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For meeting of April 14, 2016
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April 8, 2016

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DP by GAB*
Acting General Counsel

Adav Noti *AN by GAB*
Acting Associate General Counsel

Joanna S. Waldstreicher *JSW by GAB*
Attorney

Subject: AO 2016-01 (Ethiq) Draft A

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 12 pm (Eastern Time) on April 13, 2016.

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 2016-01

2

3 Bradley W. Hertz, Esq.
4 The Sutton Law Firm
5 150 Post Street, Suite 405
6 San Francisco, CA 94108

DRAFT A

7

8 Dear Mr. Hertz:

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

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

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on February
19 23, 2016.

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

1 businesses that may share the user’s views.¹ Because Ethiq will tailor the content it provides to
2 each user based on its algorithm and the preferences the user indicates, different users may
3 receive different news content.

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

17 Ethiq will provide its news content free of charge to all users of its app and website.
18 Ethiq plans to generate income by selling advertising space on the app and by licensing its
19 proprietary algorithm and data to companies conducting market research. Advertisers on Ethiq’s
20 app may include candidates and political committees, but all advertisers will pay the same rates

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.

1 for ad space, and advertising purchases will not affect the use of Ethiq’s algorithm to provide
2 news content or any of Ethiq’s business decisions.

3 ***Question Presented***

4 *Will Ethiq’s planned production and distribution of journalistic content qualify for the*
5 *media exceptions from the definitions of “contribution” and “expenditure”?*

6 ***Legal Analysis and Conclusion***

7 Yes, Ethiq’s planned production and distribution of journalistic content will qualify for
8 the media exemptions from the definitions of “contribution” and “expenditure.”

9 The Act and Commission regulations define the terms “contribution” and “expenditure”
10 to include any gift of money or “anything of value” made in connection with a federal election.
11 *See* 52 U.S.C. § 30118(b). But “[a]ny cost incurred in covering or carrying a news story,
12 commentary, or editorial by any . . . Web site, newspaper, magazine, or other periodical
13 publication, including any Internet or electronic publication” is exempt from the definitions of
14 contribution and expenditure “unless the facility is owned or controlled by any political party,
15 political committee, or candidate.” 11 C.F.R. §§ 100.73, 100.132; *see also* 52 U.S.C.
16 § 30101(9)(B)(i).

17 The Commission applies a two-step analysis to determine whether this media exemption
18 (also known as the “press exemption”) applies. First, the Commission asks whether the entity
19 engaging in the activity is a press entity within the meaning of the Act and Commission
20 regulations. *See, e.g.*, Advisory Opinion 2005-16 (Fired Up). Second, in determining the scope
21 of the exemption, the Commission considers (1) whether the press entity is owned or controlled
22 by a political party, political committee, or candidate; and (2) whether the press entity is acting
23 as a press entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its

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

9 **1. Press Entity Status**

10 Congress enacted the media exemption to ensure that the Act would not “limit or burden
11 in any way the first amendment freedoms of the press” and would protect “the unfettered right of
12 the newspapers, TV networks, *and other media* to cover and comment on political campaigns.”
13 H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974) (emphasis added). Thus, although the
14 statutory media exemption applies to “any broadcasting station, newspaper, magazine, or other
15 periodical publication,” 52 U.S.C. § 30101(9)(B)(i), the Commission’s regulations provide that
16 the exemption also applies to qualified internet activities. 11 C.F.R. §§ 100.73, 100.132. Upon
17 amending the regulations to reflect this more current understanding of media entities, the
18 Commission noted that “the media exemption applies to media entities that cover or carry news
19 stories, commentary, and editorials on the Internet, just as it applies to media entities that cover
20 or carry news stories, commentary, and editorials in traditional media.” Internet
21 Communications, 71 Fed. Reg. 18589, 18608 (Apr. 12, 2006). Accordingly, as used in the
22 Commission’s media exemption regulations, “[t]he terms ‘website’ and ‘any Internet or
23 electronic publication’ are meant to encompass a wide range of existing and developing

1 technology, such as websites, ‘podcasts,’ etc.” Internet Communications, 71 Fed. Reg. at 18608
2 n.52; *see also, e.g.*, Advisory Opinion 2000-13 (iNEXTV) (concluding that company providing
3 news and information online with limited original content qualified as media entity despite
4 lacking traditional offline media presence); Advisory Opinion 2005-16 (Fired Up) (concluding
5 that requestor’s websites that provided original news content and links to and commentary on
6 other sites’ content qualified for media exemption).

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

15 **2. Ownership Criteria and Legitimate Press Function**

16 Ethiq is not owned or controlled by any political party, political committee, or candidate.
17 Therefore, the final step in the Commission’s media exemption inquiry is to determine whether
18 Ethiq will be acting as a press entity in conducting the activity at issue; that is, whether it will be
19 acting in its “legitimate press function.” To make this determination, the Commission generally
20 looks to whether the news material at issue is available to the general public, and whether it is
21 comparable in form to those ordinarily issued by the entity. *See FEC v. Mass. Citizens for Life,*
22 479 U.S. 238, 251 (1986).

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

18 The Commission therefore concludes that because Ethiq is a press entity, is not owned or
19 controlled by any candidate, political party, or political committee, and will be engaged in 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).

