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AGENDA ITEM
For meeting of July 23, 2014
SUBMITTED LATE

July 21, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Subject: Draft AO 2014-08 (Nick for New York)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on July 23, 2014.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2014-08

2

3 Mr. Joseph Shippee
4 Campaign Manager
5 Nick for New York
6 PO Box 3193
7 New York, NY 10036

DRAFT

8

9 Dear Mr. Shippee:

10 We are responding to your advisory opinion request on behalf of congressional candidate
11 Nicholas Di iorio and his principal campaign committee, Nick for New York, concerning Mr. Di
12 iorio's proposed appearance on a reality television show and potential payment for that
13 appearance. The Commission concludes that under the Federal Election Campaign Act, 2 U.S.C.
14 §§ 431-57 (the "Act"), and Commission regulations, Mr. Di iorio may appear on the reality
15 television show as proposed, but neither the candidate nor his staff may be paid for that
16 appearance.

17 ***Background***

18 Except where noted otherwise, the facts presented in this advisory opinion are based on
19 your letter received on June 4, 2014, and your email dated July 2, 2014.

20 Nicholas Di iorio is a candidate for the House of Representatives in the 12th
21 Congressional District of New York. Nick for New York (the "Committee") is Mr. Di iorio's
22 principal campaign committee. Two individuals, one of whom is a television producer, have
23 approached the Committee about filming a multi-episode reality television show featuring Mr.
24 Di iorio. Neither the Committee nor Mr. Di iorio had any prior contact with these individuals
25 before being approached about filming the show.

26 Your request states that the show would feature two congressional candidates running in
27 districts where their odds of winning are very low; the producers are interested in "exploring the
28 motivations, trials and tribulations of some candidates running in races considered unwinnable."

1 Their plan is to film the candidate and his campaign team going about day-to-day campaign tasks
2 and events from August through early November 2014. The producers intend to film from a
3 purely observational perspective, and in three basic contexts: (1) interviews with the candidate,
4 campaign staff, and others involved in the campaign; (2) closed door meetings of the candidate
5 and staff; and (3) parades, campaign rallies, and other public appearances. No episodes will air
6 until after the November 4 general election. Any advertisements for the show that run before the
7 election will not include the candidate's name or likeness or any candidate-specific information.

8 Mr. Di iorio has signed an agreement with the show's producers, in which the parties
9 agree to move forward with the show if Esquire Network ("Esquire") decides to pick it up.

10 According to Esquire's website, Esquire is a cable provider currently distributing over a dozen
11 other reality show series on diverse topics. *See Shows, ESQUIRE TV, <http://tv.esquire.com/about>*
12 (last visited July 15, 2014). Esquire describes itself as "a strategic partnership between
13 NBCUniversal and Hearst Magazines," "a unit of NBCUniversal Cable Entertainment," and "a
14 division of NBCUniversal." *About, ESQUIRE TV, <http://tv.esquire.com/about>* (last visited July
15 15, 2014).

16 The request states that it is customary for individuals featured in reality television shows
17 to be paid for their appearance, and that Mr. Di iorio and certain members of the Committee's
18 staff would probably be paid in this case, as well. Details of how and when the candidate and
19 staff would be paid have not yet been decided, but the amount and timing of such payments are
20 expected to be comparable to what and when other reality television participants are paid. The
21 requestors expect the network to provide all funding for the television show, including any
22 payments to the candidate and staff.

23

1 ***Question Presented***

2 *Under the Act and Commission regulations, may the candidate and his Committee staff*
3 *be filmed for the reality television show and, if so, may they be paid?*

4 ***Legal Analysis and Conclusions***

5 Yes, the candidate and his Committee staff may be filmed for the reality television show,
6 but they may not receive payment for doing so.

7 The Act and Commission regulations provide that candidates and political committees
8 may not knowingly receive from a corporation any “contribution,” which includes “anything of
9 value” given for the purpose of influencing a federal election or given by a corporation to a
10 candidate or campaign committee in connection with a federal election. 2 U.S.C. §§ 431(8)(A),
11 441b(a), (b); 11 C.F.R. §§ 100.52(a), 114.1(a), 114.2(b).

12 As a threshold matter, it is not clear from the facts presented in the request whether the
13 filming and airing of the show would constitute “anything of value” within the meaning of the
14 Act. The mere filming of campaign meetings, rallies, and similar events provides no value to the
15 campaign unless the footage is used, aired, or distributed in some fashion, and the request states
16 that the proposed show would not air (or be advertised using Mr. Di iorio’s name or likeness)
17 prior to the election. This fact suggests that the filming, advertising, and airing of the show
18 probably would not be things of value to the campaign. Nonetheless, there are scenarios
19 factually consistent with the request that could result in things of value accruing to Mr. Di iorio’s
20 campaign, such as if Mr. Di iorio is elected to Congress in 2014 and the show airs during his
21 2016 campaign.

22 Accordingly, to determine whether the requestors may participate in the show under the
23 Act and Commission regulations, the Commission must determine whether the show qualifies

1 for the “media exemption.” Under that provision, “[a]ny cost incurred in covering or carrying a
2 news story, commentary, or editorial by any broadcast station (including a cable television
3 operator, programmer, or producer) . . . is not a contribution unless the facility is owned or
4 controlled by any political party, political committee, or candidate.” 11 C.F.R. § 100.73.

5 The factors that the Commission assesses to determine whether activity falls within the
6 media exemption are well-established. First, the entity engaging in the activity must be a press
7 entity. *See* Advisory Opinion 2005-16 (Fired Up!); Advisory Opinion 2000-13 (iNEXTV);
8 Advisory Opinion 1998-17 (Daniels Cablevision); Advisory Opinion 1996-48 (National Cable
9 Satellite). Next, the Commission applies the two-part test presented in *Reader’s Digest Ass’n v.*
10 *FEC*, which states that: (1) the press entity cannot be owned or controlled by a political party,
11 political committee, or candidate; and (2) the press entity must be acting as a press entity in
12 conducting the activity at issue (*i.e.*, the entity must be acting in its “legitimate press function”).
13 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981); *see also* *FEC v. Phillips Publishing*, 517 F. Supp.
14 1308, 1312-13 (D.D.C. 1981); Advisory Opinion 2007-20 (XM Radio); Advisory Opinion 2005-
15 19 (Inside Track); Advisory Opinion 2005-16 (Fired Up!); Advisory Opinion 2004-07 (MTV).

16 When determining whether an entity qualifies as a press entity, the Commission has
17 focused on whether the entity produces on a regular basis a program that disseminates news
18 stories, commentary, or editorials. *See, e.g.*, Advisory Opinion 2008-14 (Melothe); Advisory
19 Opinion 2007-20 (XM Radio); Advisory Opinion 2005-19 (The Inside Track). Under this
20 standard, the Commission has repeatedly found broadcast and cable television networks to be
21 press entities. *See, e.g.*, Advisory Opinion 2003-34 (Showtime) (finding that cable network
22 producing reality television show about campaigns was press entity and that show was
23 “commentary” under Act); Advisory Opinion 2004-07 (MTV) (finding that MTV's mock

1 presidential election qualifies for press exemption); Advisory Opinion 1998-17 (Daniels
2 Cablevision) (finding that broadcast network Daniel’s Cablevision qualified for press exemption
3 and could give out free 30 second advertising spots to candidates); Advisory Opinion 1996-48
4 (National Cable Satellite) (finding that C-SPAN is press entity). Like the entities previously
5 deemed to be press entities by the Commission, Esquire is a cable network that regularly
6 disseminates news, commentary, or editorials in the form of television shows.¹ Therefore,
7 Esquire qualifies as a press entity.

8 Next, Esquire satisfies both criteria set forth in *Reader’s Digest*. First, as a unit of
9 NBCUniversal Cable Entertainment and a division of NBCUniversal, Esquire is not owned or
10 controlled by a political party, political committee, or candidate.² *About Us*, NBCUNI,
11 <http://www.nbcuni.com/corporate/about-us/> (last visited July 14, 2014) (stating that
12 NBCUniversal is a subsidiary of Comcast, a publicly traded corporation). Second, Esquire
13 would be acting as a press entity in conducting the activity at issue. The Commission typically
14 considers two factors in determining whether a press entity is acting in its “legitimate press
15 function”: (1) whether the material is made available to the general public, and (2) whether the
16 material is comparable in form to the entity’s ordinary productions. *See, e.g.*, Advisory Opinion
17 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986));

¹ The television series currently being distributed by Esquire include *Risky Listing*, a series about individuals involved in the “intensely competitive world of New York nightlife real estate”; *American Ninja Warrior*, a series following competitors as they tackle “the world’s most difficult obstacle courses”; *Boundless*, a series in which two “ultra athletes” engage in endurance races over a five-month period; and *Alternate Route*, a series in which a photojournalist “hits the road in search of people, places and objects that embody the timeless American spirit.” *See About*, ESQUIRE TV, <http://tv.esquire.com/about> (last visited July 14, 2014).

² On its website, Esquire also describes itself as a “strategic partnership” between NBCUniversal and Hearst Magazines. *About*, Esquire TV, <http://tv.esquire.com/about> (last visited July 15, 2014). For purposes of this advisory opinion, the Commission assumes that Hearst Magazines is not owned or controlled by a political party, political committee, or candidate to the extent that it may exercise any ownership or control over Esquire. *See* Hearst Corporation, *State of the News Media: Who Owns the Media*, PEW Research Center (2012), <http://stateofthemedial.org/media-ownership/company-profile/?mediaid=46&id=63>.

1 Advisory Opinion 2000-13 (iNEXTV). Here, the network’s materials will be available to the
2 general public: Esquire is a national cable network and will broadcast the show on its widely
3 viewable channel.³ Second, Esquire distributes other reality television shows that appear to be
4 comparable to the one proposed here.⁴

5 Thus, Esquire satisfies all necessary criteria to be considered a press entity and would be
6 acting in its press function in airing the proposed television show. As a result, even if the filming
7 and airing of the show were to constitute things of value to the campaign, the Commission
8 concludes that those activities (as described in the request) would be permissible because they
9 would not be contributions under the Act or Commission regulations.

10 However, while the candidate and Committee staff may participate in the filming of the
11 show, neither the candidate nor his campaign staff may receive payment for that participation.
12 Commission regulations provide that compensation paid to a candidate or campaign committee is
13 a contribution to that candidate or committee unless:

14 (A) The compensation results from *bona fide* employment that is genuinely
15 independent of the candidacy;

16 (B) The compensation is exclusively in consideration of services provided by the
17 employee as a part of this employment; and

³ The channel is available to approximately 75 million television households. *About, ESQUIRE TV*, <http://tv.esquire.com/about> (last visited July 14, 2014).

⁴ As noted above, Esquire is currently distributing over a dozen other reality series on diverse topics. Although not focused on campaigns or the political process, several of these shows are similar to the show proposed here, in that they feature individuals pitted against challenging odds or in pursuit of American ideals. *See Shows, ESQUIRE TV*, <http://tv.esquire.com/about> (last visited July 14, 2014). *See also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) (relying on “superficial considerations of form” to determine whether a publication met the requirements of the press exemption).

1 (C) The compensation does not exceed the amount of compensation which would
2 be paid to any other similarly qualified person for the same work over the same
3 period of time.

4 11 C.F.R. § 113.1(g)(6)(iii).

5 Here, the proposed payment to the candidate and committee staff fails to satisfy the first
6 requirement, *i.e.*, that the compensation result from employment that is “genuinely independent
7 of the candidacy.” To the contrary, the candidate and his staff were asked to appear on the
8 reality television show specifically *because of* Mr. Di iorio’s candidacy. Therefore, any
9 compensation paid to the candidate or his staff by Esquire would be a contribution under 11
10 C.F.R. § 113.1(g)(6)(iii), and the requestors’ knowing receipt of such a corporate contribution
11 would be impermissible under 2 U.S.C. § 441b(a).⁵

12 This response constitutes an advisory opinion concerning the application of the Act and
13 Commission regulations to the specific transaction or activity set forth in your request. *See*
14 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or
15 assumptions presented, and such facts or assumptions are material to a conclusion presented in
16 this advisory opinion, then the requestors may not rely on that conclusion as support for their
17 proposed activity. Any person involved in any specific transaction or activity which is
18 indistinguishable in all its material aspects from the transaction or activity with respect to which
19 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C.

⁵ Moreover, the media exemption would not apply to such payments, because paying a candidate for being a candidate is not a legitimate press function. In Advisory Opinion 2008-14 (Melothe), the Commission distinguished between expenses incurred by a press entity in covering briefings by campaign staff and expenses incurred in conducting the briefings itself. “While the former situation may be analogous to media coverage of a press conference given by campaign officials, the latter situation would be conducting part of the campaign,” which is not a legitimate press function. Advisory Opinion 2008-14 (Melothe) at 6.

1 § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
2 affected by subsequent developments in the law, including, but not limited to, statutes,
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
4 on the Commission's website.

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On behalf of the Commission,

Lee E. Goodman
Chairman