

THE SUTTON LAW FIRM

February 22, 2016

VIA OVERNIGHT DELIVERY

Daniel A. Petalas, Esq.
Acting General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RE: Request for Advisory Opinion

Dear Mr. Petalas:

On behalf of our client Ethiq, Inc. ("Ethiq"), we respectfully request an advisory opinion from the Federal Election Commission (the "Commission") pursuant to the Federal Election Campaign Act ("FECA"). (See 52 U.S.C. section 30108(a); 11 CFR section 112.1.) Specifically, Ethiq seeks an advisory opinion as to whether its production and distribution of journalistic content qualifies for the media exemption/press exemption relative to FECA's restrictions and disclosure, disclaimer, and reporting requirements for "contributions" and "expenditures." (See 52 U.S.C. sections 30101(8)(B)(i) and (9)(B)(i).)

Ethiq is a for-profit news organization and media company that plans to produce and distribute journalistic content for its registered users. This content will offer political information and commentary to users based on an algorithm previously considered by the Commission. (See Advisory Opinion 2015-12 (Ethiq).) As a news media company distributing news media content, Ethiq's activity should qualify for the media exemption, and we request that the Commission make this determination in an advisory opinion.

Background

The Commission has already issued an advisory opinion regarding, among other things, the absence of Ethiq's reporting requirements under FECA. (See Advisory Opinion 2015-12 (Ethiq).) At that time, the Commission understood that Ethiq produces and distributes news, at no cost, to users of its downloaded mobile application (the "app"), and will soon provide the same services to users of its traditional website. Users download the app and submit information regarding politics, sports, social issues, current events, and breaking news by completing an initial survey. This information establishes a user's baseline profile and is

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150 Post Street, Suite 405 ☐ San Francisco, CA 94108

Tel: 415/732-7700 ☐ Fax: 415/732-7701 ☐ www.campaignlawyers.com AOR001

used to weigh, or “score,” candidates and businesses based on strict business criteria – a process already approved by the Commission. (See Advisory Opinion 2015-12 (Ethiq).) Each user’s content may be further tailored as they rate various content supplied by the Ethiq app or website.

Initial candidate scores are based upon the extent to which the Ethiq users and candidates agree or disagree on various issues. Ethiq digitizes candidate voting records and public positions on a variety of issues to calculate these scores. Initial business scores are based in part on the business’ political activity, including the extent to which the business directly (via independent expenditures) or indirectly (via PACs or contributions by its high-level executives) supports particular candidates or causes. Ethiq digitizes Commission records and other political activity information to calculate these scores. Ethiq users will be able to view their individualized score and a list of reasons that a particular candidate received a particular score.

Importantly, all scoring is an objective business decision made using a regularized algorithm, as previously analyzed by the Commission. (See Advisory Opinion 2015-12 (Ethiq).) Ethiq does not support or oppose any political parties, political committees, candidates, or causes. Ethiq will not engage in express advocacy for or against any candidate, or advocate for or against any political issue, in its presentation of information on its app or website. Any links to candidate or committee web pages are informational only, and will therefore direct users only to the homepages – and not to contribution pages.

After scores are calculated and applied, the focus of Ethiq’s activity shifts from the use of data to the provision of media content. This media content is the focus of Ethiq’s present advisory opinion request. Each Ethiq user receives a variety of content based on their baseline scores, including information regarding pending and former legislation, the votes of legislators on that legislation, and campaign finance reporting data for candidates and public officials.

Ethiq’s content will be distributed in various forms, such as infographics displaying data from legislators’ votes on different issues. Ethiq will also curate articles from various third party sources, much like Drudge Report or Huffington Post. And Ethiq users will receive originally produced articles, pictures, and videos produced by Ethiq’s paid journalists. Ethiq currently employs journalists as independent contractors. Ethiq’s journalists engage in the type of journalism practiced by many other news media organizations, and might, for example, follow a presidential candidate to report on their campaign speeches and events.

Ethiq will maintain editorial control over the work of their journalists, and wishes to cast a wide net – balancing a variety of views in order to cultivate a bipartisan audience. Both curated and original content will refer to clearly identified candidates for federal office; however, Ethiq will not be working with any candidates or public officials to produce, edit, or provide content to users. Users will receive and can request this content spontaneously, using both Ethiq’s app and website.

As with any news media company, content is Ethiq’s most important product for users. In order to generate a user base and foster a continuing relationship with consumers, Ethiq will have its users rate content to indicate their preferences on particular issues, legislation, or candidates. Ethiq will then adapt user scores to offer more tailored content. These continually adjusted scores mean that Ethiq will provide different content to different users.

Ethiq’s app, website, and content will be free. Ethiq plans to generate income by: (1) selling digital advertising space on the app to third parties, including candidates and political committees; and (2) licensing its proprietary algorithm and dataset to companies conducting market research. Please note that all advertisers – whether political or otherwise – will buy advertising space at the same rate, and purchases will in no way affect the objective business decisions made using the regularized algorithm. Also, Ethiq will not convey, to any third party (including but not limited to users, licensees, or advertisers) the number of high-level executives used to calculate corporate contributions.

The question presented in this advisory opinion request is whether Ethiq’s media content qualifies for the media exemption to FECA’s definitions of “contributions” and “expenditures.” It is important to Ethiq that its activities fully conform with the law, and that it stands on equal footing with other news media companies in producing and distributing journalistic content. Ethiq therefore requests that the Commission determine that above-described content qualifies for FECA’s media exemption.

Legal Analysis

We believe that Ethiq’s activities qualify for the media exemption because Ethiq will regularly produce and distribute content that disseminates political commentary and information to the public, and it is not owned or controlled by a political party, committee, or candidate. (See 52 U.S.C. sections 30101(8)(B)(i) and (9)(B)(i).)

As you know, the media exemption cannot be limited to “traditional” media corporations. (Explanation and Justification to the Internet Communications Regulations, Federal Register, Vol. 71, No. 70, dated April 12, 2006, Pages 18594 and 18608-18610 [“The Commission concludes that bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities.”].) The exemption thus should apply to Ethiq’s app and website – both of which distribute aggregated/curated and original political commentary and information.

I. The Press Exemption Applies to Ethiq.

FECA imposes restrictions, as well as disclosure, disclaimer, and reporting requirements in connection with corporate funds/money spent on “contributions” or “expenditures.” (See, e.g., 52 U.S.C. sections 30104(c), 30104(f), and 30120(a)(3).) However, as discussed throughout this request, FECA also includes a media exemption for “contributions” and “expenditures.” (See 52 U.S.C. sections 30101(8)(B)(i) and (9)(B)(i).)

Under 11 C.F.R. section 100.132, “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcast station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not an expenditure unless the facility is owned or controlled by any political party, political committee, or candidate....” Applicable federal regulations provide a parallel exemption from the definition of “contribution” for the costs incurred in covering or carrying such news stories, commentaries, or editorials. (See 11 C.F.R. section 100.73.)

There is also a media exemption for “electioneering communications” (see 52 U.S.C. section 30104(f)(3)(B)(i)), but we omit a discussion of this exemption because it is not applicable to Ethiq’s modes of communication. 11 C.F.R. section 100.29(c)(1) clearly exempts from the definition of “electioneering communication” any communication that “[i]s publically disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station.” Because Ethiq’s communications are conducted through Ethiq’s app and website, they are already exempt from FECA’s definition of “electioneering communication” and Ethiq therefore has no need to seek the media exemption relative to such non-electioneering communications.

The Commission undertakes a two-part analysis to determine whether the media exemption applies. First, the Commission determines whether the entity engaging in the activity is a press entity. (See, e.g., Advisory Opinions 2010-08 (Citizens United), 2005-16

(Fired Up), and 1996-16 (Bloomberg).) Second, the Commission determines the exemption's applicability by considering: (1) whether the entity is owned or controlled by a political party, committee, or candidate; and (2) whether the entity acts in its "legitimate press function" in conducting the particular activity at issue. (See Reader's Digest Assn. v. FEC (S.D.N.Y. 1981) 509 F.Supp. 1210, 1215.)

If a political party, committee, or candidate owns or controls the media entity, then the press exemption does not apply. (See 52 U.S.C. section 30101(9)(B)(i).) As set forth herein, Ethiq is not so owned or controlled. Further, federal case law requires that the press entity act in its press capacity in order to qualify for the exemption. (See FEC v. Massachusetts Citizens for Life, Inc. (1986) 479 US 238.) As described below, Ethiq indeed acts in its press capacity and therefore satisfies this requirement.

If the Commission determines that the entity is not owned or controlled by a political party, committee, or candidate and is acting in a press capacity, then the entity is granted the press exemption, as the Commission does not have subject matter jurisdiction over the conduct of the entity. (See FEC v. Phillips Publishing, Inc. (D.D.C. 1981) 517 F.Supp. 1308, 1313; See also Advisory Opinions 2010-08 (Citizens United), 2007-20 (XM Radio), and 2005-19 (Paradigm Shift Productions).)

A. Ethiq is a Press Entity.

As a non-partisan, for-profit, news media company, Ethiq is a press entity. The Commission applies the media exemption to "any broadcast station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication." Ethiq will soon provide its original and aggregated/curated content on a traditional webpage, which is an accepted medium of communication under the exemption. And while Ethiq's app does not fall explicitly within this outlined media, Ethiq will produce the type of online political commentary and news media contemplated by statute and regulation, and distribute it in the manner envisioned and encompassed by the press exemption. (See Advisory Opinion 2005-16 (Fired Up).)

After determining that Ethiq's modes of communication fall within the exemption, the Commission next determines whether the entity is in the "regular business" of distributing news or commentary. (See Advisory Opinion 2005-16 (Fired Up).) Ethiq is a for-profit company whose primary function is to provide news, information, and commentary to users through its app. The profit motive is relevant to whether a speaker is a press entity, although

the profit motive is not (and could not constitutionally be) essential to press entity status. (See Advisory Opinion 2000-13 (iNEXTV).) Ethiq derives profit from its dissemination and production of journalistic content – a factor which further supports the applicability of the press exemption to Ethiq.

Availability to the general public is also a factor when considering whether an entity is a press entity. (See Advisory Opinion 2003-34 (Viacom).) Ethiq's content is available at no cost to the general public and is distributed in the same way as other online news sources described in and permitted by FECA and in Commission regulations. This serves as another factor in Ethiq's favor as it seeks the Commission's opinion that the press exemption applies.

Editorial control is another factor to be considered as part of the analysis. (See Advisory Opinion 2005-16 (Fired Up).) Ethiq maintains editorial control over the content provided to users through its webpage and app – much as other newspaper or magazine editors do – and uses its regularized algorithm to determine which news stories, commentaries, and editorials appear in a particular users' app. In this regard, Ethiq also demonstrates its status as a press entity.

Ethiq is a news media company in the regular business of distributing news and commentary through media that fit within the Commission's press exemption. Therefore, Ethiq is a press entity and satisfies the first prong of the press exemption test.

B. Ethiq's Activity Is Entitled to the Media Exemption Based on its Ownership and Exercise of its Legitimate Press Function.

Once it is established that an entity qualifies as a "press entity," the Commission next determines whether the entity is owned or controlled by a political party, political committee, or candidate, and whether the entity is acting as a press entity in performing the media activity. (See 11 C.F.R. section 100.73; Advisory Opinion 2004-7 (MTV and Viacom).) If a press entity is not owned or controlled by a political party, committee, or candidate, and if it acts as a legitimate press entity in conducting its activities, then it is exempt from FECA's restrictions, and disclosure, disclaimer, and reporting requirements, and the Commission should confirm the exemption. (See Phillips Publishing, 517 F.Supp. at 1313.)

1) Ethiq is not owned or controlled by a political party, committee, or candidate.

Ethiq is neither owned nor controlled by a political party, political committee, or candidate. It is a press entity and at all times acts, and intends to continue to act, as a press

entity – publishing and producing news, editorials, and commentary for its users. Ethiq is completely devoted to its independent journalistic goals and satisfies the law's ownership requirements in this regard.

2) Ethiq will act in its legitimate press function by creating and producing political information and commentary and distributing it to its users.

Whether a press entity is acting in its legitimate press function depends on whether its activities are comparable to those activities that it normally undertakes. (See Massachusetts Citizens for Life, 479 U.S. at 250-51.) The Commission has previously concluded that press functions include the “provision of news stories, commentary, and editorials.” (See Advisory Opinions 2008-14 (Melothe, Inc.) and 2005-16 (Fired Up).)

Ethiq is a news organization and media company whose business model involves the regular and continued production and distribution of news and political commentary targeted at specific users based on a regularized algorithm. This mathematical formula might target some content to one group of users, and different content to another group of users, but this is a regularized system of publication.

There is no special type or form of broadcast to support or oppose particular candidates, parties or issues, nor does Ethiq attempt to forego regular media aggregation/curation and production in favor of distributing campaign materials. Ethiq produces and distributes content for its users based on the users' preferences. Its regular output is news and political commentary, and the Commission should conclude that distributing this content to users is within Ethiq's legitimate news organization function.

The Commission's inquiry here is whether Ethiq's distribution of aggregated/curated and original content will fall outside its normal press activity. The Massachusetts Citizens for Life Court distinguished between a speaker's regularly published newsletter – which is entitled to the media exemption – and a “Special Edition” flyer – which is not entitled to the exemption, because various “considerations of form” indicated that the “Special Edition” flyer was unlike the regularly published newsletter.

In previous inquiries, the Commission declined to apply the media exemption where it found that an entity deviated from its normal standard of operations with regard to the form of the communication. For example, where a non-profit organization sought to distribute communications supporting candidates instead of publishing a regularized periodical (see

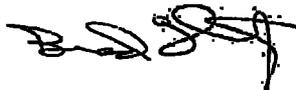
Advisory Opinion 1988-22 (San Joaquin Valley Republican Associates)), the Commission concluded that the organization could not avail itself of the press exemption.

Additionally, where an insurance company proposed to qualify the distribution of books that included interviews with presidential candidates as a "news story" (see Advisory Opinion 1987-08 (AIG and U.S. News)), the Commission concluded that the company was not covered by the press exemption. These considerations of form, however, do not apply to Ethiq because the distribution of political information and commentary through its app and webpage is Ethiq's regular business and legitimate press function, and Ethiq will act in its legitimate press function by creating and producing political information and commentary and distributing it to its users.

Conclusion

Ethiq thanks the Commission in advance for analyzing this important issue and requests that the Commission agree that Ethiq's activities qualify for the media/press exemption. If we may provide additional information, please contact us.

Respectfully submitted,



Bradley W. Hertz

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