



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 14, 2016

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2016-01

Bradley W. Hertz, Esq.
The Sutton Law Firm
150 Post Street, Suite 405
San Francisco, CA 94108

Dear Mr. Hertz:

We are responding to your advisory opinion request on behalf of Ethiq, Inc. concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations to Ethiq’s distribution of news content via its website and mobile application (“app”).

The Commission concludes that the costs incurred by Ethiq in covering or carrying news stories, commentary, and editorials on its website and app are encompassed by the Act’s media exemption and therefore do not constitute “expenditures” or “contributions” under the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on February 23, 2016.

Ethiq is a for-profit corporation that is not owned or controlled by a political party, political committee, or candidate. Ethiq plans to produce and distribute political news and commentary to its users through Ethiq’s app and website. Ethiq users will submit information about their preferences and opinions on various political and non-political topics by completing an initial survey. Ethiq will run this information through an algorithm that will help to tailor the content Ethiq provides to each user, such as information and news regarding candidates and businesses that may share the user’s views.¹ Because Ethiq will tailor the content it provides to

¹ The Commission addressed other proposed uses of this algorithm in Advisory Opinion 2015-12 (Ethiq). In requesting that opinion, Ethiq did not indicate that it intended to engage in the journalistic activity that is at issue in the instant request.

each user based on its algorithm and the preferences the user indicates, different users may receive different news content.

Ethiq will distribute its content in various forms, such as infographics, articles, pictures, and videos. Topics may include pending legislation and legislators' votes, campaign finance data, and reporting on candidates' campaigns and speeches. Some of the content will be "curated" from third-party sources, while some content will be produced by Ethiq itself. Ethiq's original content will be created by journalists working as independent contractors under Ethiq's editorial control. Ethiq's news content will refer to clearly identified candidates for federal office, but Ethiq will not work with any candidates or public officials to produce, edit, or provide content to its users. Ethiq intends to balance a wide variety of views in the news content it distributes: Ethiq will not support or oppose any candidates, political parties, or political committees, will not engage in express advocacy for or against any candidate, and will not advocate regarding political issues in its distribution of news content. Any links to candidate or political committee websites that Ethiq includes in its content will direct users only to the homepages for those sites, not to contribution pages.

Ethiq will provide its news content free of charge to all users of its app and website. Ethiq plans to generate income by selling advertising space on the app and by licensing its proprietary algorithm and data to companies conducting market research. Advertisers on Ethiq's app may include candidates and political committees, but all advertisers will pay the same rates for ad space, and advertising purchases will not affect the use of Ethiq's algorithm to provide news content or any of Ethiq's business decisions.

Question Presented

Will Ethiq's planned production and distribution of journalistic content qualify for the media exemptions from the definitions of "contribution" and "expenditure"?

Legal Analysis and Conclusion

Yes, Ethiq's planned production and distribution of journalistic content will qualify for the media exemptions from the definitions of "contribution" and "expenditure."

The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or "anything of value" made in connection with a federal election. *See* 52 U.S.C. § 30118(b). But "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any . . . Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication" is exempt from the definitions of contribution and expenditure "unless the facility is owned or controlled by any political party, political committee, or candidate." 11 C.F.R. §§ 100.73, 100.132; *see also* 52 U.S.C. § 30101(9)(B)(i).

The Commission applies a two-step analysis to determine whether this media exemption (also known as the "press exemption") applies. First, the Commission asks whether the entity engaging in the activity is a press entity within the meaning of the Act and Commission

regulations. *See, e.g.*, Advisory Opinion 2005-16 (Fired Up). Second, in determining the scope of the exemption, the Commission considers (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 Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinion 2004-07 (MTV); Advisory Opinion 2005-16 (Fired Up). In applying this analysis the Commission considers whether the entity’s materials are available to the general public and whether they are comparable in form to those ordinarily issued by the entity. *See FEC v. Mass. Citizens for Life*, 479 U.S. 238, 251 (1986); Advisory Opinion 2000-13 (iNEXTV) (concluding that website covered by media exemption was “viewable by the general public and akin to a periodical or news program distributed to the general public”).

1. Press Entity Status

Congress enacted the media exemption to ensure that the Act would not “limit or burden in any way the first amendment freedoms of the press” and would protect “the unfettered right of the newspapers, TV networks, *and other media* to cover and comment on political campaigns.” H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974) (emphasis added). Thus, although the statutory media exemption applies to “any broadcasting station, newspaper, magazine, or other periodical publication,” 52 U.S.C. § 30101(9)(B)(i), the Commission’s regulations provide that the exemption also applies to qualified internet activities. 11 C.F.R. §§ 100.73, 100.132. Upon amending the regulations to reflect this more current understanding of media entities, the Commission noted that “the media exemption applies to media entities that cover or carry news stories, commentary, and editorials on the Internet, just as it applies to media entities that cover or carry news stories, commentary, and editorials in traditional media.” Internet Communications, 71 Fed. Reg. 18589, 18608 (Apr. 12, 2006). Accordingly, as used in the Commission’s media exemption regulations, “[t]he terms ‘website’ and ‘any Internet or electronic publication’ are meant to encompass a wide range of existing and developing technology, such as websites, ‘podcasts,’ etc.” Internet Communications, 71 Fed. Reg. at 18608 n.52; *see also, e.g.*, Advisory Opinion 2000-13 (iNEXTV) (concluding that company providing news and information online with limited original content qualified as media entity despite lacking traditional offline media presence); Advisory Opinion 2005-16 (Fired Up) (concluding that requestor’s websites that provided original news content and links to and commentary on other sites’ content qualified for media exemption).

Ethiq’s website and app will provide news and information about candidates and businesses to users, through both curated and original news content. Ethiq will employ journalists to produce original content and will retain editorial control of that content, similar to the way in which traditional magazine and newspaper editors generate and manage the content of their publications, and also similar to the way that the requestors in Advisory Opinion 2000-13 (iNEXTV) and Advisory Opinion 2005-16 (Fired Up) determined what content would appear on their websites. The Commission therefore concludes that Ethiq is a press entity under the first step of the media exemption test.

2. Ownership Criteria and Legitimate Press Function

Ethiq is not owned or controlled by any political party, political committee, or candidate. Therefore, the final step in the Commission's media exemption inquiry is to determine whether Ethiq will be acting as a press entity in conducting the activity at issue; that is, whether it will be acting in its "legitimate press function." To make this determination, the Commission generally looks to whether the news material at issue is available to the general public, and whether it is comparable in form to those ordinarily issued by the entity. *See FEC v. Mass. Citizens for Life*, 479 U.S. 238, 251 (1986).

Ethiq's news content will be available to the general public: Though a person must register with Ethiq as a user in order to receive the materials, any person is free to register. And once a user has registered, "the focus of Ethiq's activity shifts . . . to the provision of media content." Advisory Opinion Request at AOR002. Ethiq's distribution of news content and commentary is at the core of its operations, as its "business model involves the regular and continued production and distribution of news and political commentary" and "[i]ts regular output is news and political commentary." *Id.* at AOR007. The material Ethiq normally distributes is tailored to its users based on their preferences, and Ethiq states that it will neither engage in special broadcasts nor otherwise "forego regular media aggregation/curation" to distribute material that supports or opposes particular candidates, parties, or issues. *Id.* Therefore its provision of news stories, commentary, and editorials on its website and its app fall within Ethiq's legitimate press function. *See* Advisory Opinion 2005-16 (Fired Up) at 6 (concluding that news distribution on requestor's website was within legitimate press function of online press entity). The fact that delivery of content may be tailored based on an individual user's preferences does not change the journalistic nature or form of the news content provided, and such tailoring is not dissimilar from the tailored delivery provided to users of many established newspapers' and magazines' websites.²

The Commission therefore concludes that because Ethiq is a press entity, is not owned or controlled by any candidate, political party, or political committee, and will be engaged in its legitimate press function in providing news content to its users, costs incurred by Ethiq in covering or carrying news stories, commentary, and editorials as described in the request will not constitute "expenditures" or "contributions" under the Act and Commission regulations.

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* 52 U.S.C. § 30108. 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

² For example, *The New York Times*'s website displays articles for each reader based on his or her activity on the newspaper's website: "NYTimes Recommendations uses your viewing history on NYTimes.com, including the mobile site and apps, to identify your most-viewed topics and sections. Based on what you've viewed recently, NYTimes Recommendations suggests additional content you might like. The more time you spend on NYTimes.com, the more accurate the recommendations become." Recommendations, <http://www.nytimes.com/content/help/extras/recommendations/recommendations.html> (last visited March 3, 2016).

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 id.* § 30108(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. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

A handwritten signature in blue ink, appearing to read "Matthew S. Petersen", with a horizontal line underneath the signature.

Matthew S. Petersen
Chairman