sarah PAC, Mike Huckabee has Huck PAC, Newt Gingrich has American Solutions PAC, Rick Santorum has America’s Foundations PAC—and all are television hosts or commentators. An advisory opinion here granting all that Mr. Colbert requests would permit the corporate media employer of these individuals—who are, unlike Mr. Colbert, serious politicians, not comedians—to make unlimited, undisclosed contributions to their PACs under the guise of the “press exemption.” There is no legal justification for such a

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<sup>2</sup> Corporations such as Viacom are free under FECA to set up a separate segregated fund and pay the administrative expenses of such fund, subject to “restricted class” constraints on the fund, but Colbert Super PAC is not a separate segregated fund. See 2 U.S.C. § 441b(b)(2)(C).

radical evisceration of FECA disclosure requirements. Mr. Colbert's ultimate goals here may be comedic, but the Commission should not be the straight man at the expense of the law.

We appreciate the opportunity to provide these comments to you.

Sincerely,

*/s/ Fred Wertheimer*

*/s/ J. Gerald Hebert*

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