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May 3, 2019

MEMORANDUM

TO: The Commission

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Subject: Draft AO 2019-05 (System 73) 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 12:00 pm (Eastern Time) on May 8, 2019.

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 <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2019-05

2

3 Craig Engle, Esq.

4 Arent Fox LLP

5 1717 K Street, NW

6 Washington, DC 20006-5344

7

8

9 Dear Mr. Engle:

DRAFT A

10 We are responding to your advisory opinion request on behalf of System73
11 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
12 (the “Act”), and Commission regulations to System73’s proposal to pay a political
13 committee a “license fee” for the exclusive rights to livestream the committee’s political
14 event. The Commission concludes that System73’s proposal would result in a prohibited
15 corporate contribution because the proposal does not meet the requirements for the media
16 exemption and is not otherwise permissible because it would result in fundraising for the
17 committee.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 March 20, 2019 and your email received on March 21, 2019.

21 System73 is an incorporated communications technology network. Advisory
22 Opinion Request (AOR) at AOR001. System73 provides internet livestream and linear
23 streaming video services to commercial clients, including several Fortune 500 companies,
24 and has created two streaming channels as part of its business arrangements with
25 commercial clients. AOR001-002. One channel focuses on business, finance, and
26 investment news and analysis of technology issues. AOR002. The other covers sporting

1 events. *Id.* Both channels involve a mix of original content, live events, and content
2 acquired from other creators. *Id.*

3 In its relationships with commercial clients, System73 earns revenue from its sale
4 to third parties of advertising time that airs during or between System73 programs. *Id.*
5 System73 also compensates its commercial clients for the rights to air their content and
6 may use one of two business models to do so. AOR0015. System73 may either: 1)
7 negotiate and pay its client a fixed upfront fee, which System73 refers to as a “license
8 fee,” that will generally be determined based on the projected advertising revenue that
9 System73 expects to earn for airing content related to that client, or 2) negotiate and pay
10 its client a fixed percentage of the advertising revenue that System73 actually receives
11 from advertisers for airing content related to that client. *Id.*

12 System73 now wants to expand its business to political committees and enter into
13 financial arrangements with candidate and party committees to “broadcast their campaign
14 appearances, rallies, debates and related events” as the “exclusive livestream provider” of
15 committees’ political events.¹ AOR002-003. System73 explains that it would provide
16 “broadcast quality online streaming services” to political committees so that the
17 committees can “more broadly broadcast” their events. AOR002. System73 states that it
18 “has heard concerns raised by candidates that traditional networks do not adequately
19 cover their campaign events; that rallies of national interest are only covered in the
20 immediate geographic market; that the quality of the video or streaming service is too
21 low to make high quality continuous viewing desirable; or that certain constituents, such

¹ System73 uses the terms “political committee,” “candidate,” and “party” to refer to its potential political clients in its request, often interchangeably. Accordingly, the Commission assumes that references to “political committees” include candidate committees and political party committees but do not include non-connected political committees.

1 as millennials, prefer to watch political events on line, at the time they choose to, without
2 paying a fee.” *Id.*

3 For its political clients, System73 would negotiate and pay a “fixed license fee” to
4 committees for exclusive rights to livestream a political event or series of events.

5 AOR003. System73 may either pay the committee for the right to the committee’s events
6 one at a time or purchase rights to a series of committee events. *Id.* For example,

7 System73 may enter into an agreement with a political committee to be the exclusive
8 livestream provider of all of a candidate’s events in New Hampshire or Iowa. *Id.*

9 System73 acknowledges that its proposal to pay political committees is a “unique
10 business plan.” AOR014.

11 As with its commercial streaming arrangements, System73 would also negotiate
12 and sell advertising time to third parties for ads to air during streaming political content.

13 AOR003. Advertisers would pay System73 and would not pay the political committee.

14 *Id.* System73 would negotiate the license fee it would pay to the committee and the
15 amounts that commercial advertisers would pay to System73 separately, but those
16 negotiations “may run concurrently to ensure that System73 does not over pay for
17 broadcast rights and can generate a reasonable profit” after costs. *Id.*

18 System73 may arrange for the filming of a political event in any of the following
19 ways: 1) System73 may obtain video of the event directly from the political committee,
20 2) System73 may acquire the rights to video filmed by an independent camera operator
21 unconnected to any political committee, or 3) System73 may use its own camera crew or
22 enter into an agreement with a third-party camera crew to film the event. AOR005. In
23 each of these circumstances, System73 would pay a license fee to the committee, but the

1 license fee to the committee “would likely be less” if System73 obtains the video from a
2 source other than the committee because of the added cost to System73. *Id.*

3 System73 would not exert any editorial control over the content of a committee’s
4 event or assist committees in creating content for advertisers. AOR004. However,
5 System73 would permit its political clients to “to reserve the right to reject any particular
6 advertiser on the basis of its taste, topic or morality.” AOR011. In addition, System73
7 would create “promotional materials” for its political programming. AOR004.
8 Promotional materials would not advocate for or against any candidate, but may include a
9 title card for content, introductory music, an announcer to put the upcoming event into
10 context, and an online link where a viewer can go for more information. *Id.* All
11 promotional content would be owned by System73, and System73 would not provide its
12 promotional materials to any political committee and would not seek approval of
13 promotional materials by any political committee. AOR003, AOR015. In addition to
14 conducting its own promotional efforts, System73 would encourage political committee
15 clients to promote the airing of the committee’s political events, for example, through
16 tweets, website posts, or emails to supporters. AOR004. System73 has not yet made a
17 decision about whether it would license the use of its video footage of political events,
18 but any license agreements that System73 enters into with political committees or third
19 parties for the use of video footage would be consistent with the terms and license rates
20 used for System73’s commercial clients. AOR015.

21 System73 is a privately-held company, is not owned or controlled by any
22 candidate or political party, and plans to make its services available on a non-partisan
23 basis. AOR004.

1 ***Question Presented***

2 *May System73 pay a political committee a fixed “license fee” for the exclusive*
3 *right to livestream the committee’s event with the expectation that System73 will make a*
4 *profit by selling advertising time for ads that will air during the livestreaming of the*
5 *event?*

6 ***Legal Analysis***

7 No. System73 may not pay a political committee a fixed “license fee” for the
8 exclusive right to livestream the committee’s event because that payment would be a
9 prohibited corporate contribution. System73’s proposal does not meet the requirements
10 for the media exemption and is not otherwise permissible because it would result in
11 fundraising for the committee.

12 Under the Act, corporations are generally prohibited from using general treasury
13 funds to make contributions to federal candidates, federal accounts of political party
14 committees, and other political committees.² 52 U.S.C. § 30118(a). Subject to certain
15 exclusions, a contribution is “any direct or indirect payment, distribution, loan, advance,
16 deposit, or gift of money, or any services, or anything of value” made to “any candidate,
17 campaign committee, or political party or organization, in connection with” a federal
18 election. 52 U.S.C. § 30118(b). Commission regulations clarify that “anything of value”
19 includes “the provision of any goods or services without charge or at a charge that is less
20 than the usual and normal charge for the goods or services,” unless the transaction is

² A corporation, however, may make independent expenditures and may make contributions to non-connected political committees that make only independent expenditures or to separate accounts maintained by non-connected political committees for making only independent expenditures. *Citizens United v. FEC*, 558 U.S. 310 (2010); *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C. 2011).

1 specifically permitted by regulation. 11 C.F.R. § 100.52. Accordingly, System73's
2 proposal to make a direct payment to a political committee for the exclusive right to
3 livestream the committee's campaign appearance, rally, debate, or related event would
4 result in a prohibited corporate contribution, unless the proposed activities fall within an
5 exclusion from the definition of contribution or are otherwise permissible under the Act
6 and Commission regulations.

7 *1. System73's proposed activities do not qualify for the media exemption*
8 *because its payment of a "license fee" to a political committee for the*
9 *exclusive right to livestream the committee's event is not a legitimate*
10 *media function.*

11 Commission regulations exclude from the definition of contribution "[a]ny cost
12 incurred in covering or carrying a news story, commentary, or editorial by any
13 broadcasting station (including a cable television operator, programmer or producer),
14 Web site, newspaper, magazine, or other periodical publication, including any Internet or
15 electronic publication . . . unless the facility is owned or controlled by any political party,
16 political committee, or candidate." 11 C.F.R. § 100.73; *see also*
17 52 U.S.C. § 30101(9)(B)(i) (excluding these types of activities from the definition of
18 "expenditure"); 11 C.F.R. § 100.132 (same). This is known as the "press exemption" or
19 "media exemption." As reflected in the legislative history of the Act, this exemption was
20 intended to ensure that the Act would not "limit or burden in any way the first
21 amendment freedom[] of the press" and would protect "the unfettered right of the
22 newspapers, TV networks, and other media to cover and comment on political
23 campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974). The Commission
24 uses a two-step analysis in determining whether the media exemption applies, first asking

1 whether the entity engaging in the activity is a media entity within the meaning of the Act
2 and Commission regulations, and if so, then asking whether the media entity (a) is owned
3 or controlled by a political party, political committee, or candidate; and (b) is acting in its
4 capacity as a media entity in conducting the activity at issue (*i.e.*, is the activity within the
5 entity’s “legitimate press function”). *See, e.g.*, Advisory Opinion 2016-01 (Ethiq) at 2-3
6 (applying two-step analysis established by the United States District Court in *Reader’s*
7 *Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

8 a. Media Entity

9 In the first step, the Commission asks whether the entity engaging in the activity
10 is a media entity within the meaning of the Act and Commission regulations.³ *See, e.g.*,
11 Advisory Opinion 2016-01 (Ethiq) at 2-3. In analyzing whether an entity is a media
12 entity, the Commission focuses on “whether the entity in question produces on a regular
13 basis a program that disseminates news stories, commentary, and/or editorials.”
14 *Compare* Advisory Opinion 2010-08 (Citizens United) at 5 (film company that produced
15 14 films over six years, with substantial percentage of corporate budget devoted to
16 production and distribution, was a media entity) *with* Advisory Opinion 2004-30
17 (Citizens United) at 7 (finding same company did not qualify for exemption years earlier
18 in part because it had only produced two films). “Commentary” is interpreted broadly to
19 include not only commentary by the media entity and its staff, but also guest
20 commentary. Advisory Opinion 1982-44 (Democratic National Committee *et al.*) at 3
21 (“[T]he Commission is of the view that commentary cannot be limited to the broadcaster.

³ Neither the Act nor Commission regulations use or define the term “press entity” or “media entity.” Those terms are used interchangeably in Commission opinions. For simplicity, this advisory opinion uses the term “media entity” and “media exemption” throughout except where quoting a source that uses the term “press entity” or “press exemption.”

1 The exemption already includes the term ‘editorial’ which applies specifically to the
2 broadcaster’s point of view. In the opinion of the Commission, ‘commentary’ was
3 intended to allow the third persons access to the media to discuss issues.”); Advisory
4 Opinion 1998-17 (Daniels Cablevision) at 5 (30 second free air time provided on equal
5 basis was “commentary” for purposes of the media exemption).

6 In addition, the Commission has not limited the definition of “media entity” to
7 “traditional news outlets.” Advisory Opinion 2010-08 (Citizens United) at 4. For
8 example, the Commission found that a web company that operated a network of
9 specialized news and information websites with limited original content qualified as a
10 media entity. Advisory Opinion 2000-13 (*Ampex et al.*) at 3; *see also* Advisory Opinion
11 2008-14 (Melothé) at 4 (company that proposed to launch and operate an internet TV
12 station covering campaigns of one or more federal candidates through news reports,
13 roundtable discussions, coverage of campaign events, and commentary qualified as media
14 entity).

15 b. Ownership and Control and Legitimate Media Function

16 In the second step of the Commission’s analysis, the Commission considers
17 whether activity by a qualified media entity is within the scope of the exemption based
18 on: (a) whether the media entity is owned or controlled by a political party, political
19 committee, or candidate, and (b) whether the media entity is acting within its legitimate
20 media function. Advisory Opinion 2016-01 (*Ethiq*) at 3; Advisory Opinion 2007-20 (XM
21 Satellite Radio) at 3-4 (finding satellite radio company featuring news updates, candidate
22 interviews, speeches, debate coverage, polling results, fundraising status, and live call-in
23 shows within the media exemption in providing free airing of candidate-supplied

1 content); Advisory Opinion 2005-16 (Fired Up) at 4, 6 (determining cost of carrying
2 content on website that provided commentary, summaries and editorials of news stories
3 created by others, as well as its own original reporting, within entity's legitimate media
4 function). Two considerations relevant to this analysis are whether: 1) the entity's
5 materials are available to the general public and 2) comparable to those ordinarily issued
6 by the entity. *See, e.g.*, Advisory Opinion 2000-13 (Ampex) at 3 (concluding costs of
7 producing website "viewable by the general public and akin to a periodical or news
8 program" within media entity's legitimate media function).

9 The Commission has previously determined that a media entity may provide free
10 airtime to candidates within the scope of the media exemption. *See* Advisory Opinion
11 2007-20 (XM Satellite Radio) at 4 (finding free airing of candidate-supplied content by
12 media entity within entity's media function); Advisory Opinion 1998-17 (Daniels
13 Cablevision) at 1-2, 5 (providing 30 seconds free air time to candidates on equal basis
14 within media function); Advisory Opinion 1982-44 at 3 (Democratic National Committee
15 *et al.*) (concluding cable company proposal to provide two hours of free time to both
16 major political parties to discuss issues, to attempt to show the differences between the
17 two parties, and to encourage support of political parties within company's media
18 function).

19 On the other hand, the Commission has concluded that the media exemption does
20 not extend to "active participation in core campaign or electioneering functions" by a
21 media entity because such activities are not legitimate media functions. Advisory
22 Opinion 2008-14 (Melothe) at 6 (finding internet company could not create briefings for
23 campaign staffers or give awards to campaign volunteers under media exemption);

1 Advisory Opinion 2011-11 (Colbert) at 9-10 (finding media company would not act
2 within legitimate media function if it provided independent expenditure advertisements to
3 political committee or administered or operated political committee because those
4 activities are core campaign functions). As a result, the media exemption “does not cover
5 campaign activity, even if the campaign activity is conducted by a press entity.”

6 Advisory Opinion 2011-11 (Colbert) at 8; *see also* *FEC v. Massachusetts Citizens for*
7 *Life*, 479 U.S. 238, 251 (recognizing “the distinction of campaign flyers from regular
8 publications”); *Reader’s Digest Ass’n*, 509 F. Supp. at 1214 (stating media exemption
9 would not apply where “on Election Day a partisan newspaper hired an army of incognito
10 propaganda distributors to stand on street corners denouncing allegedly illegal acts of a
11 candidate and sent sound trucks through the streets blaring the same denunciations, all in
12 a manner unrelated to the sale of its newspapers”).

13 The Commission has not previously considered whether paying a license fee to a
14 political committee for the rights to livestream or broadcast political content is an activity
15 within an entity’s legitimate media function. However, the Commission has considered
16 circumstances where fundraising mechanisms might be provided as a component of a
17 media entity’s publication or broadcast and determined that “[p]roviding a mechanism for
18 raising funds for candidates is not a typical press function.” Advisory Opinion 2008-14
19 (Melothe) at 7 (stating that the intermittent provision of hyperlink directing media
20 website’s visitors to campaign’s contribution page would be permissible where entity’s
21 activity otherwise qualified for media exemption, but providing contribution page or
22 permanent hyperlink to website where viewers could make contributions or regularly

1 featuring unpaid solicitations for contributions would not be covered by media
2 exemption).

3 c. System73's Proposal

4 System73's proposal to pay a political committee a "license fee" for the exclusive
5 right to livestream the committee's political event does not qualify for the media
6 exemption. For purposes of step one of the media exemption analysis, the Commission
7 assumes that System73 is a media entity because System73 airs two channels that focus
8 on business, finance, and investment news and sporting events. AOR002. The
9 Commission makes this assumption given the broad interpretation of "media entity" and
10 "commentary" in previous advisory opinions. However, the Commission has not
11 previously determined that a corporation that airs commercial content as part of a
12 revenue-sharing arrangement with a corporate client is a media entity. AOR001. For
13 purposes of this request, the Commission need not determine whether System73 would
14 qualify as a media entity given that System73's proposal fails to meet the requirements of
15 the exemption on other grounds.

16 For step two of the Commission's analysis, System73 is not owned or controlled
17 by a political party, political committee, or candidate. AOR004. However, System73's
18 proposal to pay a political committee for the exclusive right to livestream the
19 committee's political event does not qualify for the media exemption because System73
20 would not be acting within the scope of a legitimate media function in paying the
21 committee for this access. Unlike those circumstances in which the Commission has
22 determined that providing free airtime to candidates was covered by the media
23 exemption, System73 would not only stream a committee's events but would also pay the

1 committee a license fee, which would be a “mechanism for raising funds for candidates.”
2 The Commission has previously determined that providing such a mechanism is “not a
3 typical press function.” *See* Advisory Opinion 2008-14 (Melotheé) at 7. Because every
4 System73 livestream of a political committee’s event would involve System73’s payment
5 of a license fee to a political committee, its proposal is not similar to the intermittent
6 provision of a fundraising hyperlink but instead is akin to a permanent fundraising
7 method for the committee.⁴ *See id.* For example, the opportunity to earn a license fee
8 could encourage a political committee to hold additional campaign events beyond what
9 the committee would otherwise schedule so that it could receive additional campaign
10 funds.

11 Further, System73 would pay a fee to the committee regardless of whether the
12 committee provides its own video footage to System73 or System73 conducts and pays
13 for the filming. AOR003, AOR005. This suggests that System73 would, in essence, pay
14 the committee for access to a candidate’s speech, not simply for the video footage.
15 Therefore, System73’s proposal is unlike a news organization paying an independent
16 camera crew fair market value for the purchase of video footage, which would be a cost
17 of carrying a news story and within the media exemption. Instead, System73’s proposal
18 resembles a speaking fee or payment to attend a political event, which the Commission
19 has treated as a contribution when paid to a political committee. 11 C.F.R. § 100.53
20 (“[t]he entire amount paid to attend a fundraiser or other political event . . . is a

⁴ The requestor analogizes System73’s proposal to pay candidates a “license fee” for exclusive rights to livestream a political event with payment by members of the media to committees for the cost of air travel. AOR009. However, unlike the license payments proposed by System73, payments by members of the news media to political committees for the pro-rata share of the travel by the media members is expressly permitted by regulation and necessary to compensate the committee for an expense incurred by the media organization and not the committee. 11 C.F.R. § 100.93(b)(3).

1 contribution”); Advisory Opinion 1992-24 (Pilzer for Congress) at 3-4 (candidate
2 speaking fees whether “through payment of a fee by [a] third party group, e.g., a club or
3 association listening to the speech, or the payment of an admission charge, or both”
4 would be contributions to a political committee and cannot be paid by corporations).
5 This type of campaign fundraising activity is not within the media exemption. As a
6 result, System73’s proposal does not meet the requirements for the exemption.

7 2. *System73’s proposal to pay a political committee for the exclusive*
8 *right to livestream the committee’s event is not permissible because it*
9 *would result in fundraising for the committee.*

10 As noted above, a corporate contribution includes “any direct or indirect payment,
11 distribution, loan, advance, deposit, or gift of money, or any services, or anything of
12 value” made to “any candidate, campaign committee, or political party or organization, in
13 connection with” a Federal election, and “anything of value” includes “the provision of
14 any goods or services without charge or at a charge that is less than the usual and normal
15 charge for the goods or services.” 52 U.S.C. § 30118(b); 11 C.F.R. § 100.52. Here,
16 System73 not only proposes to provide livestreaming services to a political committee of
17 the committee’s “campaign appearances, rallies, debates, and related events” at no
18 charge, but also proposes to directly pay the political committee a license fee on top of
19 that for the exclusive coverage of those campaign events. AOR002-003. Given that the
20 license fee would be tied to the streaming of political committee campaign events,
21 System73’s proposed direct payment also would be made “in connection with” a federal
22 election. Accordingly, System 73’s proposed direct payments would be corporate
23 contributions to the participating political committees.

1 In past advisory opinions, the Commission has considered a variety of proposed
2 business models, such as sales of committee assets, ongoing commercial ventures like
3 affinity programs, and payment of speaking fees, that share some relevant characteristics
4 with System73’s proposal. For all of these business models, the Commission has
5 consistently found that, when a corporation makes a direct payment from its corporate
6 funds to a political committee, the payment is a prohibited contribution, except for a
7 limited allowance for the sale of certain committee assets not applicable to System73’s
8 proposal. The Commission’s analysis of those models further supports its conclusion that
9 System73’s proposal would result in prohibited corporate contributions.

10 a. Sale of Committee Assets

11 Among the direct payments to political committees previously considered by the
12 Commission, System73’s proposal to purchase exclusive livestream rights from political
13 committees is most similar to advisory opinions evaluating other sales of committee
14 assets. The Commission has “generally viewed the selling or commercial use of
15 committee assets by a political committee to be fundraising resulting in contributions
16 subject to the Act.” Advisory Opinion 1992-24 (Pilzer for Congress) at 2; *see also*
17 Advisory Opinion 1990-03 (CityPAC) at 2 (purchase of ad space in political committee
18 newsletter would be contribution to committee). Under 11 C.F.R. § 100.53, “[t]he entire
19 amount paid to attend a fundraiser or other political event and the entire amount paid as
20 the purchase price for a fundraising item sold by a political committee is a contribution.”
21 Fundraising results from such transactions involving committee assets “regardless of
22 whether ‘fair market value’ is paid” to the committee. Advisory Opinion 1990-03
23 (CityPAC) at 2.

1 This general principle has been “particularly [applicable] with respect to proposed
2 sales of . . . unique political campaign materials without a genuinely independent market
3 value” and to “use of committee assets to generate income through ongoing business or
4 commercial ventures.” Advisory Opinion 1990-26 (Committee to Re-Elect Virginia
5 Smith to Congress) (“Smith”) at 2-3; *see also* Advisory Opinion 1992-40 (Leading Edge
6 Communications) at 2-3 (telecommunication company’s payment of monthly
7 commission to political committee in calling card venture would be contribution because
8 committee would engage in “ongoing enterprise” rather than isolated sale or disposal of
9 assets acquired for committee’s own use); Advisory Opinion 1983-02 (Citizens for
10 Emery Committee) (committee’s plan to provide use of its computer on ongoing “fee-for-
11 services basis” to state committees, political candidates, nonprofit organizations, and
12 private businesses would be fundraising and funds generated would be contributions).

13 The Commission has recognized two exceptions to the general rule that sale of
14 committee assets and other payments to committees are fundraising. First, the
15 Commission has found that “isolated sales” of committee assets would not result in a
16 contribution where the assets had been purchased or developed for the committee’s own
17 particular use, rather than for fundraising, and the assets had ascertainable market value.”
18 Advisory Opinion 1990-26 (Smith) at 2 (finding sale of computer by terminating political
19 committee would not result in contributions); *see also* Advisory Opinion 1989-04
20 (Californians for Pete Wilson) at 2 (permitting sale of mailing lists, computer hardware,
21 and used furniture).

22 Second, the Commission has found that the sale of mailing lists and office
23 equipment do not result in a contribution to the committee if all of the following

1 conditions are met: 1) the list had been developed by the committee or the equipment
2 was purchased by the committee in the course of its political activities over a period of
3 time and primarily for its own political or campaign purposes rather than for sale or lease
4 to others; 2) the leasing of the list or sale of equipment constituted only a small
5 percentage of the committee's use of the list or equipment; 3) the list or equipment had an
6 ascertainable fair market value; and 4) the list was leased or the equipment sold at the
7 usual and normal charge in a *bona fide*, arm's length transaction and was used in a
8 commercially reasonable manner consistent with an arm's length agreement. *See, e.g.,*
9 Advisory Opinion 2014-06 (Ryan *et al.*) at 8 (finding no contribution from lease of
10 mailing list for fair market value); Advisory Opinion 2003-19 (Democratic Congressional
11 Campaign Committee) at 2-3 (applying mailing list test to sale of used office equipment).
12 The Commission has applied this test outside of the context of mailing lists and office
13 equipment and found that sale of other committee assets would be fundraising where it
14 would be difficult to determine a fair market value for the items sold or where the type of
15 item to be sold was "inherently susceptible to use for political fundraising rather than
16 commercial purposes." Advisory Opinion 2002-14 (Libertarian National Committee) at
17 5 (finding that the fair market value of advertising space in committee newsletters and
18 licensing of committee trademarks is "difficult if not impossible to determine"); *see also*
19 Advisory Opinion 1990-03 (CityPAC) at 2 (finding purchase of ad space in committee
20 newsletter would be contribution to committee).

21 Under this line of advisory opinions, System73's proposal to make a direct
22 payment to a political committee from corporate funds for the right to livestream a
23 political event would be a fundraising mechanism and a corporate contribution to the

1 committee because: 1) System73 proposes an ongoing commercial venture involving
2 political committees; 2) exclusive livestream rights to the footage by System73 would be
3 a significant component of a committee's use of the event content; and 3) the fair market
4 value of the livestream rights would be difficult to determine.

5 First, System73 does not propose an "isolated" purchase from a political
6 committee. Rather, its entire political proposal would result in "ongoing" commercial
7 business ventures with political committees for the purchase of political event content.
8 System73 and a political committee would either: 1) agree through a series of
9 transactions that System73 would livestream political events one-at-a-time for the
10 committee, or 2) agree in a single transaction that System73 would livestream all of a
11 candidate's political events in a state. AOR003. Both options would result in the type of
12 ongoing commercial activity that the Commission has determined would result in
13 contributions when the committee receives payments from a corporation. *See* Advisory
14 Opinion 1992-24 (Pilzer for Congress) at 2; Advisory Opinion 1990-26 (Smith) at 2-3.

15 Second, given that System73 would own *exclusive* rights to livestream a political
16 event, the sale of the license to System73 would constitute a significant, not small,
17 percentage of the committee's use of the content of that event and may even provide an
18 added incentive for a political committee to hold an event in the first place.

19 Third, as with committee trademarks or advertising space in a committee
20 newsletter, the fair market value of the exclusive right to the content of a political speech
21 or other political event is "difficult if not impossible to determine." *See* Advisory
22 Opinion 2002-14 (Libertarian National Committee) at 5. Indeed, such content is a
23 "unique political campaign material[] without a genuinely independent market value,"

1 and so payment for the right to livestream that content would result in a contribution. *See*
2 Advisory Opinion 1990-26 (Smith) at 2-3. Moreover, as with purchase of ad space in a
3 committee newsletter, payment of a license fee for political speech is the type of sale that
4 is “inherently susceptible to use for political fundraising rather than commercial
5 purposes.” Advisory Opinion 2002-14 (Libertarian National Committee) at 5. A
6 committee could use System73’s business model to hold events primarily for the purpose
7 of generating license fees, with the added benefit of the larger audience it could reach via
8 System73’s platform.

9 b. Other Commercial Ventures

10 Consistent with the principle that payments to political committees are generally
11 treated as contributions, the Commission has found payments by corporations and other
12 business entities to political committees in commercial ventures to be prohibited
13 corporate contributions. This is the case even when the corporation received something
14 of value from the Committee in return. For example, in the context of “affinity
15 programs” and other similar business ventures, when a corporation pays a set fee or a
16 portion of revenues earned from the joint business venture to a political committee from
17 corporate funds, the Commission has consistently found that the proposal would result in
18 a prohibited corporate contribution. Advisory Opinion 2008-18 (Mid-Atlantic Benefits)
19 at 2-5 (summarizing prior advisory opinions involving affinity programs and finding flat
20 fee of \$.25 per transaction paid from corporate revenues to political committee in affinity
21 arrangement would be contribution); Advisory Opinion 2002-07 (Careau *et al.*) at 4
22 (summarizing previous advisory opinions and determining that in those opinions “[t]he
23 Commission specifically concluded that the fact that a business corporation received

1 something of value . . . in exchange for payments that purported to be the proceeds of a
2 commercial sale did not change the nature of the transaction as a contribution.”); *see also*
3 Advisory Opinion 2010-21 (ReCellular) (“all contributions generated through [affinity]
4 programs must be made by individuals from their own funds and not by the corporate
5 service provider”).

6 The Commission has found that corporations could provide services to political
7 committees at reduced or no charge when the free service or reduced charge was due to
8 commercial considerations. *See, e.g.*, 2018-11 (Microsoft) at 4-5 (free online account
9 security features); Advisory Opinion 2012-31 (AT&T) at 3 (separate rate structure for
10 processing contributions to political committees). However, the Commission has not
11 previously concluded that a payment of corporate funds for a political committee’s
12 participation in an ongoing business venture is permissible.⁵

13 While System73 does not propose an affinity relationship with a political
14 committee, prior advisory opinions governing affinity relationships are instructive
15 because those opinions provide examples of the Commission’s treatment of payments to
16 a political committee for the committee’s participation in a business venture. Consistent
17 with the advisory opinions on affinity programs and similar ventures, System73’s
18 payment of a license fee from its corporate funds to a political committee would be a

⁵ System73 states that its proposal is a *bona fide* commercial activity and permissible under a multi-factor test outlined in Advisory Opinion 2008-10 (VoterVoter.com) at 6-7, which involved advertisements purchased by individuals and did not involve payment to a political committee by a corporation. AOR009-013. The Commission has also applied the test in that advisory opinion to determine whether a commercial vendor’s sale of merchandise results in a contribution when the vendor forwards a portion of its sale proceeds to a political committee, *see, e.g.*, Advisory Opinion 2009-32 (Jorgenson), but such a scenario is materially different from System73’s proposal, which would involve corporate funds paid directly to political committees, not the forwarding of sale proceeds on behalf of individuals. The Commission has not previously applied the VoterVoter.com test to a payment to a political committee from corporate funds. As a result, it is inapplicable to System73’s proposal.

1 prohibited contribution to the committee, even though System73 would receive
2 something of value – exclusive livestream rights – from the committee in exchange for its
3 payment.

4 c. Speaking Fees

5 As discussed further above, the Commission has found that when a committee
6 receives a speaking fee for a speech by a candidate, the fee paid is a contribution.
7 Advisory Opinion 1992-24 (Pilzer for Congress) at 3-4. This is the case “[r]egardless of
8 whether [a] Committee receives funds directly out of amounts raised from the charges or
9 donations paid by audience members, or indirectly in the form of a speaker’s fee.” *Id.* at
10 4. Here, the political content that System73 proposes to pay for includes the type of
11 content that might also be the subject of a campaign fundraiser or speaking engagement.
12 Accordingly, the Commission’s previous analysis finding that fees for candidate speaking
13 events paid to political committees are contributions is instructive and forms an
14 additional basis for the Commission’s determination that System73’s proposed license
15 arrangement would result in corporate contributions.

16 ***Conclusion***

17 The Commission concludes that System73’s proposal would result in a prohibited
18 corporate contribution. The proposal does not meet the requirements for the media
19 exemption, and is not otherwise permissible because it would result in fundraising for
20 political committees.

21 This response constitutes an advisory opinion concerning the application of the
22 Act and Commission regulations to the specific transaction or activity set forth in your
23 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change

1 in any of the facts or assumptions presented, and such facts or assumptions are material to
2 a conclusion presented in this advisory opinion, then the requestor may not rely on that
3 conclusion as support for its proposed activity. Any person involved in any specific
4 transaction or activity which is indistinguishable in all its material aspects from the
5 transaction or activity with respect to which this advisory opinion is rendered may rely on
6 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
7 conclusions in this advisory opinion may be affected by subsequent developments in the
8 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
9 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Ellen L. Weintraub
Chair