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June 30, 2014

Federal Election Commission
Office of the General Counsel
999 E Street, NW
Washington, DC 20463

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OFFICE OF GENERAL
COUNSEL

Re: Request for Advisory Opinion

Dear Commissioners:

We write on behalf of Congressman Paul Ryan, Ryan for Congress, Inc. ("Ryan for Congress"), and Prosperity Action, Inc. ("Prosperity Action") (together, the "Requestor"), to request an advisory opinion from the Federal Election Commission ("the Commission"), pursuant to 2 U.S.C. § 437f. The Requestor seeks an advisory opinion regarding the application of the Federal Election Campaign Act of 1971, as amended (the "Act") to the publication, marketing, promotion, distribution, and publicizing of a book authored by Congressman Ryan and published by Grand Central Publishing, a division of Hachette Book Group (the "Publisher"). The Wisconsin Congressional primary election in which Congressman Ryan is a candidate is August 12, 2014. Consequently, the Requestor respectfully requests expedited review pursuant to 2 U.S.C. § 437f(a)(2) and 11 C.F.R. § 112.4(b) as some of the activities set forth herein will occur during that primary election and the general election thereafter.

I. FACTUAL BACKGROUND

Congressman Ryan is a member of the United States House of Representatives, and he is a candidate for re-election to the House of Representatives. Ryan for Congress, Inc. is the principal campaign committee of Congressman Ryan. Prosperity Action, Inc. is a leadership PAC sponsored by Congressman Ryan.

The Publisher is a long-established and prominent publisher, and it is a division of the international publishing company Hachette Book Group. The Publisher, formerly Warner Books, came into existence in 1970 when Warner Communications acquired the Paperback Library and subsequently published paperback reprint editions of such bestsellers as Harper Lee's *To Kill A Mockingbird* and Umberto Eco's *The Name Of The Rose*. Today the Publisher reaches a diverse audience through hardcover, trade paperback, and mass market imprints that cater to every kind of reader.

The Publisher will publish a book in August 2014 authored by Congressman Ryan titled *The Way Forward*. The book will delve into the state of the conservative movement in America today, discuss how it contrasts with liberal progressivism, and explain what must be done to save what Congressman Ryan refers to as the "American Idea." *The Way Forward* will also challenge conventional thinking, renew the conservative vision for 2014 and beyond, and show how that vision is essential for the well-being of our communities and the future of our nation. In addition to publishing Congressman Ryan's book, the Publisher will promote and market *The Way Forward* for the purpose of generating publicity and increasing sales. The contractual agreement between Congressman Ryan and the Publisher (the "Publisher Agreement") was reviewed and approved by the House of Representatives Committee on Ethics, which determined that the Publisher is an established publisher and the Publisher Agreement adheres to the traditional standards and practices in the publishing industry. See generally Advisory Opinions 2011-02 (Brown) and 2001-08 (Specter) (noting receipt of advice letters from Senate Select Committee on Ethics). The Publisher Agreement provides for the payment to Congressman Ryan of royalties based on an industry-standard percentage of the net sales revenue. There is no advance payment of royalties to Congressman Ryan in accordance with Rule 25 of the Rules of the House of Representatives.

A. Planned Activities of Congressman Ryan, Ryan for Congress, and Prosperity Action

(1) Ryan for Congress wishes to purchase copies of the book to be distributed solely to supporters and contributors of the Congressman's campaign. These copies of the book would be purchased in bulk directly from the Publisher at the standard discounted bulk rate the Publisher offers, under normal industry practice, to other large purchasers. The committee would use its campaign funds to buy the books from the Publisher at the discounted bulk rate. The number of books purchased will not exceed the number needed to fulfill the campaign-related purposes. Congressman Ryan will ensure that he does not receive any royalties from any book purchases, bulk or otherwise, made by Ryan for Congress, through two methods. First, the Publisher will be instructed to exclude all associated royalties from the royalty calculation, and second, the Publisher will be instructed to donate any royalties generated by those purchases directly to a charitable organization described in section 501(c)(3) of the Internal Revenue Code that is not in any way associated with Mr. Ryan or Mr. Ryan's family. See generally Advisory Opinion 2007-18 (Rangel). Congressman Ryan will not receive any personal benefit from any royalties the Publisher directly donates to charity.

(2) Prosperity Action wishes to purchase copies of Congressman Ryan's book to be distributed solely to Prosperity Action's supporters and contributors. Prosperity Action would purchase Congressman Ryan's book directly from the Publisher at the same bulk rate provided under normal industry practice to Ryan for Congress and other large purchasers. Prosperity Action would distribute these books to its supporters and contributors, and would purchase only the number of books needed to fulfill this purpose. Although not required, the Publisher will be instructed to exclude all associated royalties from the royalty calculation, and donate any royalties generated by those purchases directly to a charitable organization described in section 501(c)(3) of the Internal Revenue Code that is not in any way associated

with a Mr. Ryan or Mr. Ryan's family. *See generally* Advisory Opinion 2007-18 (Rangel). Congressman Ryan will not receive any personal benefit from any royalties the Publisher directly donates to charity.

(3) Congressman Ryan and Ryan for Congress will advertise and market the sale of the book in various ways. Ryan for Congress wishes to promote the book on its website. The Ryan for Congress website is updated daily. Any references or information related to the Congressman's book would be limited to 1-2 sentences in length, including hyperlinks, unless the Commission permits the inclusion of additional or more extensive material. Hyperlinks on the committee's website will redirect interested viewers to the Publisher's website for more information about the book or to an online book seller (such as Amazon.com or Barnesandnoble.com). The cost of placing this material on the website would be *de minimis*. The committee also wishes to promote the book through information and hyperlinks on its social media pages, including Twitter and Facebook. References or information related to the Congressman's book on Twitter and Facebook would include information regarding where a person may buy the book, attend a book tour event or appearance, or other publicity-related information, to the extent permitted by the Commission.

(4) Ryan for Congress wishes to send emails to its existing email lists that would reference *The Way Forward* for campaign fundraising purposes and other campaign-related activities for the purpose of influencing Congressman Ryan's election to federal office.

(5) Prosperity Action wishes to advertise and market the sale of the book in various ways on its website and social media pages, including Twitter and Facebook. The Prosperity Action website is updated daily. References to Congressman Ryan's book on the Prosperity Action website and social media pages would consist of basic information about the book and hyperlinks. Information conveyed on these sites would include where a person may buy the book, attend a book tour event or appearance, or other publicity-related information, to the extent permitted by the Commission.

(6) Prosperity Action wishes to send emails to its existing email lists that would reference *The Way Forward* for committee fundraising purposes and other election-related activities for the purpose of influencing one or more elections for federal office.

(7) Congressman Ryan intends to make use of email and mailing lists maintained by both Ryan for Congress and Prosperity Action for purposes related to promoting the book, such as notifying recipients of the book's publication. In so doing, Congressman Ryan will enter into separate list rental agreements with Ryan for Congress and Prosperity Action. Both agreements will specify the fair market value for renting the lists, to be determined by an independent list appraisal. These list rental arrangements would comply with the requirements set forth by the Commission in Advisory Opinion 2002-14 (Libertarian National Committee).

B. Planned Activities of Publisher

The Publisher will plan, engage in, and pay for various marketing and promotional activities in support of Congressman Ryan's book, including appearances by Congressman Ryan at book signings and other appearances. The purpose of these efforts will be to promote Congressman Ryan's book and increase sales.

As is common for high-profile book publications, the Publisher intends to conduct and pay for promotion, including a promotional bus tour. In connection with this bus tour, the Publisher will pay all costs associated with obtaining and operating a tour bus that will travel to various cities around the country. All costs incurred by the Publisher in connection with this promotional bus tour will be in accordance with the Publisher Agreement, and the Rules of the House of Representatives, which specify that all such activities be conducted on the same or equal terms as are made available to other authors who are not Members of Congress. Congressman Ryan and the Publisher have already determined that the tour bus will *not* travel through or stop in the State of Wisconsin. (Congressman Ryan represents the First Congressional District of Wisconsin.) The remainder of the promotional bus tour will be determined and scheduled by the Publisher.

The Publisher will also schedule media appearances for Congressman Ryan on national and local television and radio shows, and interviews with print and online media. Some of these television and radio appearances, and print and online media interviews, will likely be available within the First Congressional District's media markets.¹

II. QUESTIONS PRESENTED

1. May Ryan for Congress use campaign funds to purchase copies of *The Way Forward* directly from the Publisher, at the standard discounted bulk rate, for subsequent distribution to Ryan for Congress supporters and for other campaign-related activities? Is this use of campaign funds permissible under the Act? Does Ryan for Congress' purchase of books from the Publisher at the standard, discounted bulk rate result in an in-kind contribution from the Publisher to Ryan for Congress?

2. May Prosperity Action use committee funds to purchase copies of *The Way Forward* directly from the Publisher, at the standard discounted bulk rate, for subsequent distribution to Prosperity Action supporters and for other election-related activities? Is this use of committee funds permissible under the Act? Does Prosperity Action's purchase of books from the Publisher at the standard, discounted bulk rate result in an in-kind contribution from the Publisher to Prosperity Action?

3. May Ryan for Congress place material promoting *The Way Forward* on its website and social media sites so long as the cost of doing so is *de minimis*?

¹ The First Congressional District of Wisconsin includes portions of the Milwaukee, Madison, and Rockford, Illinois, media markets. These media markets also cover significant commercial markets for the book that are not within the boundaries of the First Congressional District.

4. May Prosperity Action place material promoting *The Way Forward* on its website and social media sites?

5. May Congressman Ryan use the Ryan for Congress and Prosperity Action email and mailing lists to promote the sale of *The Way Forward* if Congressman Ryan reimburses each committee for the lists' fair market value based on an independent list appraisal?

6. Does Congressman Ryan or Ryan for Congress accept or receive an in-kind contribution as a result of the Publisher's publication of Congressman Ryan's book, *The Way Forward*, or is the publication of the book covered by the Act's media exemption, thereby exempting the Publisher's associated costs and expenses from the Act's definitions of "expenditure" and "contribution"?

7. Does Congressman Ryan or Ryan for Congress accept or receive any in-kind contribution as a result of the Publisher's payment of costs incurred in connection with the promotion of Congressman Ryan's book, including a bus tour, or are these costs also covered by the Act's media exemption??

8. If the Commission does not agree that the Publisher's publication of Congressman Ryan's book and related promotional activities, costs, and expenses, are covered by the media exemption, and thereby exempted from the Act's definitions of "expenditure" and "contribution," or if the Commission is unable to render an opinion on these questions, the Requestor asks, in the alternative, if Congressman Ryan and/or Ryan for Congress avoid the receipt of an in-kind contribution from the Publisher because the Publisher's various activities, costs, and expenses are exempted from the Act's regulation under the Commission's *bona fide commercial activity doctrine*?

III. LEGAL DISCUSSION

Question 1: *May Ryan for Congress use campaign funds to purchase copies of The Way Forward directly from the Publisher, at the standard discounted bulk rate, for subsequent distribution to Ryan for Congress supporters and for other campaign-related activities? Is this use of campaign funds permissible under the Act? Does Ryan for Congress' purchase of books from the Publisher at the standard, discounted bulk rate result in an in-kind contribution from the Publisher to Ryan for Congress?*

The Requestor seeks confirmation from the Commission that Ryan for Congress may purchase copies of *The Way Forward* directly from the Publisher at the standard discounted bulk rate, distribute those copies to the campaign's supporters and contributors, and/or use those copies for other campaign-related activities. The Requestor also seeks the Commission's confirmation that this proposed activity is a permissible use of campaign funds under the Act that does not constitute a personal use of campaign funds, and does not result in a corporate in-kind contribution from the Publisher to Ryan for Congress.

The Commission has previously concluded that principal campaign committees may purchase its candidate's books for distribution to supporters and other campaign-related uses.

See Advisory Opinions 2011-02 (Brown), 2001-08 (Spector), 2004-18 (Lieberman), 1995-46 (D'Amato), and 1993-20 (Campbell). As in Advisory Opinion 2011-02 (Brown), and the Commission's prior opinions, Ryan for Congress seeks to purchase Congressman Ryan's book directly from the Publisher, at the standard discounted bulk rate, for distribution to the campaign's donors and supporters, and/or for other campaign-related uses, for the purpose of influencing Congressman Ryan's election to federal office. The quantity of books purchased by Ryan for Congress would not exceed the number needed for this described purpose. Congressman Ryan will not receive any royalties from book purchases by Ryan for Congress, as the Publisher will donate any royalties due to Congressman Ryan to a charity described in section 501(c)(3) of the Internal Revenue Code and exclude these sales from any royalty calculation. Consistent with Advisory Opinion 2011-02, Congressman Ryan will not receive any personal benefit, tangible or intangible, for the royalties generated by the sale of books purchased by Ryan for Congress.

In Advisory Opinion 2011-02, the Commission determined that Senator Brown's principal campaign committee could "use campaign funds to purchase copies of [Senator Brown's] book from the publisher at the fair market price, and the publisher may donate to charity the amount that Senator Brown would have otherwise earned as royalties from bulk sales of the book to the Committee." Advisory Opinion 2011-02 (Brown). The Commission concluded in Advisory Opinion 2011-02, and in a lengthy line of preceding Advisory Opinions, that "the use of the authorized committee's campaign funds to purchase its candidate's book would defray an expense that would not exist irrespective of the campaign and would not be an impermissible personal use." *Id.* In these cases:

The Commission's conclusion was based on several facts: the authorized committee's funds would be used to purchase the book solely for distribution to the committee's contributors and supporters, and thus would be used for the committee only for the purpose of influencing its candidate's election to Federal office; the quantity purchased would not exceed the number needed for this described purpose; all royalties attributable to the committee purchase would be paid by the publisher to charity; and the committee's purchase would be removed by the publisher from the royalty calculation.

Id. The Commission also specified in Advisory Opinion 2011-02 that a campaign's purchase of its candidate's book at a bulk rate that is "a standard fair market price that the publisher, under normal industry practice, makes available on equal terms to other large purchasers that are not political organizations or committees" does "not result in an impermissible in-kind corporate contribution from the publisher." Advisory Opinion 2011-02 fn. 5.

Question 2: *May Prosperity Action use committee funds to purchase copies of The Way Forward directly from the Publisher, at the standard discounted bulk rate, for subsequent distribution to Prosperity Action supporters and for other election-related activities? Is this use of committee funds permissible under the Act? Does Prosperity Action's purchase of books from the Publisher at the standard, discounted bulk rate result in an in-kind contribution from the Publisher to Prosperity Action?*

Prosperity Action seeks confirmation it may use committee funds to purchase copies of the book directly from the Publisher, at the standard discounted bulk rate, for subsequent distribution to Prosperity Action supporters and for other election-related activities.

The "book" advisory opinions referenced above, and cited in Advisory Opinion 2011-02, analyze the questions presented under 2 U.S.C. § 439a, which applies only to candidates and candidate's principal campaign committees. Nevertheless, Prosperity Action would purchase Congressman Ryan's book for distribution to its own supporters and contributors, and this purchase would be "for the purpose of influencing" one or more elections for Federal office. See 2 U.S.C. § 431(9)(A)(i). The Commission has previously approved a request by a non-connected, multicandidate committee "to purchase a sizeable number of copies of 'A Time to Run,' a novel written by Senator Barbara Boxer, from the publisher, Chronicle Books." Advisory Opinion 2006-01 (PAC For A Change). (Advisory Opinion 2006-01 does not identify PAC For A Change as Senator Boxer's leadership PAC or otherwise discuss the relationship between the PAC and Senator Boxer. We presume that the Commission was aware at the time that the PAC was in fact Senator Boxer's leadership PAC.)

The Requestor seeks the Commission's confirmation that Prosperity Action may purchase of Congressman Ryan's book at a bulk rate that is "a standard fair market price that the publisher, under normal industry practice, makes available on equal terms to other large purchasers that are not political organizations or committees" and that such purchase does "not result in an impermissible in-kind corporation contribution from the publisher." Advisory Opinion 2011-02. In Advisory Opinion 2006-01, the Commission concluded that the requestor in that matter could purchase Senator Boxer's book "at the same discounted rate paid by other large purchasers," and that no in-kind contribution would result. *Id.*

The Requestor also seeks the Commission's confirmation that the proposed Prosperity Action purchase would not constitute the payment of a personal use expense by a person other than the candidate or candidate's committee, and therefore a contribution to Ryan for Congress under 11. C.F.R. § 113.1(g)(6). See *Final Rule on Contribution and Expenditure Limitations and Prohibitions: Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7871 (Feb. 9, 1995) ("Generally, payments of expenses that would be personal use if made by the candidate or the candidate's committee will be considered contributions to the candidate if made by a third party."). Assuming the Commission determines in Question 1 above that the proposal does not involve the personal use of campaign funds, it is our understanding that the Prosperity Action purchase similarly would not be treated as a third party payment of a candidate personal use expense. Alternatively, the Commission could conclude that "the payment would have been made irrespective of the candidacy." *Id.*; see generally Advisory Opinions 2008-17 (KITPAC) and 2007-18 (Rangel). We note that the "permissible use" and "personal use" provisions of the Act at 2 U.S.C. § 439a do not apply to Prosperity Action, and that Congressman Ryan is not required by Section 439a to forego royalties from the sale of books to Prosperity Action. The application of 11. C.F.R. § 113.1(g)(6) to this situation is not entirely clear. If, however, Congressman Ryan voluntarily forgoes royalties from the bulk purchase of books by Prosperity Action by instructing the Publisher to donate those royalties to charity and exclude those sales from the royalty

calculation (as above in Question 1), will the Requestor satisfy all applicable provisions of the Act and Commission regulations?

Question 3: May Ryan for Congress place material promoting *The Way Forward* on its website and social media sites so long as the cost of doing so is *de minimis*?

Ryan for Congress seeks confirmation from the Commission that it may place material promoting Congressman Ryan's book on its campaign webpage, Facebook page, and Twitter page.

The Commission previously explained that a Member of Congress's "expenses as an author in marketing [a] book exist irrespective of his campaign," meaning, the payment of those expenses by the Member's principal campaign committee "would ordinarily constitute a prohibited personal use" of campaign funds. Advisory Opinion 2011-02. However, the Commission has made an exception where "the cost of adding promotional material to the Committee's website" is *de minimis*. See Advisory Opinion 2006-7 (Hayworth).² In Advisory Opinion 2006-7, the Commission concluded that the *de minimis* cost involved did "not constitute a prohibited personal use of campaign funds." Somewhat confusingly, however, the Commission also noted that "the proposed use of the Committee's website is limited to the addition of a *de minimis* amount of material to an otherwise substantial website." Thus, while the essential holding of Advisory Opinion 2006-7 appears to focus on the *de minimis cost* of the material added to the candidate's website, other language in the opinion emphasizes the "*de minimis amount* of material" in relation "to an otherwise substantial website." Subsequently, the Commission characterized its holding in Advisory Opinion 2006-07 as resting on "both the amount of promotional material and the cost to the committee." Advisory Opinion 2011-02.

In Advisory Opinion 2011-02, the Commission appears to have focused almost solely on the amount of material, rather than the actual costs incurred in placing this material on certain websites and social media sites.³ For example, the Commission held that the requestor could not devote "up to 25 percent of the Committee website's homepage, 25 percent of the Committee's Facebook page, 10 percent of the Committee's Twitter page, and 25 percent of Senator Brown's LinkedIn page" under the *de minimis* standard established in Advisory Opinion 2006-7. The Commission either assumed that the costs of placing these amounts of material was not *de minimis*, or simply did not consider the issue. The Commission allowed, however, that the committee could "post a *de minimis* amount of material on its otherwise substantial website and social media sites," without explaining

² Because Congressman Ryan is not donating all royalties to charity, we analyze this question in accordance with Advisory Opinions 2006-7 (Hayworth) and 2011-02 (Brown), rather than Advisory Opinion 2006-18 (Granger).

³ E-mail correspondence attached to the Request in Advisory Opinion 2011-02, dated January 21, 2011, suggests that the Office of General Counsel sought additional details regarding the amounts of material contemplated by the Requestor, even after the Requestor stated that this material would be placed "at a *de minimis* cost to the committee." See Request of Senator Brown in Advisory Opinion 2011-02.

exactly what this means. Advisory Opinion 2011-02. The Requestor seeks clarification and guidance from the Commission to resolve our confusion over whether the Commission's emphasis is on *de minimis* amount or *de minimis* cost. The Requestor suggests the appropriate emphasis should be on the whether the *cost* of adding certain material to the Committee's webpage and social media is *de minimis*. The *amount* of material is irrelevant; the Act regulates campaign *finance*, and not the amount of material a campaign distributes.

We note that there is no cost to use Facebook or Twitter. Both services allow any user to establish and maintain his or her own page at no cost. There is no distribution cost when one posts a message or other material on Facebook or Twitter. (Both services offer paid advertising opportunities, but paid placement is not contemplated here.) In other words, the distribution cost of using Facebook or Twitter, as described here, is \$0.00 regardless of whether the amount of material promoting Congressman Ryan's book constitutes 1%, 5%, 10%, or 25% of the entire Facebook or Twitter page.

Accordingly, the Requestor asks if Ryan for Congress may place material on its campaign website that promotes Congressman Ryan's book so long as the *cost* of placing such material is *de minimis*? In other words, may Ryan for Congress place more than "a single sentence" or "two sentences of promotional material" on its campaign website provided the *cost* of doing so is *de minimis*? May Ryan for Congress place material on its Facebook and Twitter pages promoting Congressman Ryan's book so long as the cost of placing such material is *de minimis*, or must material promoting Congressman Ryan's book on those pages be limited to a *de minimis* amount, as measured by a percentage of the entire page?

If the Commission answers the questions above in the negative, or is unable to render an opinion, may Ryan for Congress place one to two sentences of material promoting *The Way Forward* on the Ryan for Congress website? May Ryan for Congress post a *de minimis* amount of material on its social media sites?

Question 4: *May Prosperity Action place material promoting The Way Forward on its website and social media sites?*

Prosperity Action seeks confirmation it may place material promoting *The Way Forward* on its committee webpage, Facebook page, and Twitter page.

Because the "permissible use" and "personal use" provisions of the Act at 2 U.S.C. § 439a do not apply to Prosperity Action, Requestor seeks the Commission's confirmation that the *de minimis* limitation applied in Advisory Opinions 2011-02 and 2006-07 would not be required with respect to Prosperity Action. In other words, the Requestor seeks the Commission's confirmation that the Act and Commission regulations do not require Prosperity Action to limit the cost of material it places on its website and social media pages promoting Congressman Ryan's book to a *de minimis* amount. If the Commission answers this question in the negative, or is unable to render an opinion, the Requestor seeks the Commission's confirmation that Prosperity Action may, if it chooses, place one to two sentences of material promoting *The Way Forward* on the Prosperity Action website, and

also post a *de minimis* amount of material promoting Congressman Ryan's book on its social media sites.

Question 5: *May Congressman Ryan use the Ryan for Congress and Prosperity Action email and mailing lists to promote the sale of The Way Forward if Congressman Ryan reimburses each committee for the lists' fair market value based on an independent list appraisal?*

Congressman Ryan seeks confirmation that he may use personal funds to purchase (or rent), and use, the email list and/or the mailing list of Ryan for Congress and/or Prosperity Action to promote *The Way Forward*.

With respect to Congressman Ryan's use of the Ryan for Congress email and mailing lists, the regulations provide that "the transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value." 11 CFR 113.1(g)(3). In Advisory Opinion 2011-02, the Commission concluded that Senator Brown could personally use his campaign committee's supporter lists to promote the sale of his book if he personally reimbursed the committee for the fair market value of the rental of those lists, based on an independent list appraisal. Consistent with Advisory Opinion 2011-02, may Congressman Ryan personally purchase or rent the supporter list(s) owned by Ryan for Congress, at a rate established by an independent list appraisal, and then personally use that list(s) to promote the sale of his book?

With respect to Congressman Ryan's use of the Prosperity Action email and mailing lists, the personal use restrictions do not apply. Nevertheless, Congressman Ryan would use personal funds to purchase or rent the Prosperity Action email and/or mailing list, at the fair market value as determined by an independent list appraisal, in order to personally promote his book. As proposed, would this transaction be consistent with the Act and Commission regulations?

Provided Congressman Ryan pays the fair market value for the use of these lists, and uses the lists to promote his book, may each committee accept Congressman Ryan's personal funds as "other receipts" pursuant to Advisory Opinion 2002-14 (Libertarian National Committee)?

Question 6: *Does Congressman Ryan or Ryan for Congress accept or receive an in-kind contribution as a result of the Publisher's publication of Congressman Ryan's book, The Way Forward, or is the publication of the book covered by the Act's media exemption, thereby exempting the Publisher's associated costs and expenses from the Act's definitions of "expenditure" and "contribution"?*

As detailed above, the Publisher will publish Congressman Ryan's book in August 2014.⁴ Federal candidates and officeholders have long written books and engaged in

⁴ Congressman Ryan's book does not solicit contributions for any candidate for federal office, and it does not expressly advocate the election or defeat of any clearly identified candidate for federal office. The book does contain comparisons of the Republican Party and the Democratic Party.

promotional activities in connection with those books. The subject of candidate/officeholder books was among the first issues considered by the Commission. *See, e.g.*, Advisory Opinion 1975-77 (Rhodes). Surprisingly, though, the Commission does not appear to have ever directly addressed candidate's and officeholder's books in the context of the media exemption.

Under the Act, "[t]he term 'expenditure' does not include – (i) 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." Commission regulations recognize the media exemption at 11 C.F.R. §§ 100.73 and 100.132, and refer to "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication." Stated somewhat differently, the Commission explained that "[i]n the Act, Congress exempted from the definition of 'expenditure' costs associated with 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). *Final Rules on Internet Communications*, 71 Fed. Reg. 18,589, 18,607 (April 12, 2006) (emphasis added). Over the course of decades, the Commission has applied the media exemption broadly to both traditional and non-traditional forms of media. *See generally id.* at 18,607 – 610; Advisory Opinion 2010-08 (Citizens United).

Primarily, though, the book promotes Congressman Ryan's views on numerous political and public policy issues, and those views are also, necessarily, the views of a candidate for federal office. Furthermore, given the two-year election cycle for the House of Representatives, Congressman Ryan, like virtually all Members, is at almost all times a candidate for federal office.

In the past, the Commission has rendered opinions on the application of the media exemption even where the underlying publication would not necessarily constitute an "expenditure" or "contribution" in and of itself. Rather, the Commission has liberally rendered opinions with respect to publications or broadcasts that are merely candidate-related. *See, e.g.*, 1996-41 (Belo Corporation) (concerning proposal to produce a series of television programs featuring the views of candidates for the United States Senate, House of Representatives and Governor); 1996-16 (Bloomberg) (concerning proposal to invite presidential candidates to appear at Electronic Town Meetings "in their dual capacities as candidates and office holders"); 2007-20 (XM Radio) (concerning free airtime to presidential candidates). More recently, Advisory Opinion 2010-08 (Citizens United) did not concern any particular documentary film, but rather, addressed the question of whether the documentary films produced by Citizens United were entitled to the media exemption. Similarly, there was no specific discussion of content in Advisory Opinion 2005-16 (Fired Up!).

In other words, the media exemption has not been employed strictly as an affirmative defense raised *after* the Commission has already found what would otherwise be activity regulated by the Act. Instead, the media exemption is a broad protection that functions to prevent the Commission from examining a specific content in the first place. The media exemption provides the media with *breathing room and the assurance that it does not need to self-censor*. As Congress explained, "it is not the intent of Congress ... to limit or burden in any way the First Amendment freedoms of the press and of association." H.R. Rep. No. 93-1239 at 4 (1974).

The Commission uses a two-part test to determine whether the media exemption applies. First, is the entity at issue a "press entity"? Second, if the entity is a press entity, is it performing its legitimate press function? See Advisory Opinions 2008-14 (Melothe), 2005-16 (Fired Up!); *Final Rules on Internet Communications* 71 Fed. Reg. 18,589, 18,607 (Apr. 12, 2006) (citing *Readers Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publ'g. Inc.*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981)). The media exemption is also inapplicable and unavailable to entities that are "owned or controlled by any political party, political committee, or candidate." 11 C.F.R. §§ 100.73 and 100.132.

There would seem to be little debate that a book publisher is a "press entity" for purposes of the media exemption, even though the Commission has rarely been called upon to make such a pronouncement. Books and movies are not specifically identified in either the Act or Commission regulations that set forth the media exemption. Nevertheless, the Commission has treated both as "media" in the past. In *Citizens United v. FEC*, the Supreme Court noted that the government represented in oral argument "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." *Citizens United v. FEC*, 558 U.S. 310, 349 (2010). While the government's representation that the Commission had "never applied this statute to a book" was inaccurate,⁵ the Court's reaction during oral argument and the written opinion in *Citizens United* makes clear that book publication is a "press" activity.

In MUR 5642 (George Soros), three Commissioners referred to George Soros's book, *The Bubble of American Supremacy: The Costs of Bush's War in Iraq*, as "a book covered by the Act's media exemption." Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5642 at 4. The Commission has also acknowledged that movies enjoy the protection of the media exemption. See, e.g., Advisory Opinion 2010-08 (Citizens United) ("the costs of producing and distributing Citizens United's films, along with related marketing activities, are covered by the press exemption from the Act's definitions of 'expenditure' and 'electioneering communications.'").

⁵ See, e.g., Advisory Opinion 1987-08 (AIG/U.S. News) ("With respect to AIG's sponsorship of the Book, the Commission notes that the 'news story' exemption does not apply to distribution through facilities other than a broadcasting station, newspaper, magazine, or other periodical publication. 2 U.S.C. 431(9)(B)(i). Because the Book does not fit within any of these categories, it would not qualify for the 'news story' exemption."). The Office of General Counsel took a similarly narrow approach in MURs 5474 and 5539, asserting that "[t]heatrical release of a film does not qualify as distribution through a broadcasting station, newspaper, magazine or other periodical publication." First General Counsel's Report in MURs 5474 and 5539, at 13 fn. 11.

Nevertheless, we read Advisory Opinion 2010-08 (Citizens United) as superseding this approach. There, the Commission concluded, "While an earlier Commission advisory opinion narrowly concluded that a news story, commentary, or editorial distributed through facilities other than the enumerated media (*i.e.*, a book) is generally not covered by the press exemption, later Commission actions have read the press exemption more broadly, consistent with the Act's legislative history . . . In fact, [t]he Commission has not limited the press exemption to traditional news outlets, but rather has applied to 'news stories, commentaries, and editorials, *no matter in what medium they are published*...." Advisory Opinion 2010-08 (Citizens United) (emphasis in original).

Assuming that the Commission agrees that books are in fact protected by the Act's media exemption, and based on language in Advisory Opinion 2010-08 it appears that this is the case (see footnote 5 above), then the question is whether the Publisher is a "press entity" performing its legitimate press function. As the Commission explained, "when determining whether the term ["press entity"] applies to a particular entity, the Commission has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials." Advisory Opinion 2010-08: *see also* Advisory Opinion 2008-14 (Melothe). The Commission's analysis does not turn on one particular fact. *See* Advisory Opinions 2007-20 (XM Radio) and 2005-19 (Inside Track).

The Publisher has been in the business of disseminating information and commentary to the public in book form (including e-books and audio books) for decades, and routinely markets its book through print, radio, television, magazines, and on-line advertising. The Publisher has published and promoted "political" books in the past such as Senator McCain's *Hard Call*, Senator Kennedy's *True Compass*, and Congressman Waxman's *The Waxman Report*. The Publisher averages approximately six (6) such politically themed books and book promotions each year. The Publisher produces and disseminates its "programming" on a "regular basis." Consequently, the Publisher satisfies the Commission's "press entity" test.

Next, the Commission considers whether the entity is engaging in its legitimate press function. In considering this question, the Commission asks 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* Advisory Opinions 2010-08 (Citizens United), 2005-16 (Fired Up!), and 2000-13 (iNEXTV). The distribution of books to the public is the legitimate press function of an entity, such as the Publisher, that regularly produces "news stories, commentary, or editorials" in the form of books. The Publisher's books can be bought at book stores across the country and from numerous online book sellers, and they can be borrowed usually at no cost from public libraries. Consistent with the analysis in *FEC v. Massachusetts Citizens for Life*, Congressman Ryan's book is comparable in form and nature to the Publisher's other books. Congressman Ryan's book is in no way like the "Special Edition" at issue in *MCFL*. Consequently, the Publisher will engage in its legitimate press function when it publishes Congressman Ryan's book.

Finally, the Publisher is not owned or controlled by a political party, political committee, or candidate.

The Requestor seeks the Commission's confirmation that neither Congressman Ryan nor Ryan for Congress will accept or receive an in-kind contribution as a result of the Publisher's publication of Congressman Ryan's book, *The Way Forward*, because the Publisher is a press entity, its publication of *The Way Forward* is an exercise of its legitimate press function, and the Publisher's costs associated with the publication of *The Way Forward* are exempted from the Act's prohibitions and restrictions by the media exemption.

Question 7: Does Congressman Ryan or Ryan for Congress accept or receive any in-kind contribution as a result of the Publisher's payment of costs incurred in connection with

the promotion of Congressman Ryan's book, including a bus tour, or are these costs also covered by the Act's media exemption?

As detailed above, the Publisher will engage in, and pay for, a marketing and promotional program that will include appearances by Congressman Ryan at book signings and other promotional events, including national and local print, television, radio, and other broadcast media availability and a multi-day bus tour. The marketing and promotional program will be developed by the Publisher for the purpose of promoting Congressman Ryan's book and increasing sales. However, it can be safely assumed that as part of this promotional book tour, news media will ask Congressman Ryan questions that are campaign- and election-related in nature.

As noted above, the Commission has issued Advisory Opinions on the subject of candidate/officeholder books for decades. However, the issue of publisher-funded promotional tours and events has largely remained in the background. In Advisory Opinion 2011-02 (Brown), the publisher's promotional activities, including a book tour, were expressly acknowledged but not directly addressed by the Commission.⁶ See also Advisory Opinions 1984-56 (involving Senator's promotional appearances to promote book and publisher) and 1982-16 (involving a publisher-funded book party). It is unclear how the Commission has treated these book tours in the past, if it has considered the question at all.⁷ The Commission does not appear to have ever directly addressed promotional book tours in the context of the media exemption.

The Commission explained in Advisory Opinion 2010-08 (Citizens United), "courts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product." The Commission cited *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1313 (D.D.C. 1981) ("The court takes judicial notice of the fact that newsletters and other publications solicit subscriptions, and in their advertising doing so, they publicize content and editorial positions. If there is any doubt remaining as to whether the solicitation letter was distributed as part of the normal functions of a press entity, those doubts are dispelled by an examination of the newsletter and a copy of the solicitation letter.") and *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981) ("if

⁶ For example, the Advisory Opinion notes that "[f]ollowing the publication of the book, Senator Brown will promote the book in a national book tour during the Senate's February recess," and "[t]he Publisher will pay the travel and other costs of the book tour and promotional appearances." Advisory Opinion 2011-02. Commissioner Weintraub also raised the issue of "a corporate subsidy of the campaign" in connection with a publisher's book tour during discussion of Advisory Opinion 2011-02. See <http://www.fec.gov/audio/2011/2011021703.mp3>.

⁷ There appear to be three options that would be (more or less) consistent with past Commission action: (1) the publisher's promotional activity is simply not in connection with any election, and therefore not regulated as a "contribution" or "expenditure"; (2) the publisher's promotional activity falls within the Commission's "commercial activity" doctrine; or (3) the publisher's promotional activity is protected by the media exemption. We note that in Advisory Opinion 1982-66 (Response Marketing), the Commission treated a company's sales promotion for products relating to George Orwell's *1984* as "purely commercial activity that does not involve the receipt or payment of money or anything of value for the purpose of influencing the election of any person to Federal office."

RDA was acting in its magazine publishing function. if, for example, the dissemination of the tape to television stations was to publicize the issue of the magazine containing the Chappaquiddick article, then it would seem that the exemption is applicable"). See also Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5642 (George Soros) ("A book brochure promoting the book's themes and directing readers how to purchase copies is as plainly within the scope of a legitimate media function as newspapers or magazines (ideological or otherwise) soliciting subscriptions.").

The Publisher's proposed actions to market and promote Congressman Ryan's book are legitimate press functions consistent with the marketing and promotional activity the Publisher provides for other books in its ordinary course of business. As with other book promotions, the Publisher's promotional strategy incorporates book signings, national and local print, television, radio, and other broadcast media availabilities, and a multiple-day bus tour (outside of Wisconsin). As the Commission is well aware, celebrities, as well as other candidates and officeholders, commonly participate in bus tours organized and paid for by their publishers.⁸ For example, former Governor Huckabee and comedian Steve Harvey, among many others, have participated in bus tours to promote their books.

Each of the marketing and promotional activities that the Publisher plans to undertake are "normal, legitimate press functions" to which "the press exemption applies." *Phillips Publishing*, 517 F. Supp. at 1313.

The Requestor seeks the Commission's confirmation that neither Congressman Ryan nor Ryan for Congress will accept or receive any in-kind contribution as a result of the Publisher's payment of costs incurred in connection with the promotion of Congressman Ryan's book, including a bus tour, because these activities and expenses are also fully protected by the media exemption, meaning they do not constitute "contributions" or "expenditures" for purposes of the Act.

Question 8. *If the Commission does not agree that the Publisher's publication of Congressman Ryan's book and related promotional activities, costs, and expenses are covered by the media exemption, and thereby exempted from the Act's definitions of "expenditure" and "contribution," or if the Commission is unable to render an opinion on these questions, the Requestor asks, in the alternative, if Congressman Ryan and/or Ryan for Congress avoid the receipt of an in-kind contribution from the Publisher because the Publisher's various activities, costs, and expenses are exempted from the Act's regulation under the Commission's bona fide commercial activity doctrine?*

In the past, the Commission has treated some of the types of activities described in this Request as *bona fide* commercial activity that is not subject to the Act's restrictions. In some cases, the Commission has applied this doctrine where the media exemption might also have been applied. For example, in MURs 5475 and 5539 (concerning Michael Moore's

⁸ See, e.g., <http://premiermarketing.com> (Largest provider of national book tours for all types of authors, including current and former elected officials), and <http://pages.simonandschuster.com/atria-books-of-mystery-bus-tour> (National bus tour of several of publisher Simon and Schuster's mystery genre authors promoting mystery novels).

Fahrenheit 9/11), the Commission relied on the *bona fide* commercial activity doctrine rather than the media exemption. The Commission treated the movie "and its related enterprises," including the movie trailers and operation of a website, as commercial activity. (We note that the Commission rejected application of the media exemption in this case on the grounds that "[t]heatrical release of a film does not qualify as distribution through a broadcasting station, newspaper, magazine or other periodical publication." First General Counsel's Report in MURs 5474 and 5539 at 13 fn. 11. However, Advisory Opinion 2010-08 appears to have specifically rejected this approach.)

The Commission has used a fact-specific test to determine whether certain candidate-related commercial activity results in an expenditure or contribution. See Advisory Opinion 1994-30 (Conservative Concepts) and Advisory Opinion 1989-21 (Create-a-Craft). *Bona fide* commercial activity includes activity done by an entity organized and maintained for commercial purposes only and not for the purpose of influencing any election, and the activities themselves are for purely commercial purposes. See Advisory Opinion 2008-10 (VoterVoter.com). Factors the Commission assesses when determining *bona fide* commercial activity include: (1) whether the sales of the merchandise involve fundraising activity or solicitations for political contributions; (2) whether the activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election; (3) whether the items are sold at the vendor's usual and normal charge; and (4) whether the purchases are made by individuals for their personal use. Advisory Opinion 1989-21 (Create-a-Craft).

As in Advisory Opinion 1994-30 (Creative Concepts) and MURs 5474 and 5539 (Dog Eat Dog Films/Michael Moore), the totality of the circumstances at hand in this request demonstrate that the Publisher's marketing and promotion strategy for Congressman Ryan's book qualifies as *bona fide* commercial activity and therefore does not come under the purview of the Act and regulations. The Publisher is a long-established publisher that publishes a wide variety of different types of books, both political and non-political in nature. The activities in which the Publisher wishes to engage, including a multiple-day bus tour, hosting book signings, and booking national and local print, television, radio, and other media availability, are all for the purpose of selling books and not for the purpose of influencing a federal election. The Publisher is not arranging fundraising or other campaign events, or otherwise fundraising on behalf of Ryan for Congress or Prosperity Action. All books are being sold through traditional outlets at the usual and normal sales price charged for the book. Finally, people who purchase presumably do so for their own personal reasons, use, and enjoyment. The nature of any publisher's business is to promote its author's published book as a business venture, and the Publisher here is no different.

IV. CONCLUSION

The Requestor appreciates the Commission's consideration of this Request. Given the short time remaining before the publication of the book and the commencement of the promotional activities, we appreciate having the benefit of the Commission's guidance as early as possible. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,



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