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FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 11, 2005

AGENDA ITEM
For Meeting of: 08-18-05

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith RCS
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Robert M. Knop RMK
Attorney

Subject: Draft AO 2005-07

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 18, 2005.

Attachment

ADVISORY OPINION 2005-07

DRAFT

Mr. Andy Mayberry
Andy Mayberry for Congress
1222 Orchard Lake Lane
Hensley, AR 72065

Dear Mr. Mayberry:

We are responding to your advisory opinion request concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the publication and distribution of two periodicals, *The East Ender* newspaper and *The Spirit Magazine*, during your campaign for a seat in the U.S. House of Representatives in the 2005-2006 election cycle. Your request asks whether costs of publishing and distributing *The East Ender* and *The Spirit Magazine* are expenditures, and whether your authorized committee may purchase advertising space in *The East Ender*.

Even though you co-own the corporation that publishes both periodicals, the press exemptions from the definitions of "contribution" and "expenditure" would apply to the *bona fide* news stories described in your request. The press exemption, however, would not apply to certain commentaries and editorials. Consequently, the Commission concludes that costs of publishing and distributing editions of *The East Ender* and *The Spirit Magazine* will be prohibited corporate contributions or expenditures if the editions contain commentaries or editorials, including your opinion columns, that are coordinated communications. Lastly, the Commission concludes that your authorized committee may purchase advertising space in *The East Ender* under certain conditions.

1 ***Background***

2 The facts of this request are presented in your letter received on May 16, 2005, in
3 an e-mail message to you dated May 26, 2005, and in your e-mail message received on
4 May 27, 2005.

5 You and your wife co-own Spirit Publications, Inc., an incorporated media
6 company that publishes both *The East Ender* newspaper and *The Spirit Magazine*,
7 collectively, "Periodicals." *The East Ender* is a monthly local newspaper in the East End
8 community in Arkansas with a circulation of approximately 1,500. You represent that it
9 includes opinion columns and *bona fide* news stories that are part of a general pattern of
10 campaign-related news accounts that give reasonably equal coverage to all opposing
11 candidates in the circulation area. *The Spirit Magazine* is a monthly publication that
12 circulates primarily in central Arkansas and that has a circulation of more than 10,000.
13 The circulation area of the Periodicals is within Arkansas' 2nd Congressional District.
14 The chief source of revenue for both *The East Ender* and for *The Spirit Magazine* is
15 advertising revenue.

16 In addition to being a co-owner of Spirit Publications, Inc., you are a regular
17 opinion columnist for both periodicals. Earlier this year, you became a candidate to
18 represent Arkansas' 2nd Congressional District in the U.S. House of Representatives.
19 Your principal campaign committee is Andy Mayberry for Congress Committee
20 ("Committee").

21

1 ***Questions Presented***

2 *1. May Spirit Publications, Inc. continue to publish and distribute your opinion*
3 *columns in the Periodicals while you are a candidate for Congress?*

4 *2. Would the costs of publishing and distributing bona fide news stories about*
5 *Federal elections and local candidates in The East Ender be contributions or*
6 *expenditures?*

7 *3. May the Committee purchase advertising space in The East Ender at the same*
8 *standard rate that such space is sold to other advertisers?*

9 ***Legal Analysis and Conclusions***

10 *Question 1. May Spirit Publications, Inc. continue to publish and distribute your*
11 *opinion columns in the Periodicals while you are a candidate for Congress?*

12 Yes, Spirit Publications, Inc. may continue to publish and distribute your opinion
13 columns in the Periodicals unless your opinion columns are coordinated communications,
14 and are thus impermissible in-kind contributions and expenditures.

15 The Act defines an in-kind contribution to include an expenditure "made by any
16 person in cooperation, consultation, or concert with, or at the suggestion of, a candidate,
17 his authorized political committee, or their agents . . . ." 2 U.S.C. 441a(a)(7)(B)(i). The
18 Commission implemented this statutory provision as it applies to communications in the
19 "coordinated communications" regulations at 11 CFR 109.21. Consistent with the Act, a
20 coordinated communication is an in-kind contribution by the person paying for the
21 communication, unless it comes within an exemption from the definition of
22 "contribution." 2 U.S.C. 441a(a)(7)(B)(i); 11 CFR 109.21(b).

1 Commission regulations define the terms "contribution" and "expenditure" to
2 include any gift of money or "anything of value" for the purpose of influencing a Federal
3 election. 11 CFR 100.52(a) and 100.111; *see also* 2 U.S.C. 441b(b)(2) (providing a
4 similar definition for "contribution or expenditure" with respect to corporate activity).
5 However, Commission regulations exempt from the definitions of "contribution" and
6 "expenditure" "any news story, commentary, or editorial distributed through the facilities
7 of any broadcasting station, newspaper, magazine, or other periodical publication." 11
8 CFR 100.73 and 100.132. *See also* 2 U.S.C. 431(9)(B)(i) (statutory exemption from the
9 definition of "expenditure").[1] These exemptions do not apply to commentaries and
10 editorials that are distributed through facilities that are owned or controlled by a political
11 party, political committee, or candidate. 2 U.S.C. 431(9)(B)(i); 11 CFR 100.73 and
12 100.132. Because you are a candidate for Federal office and your opinion columns are
13 distributed through publications that you co-own, those opinion columns are not exempt
14 from the definitions of "contribution" or "expenditure" under the press or media
15 exemption.
16 Furthermore, the Act and Commission regulations prohibit any corporation from
17 making any contribution or expenditure, including providing "anything of value," in
18 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.1(a), 114.2(b)(1) and
19 (b)(2). Any person who is prohibited from making contributions or expenditures, such as
20 a corporation, is also prohibited from paying for a coordinated communication. 11 CFR
21 109.22. Because the commentaries and editorials published by Spirit Publications, Inc. in
22 the Periodicals are not exempt from the definitions of "contribution" and "expenditure,"

[1] These exemptions are known as the "press exemption" or the "media exemption."

1 the Periodicals may not carry commentaries or editorials, including your opinion
2 columns, that constitute coordinated communications.

3 The Commission's "coordinated communication" regulation at 11 CFR 109.21
4 specifies that a payment for a communication is made for the purpose of influencing a
5 Federal election, and is an in-kind contribution to the candidate or authorized committee
6 with whom or which it is coordinated, if it satisfies the following three-pronged test: (1)
7 the communication is paid for by a person other than the Federal candidate or authorized
8 committee in question; (2) one or more of the six conduct standards set forth in 11 CFR
9 109.21(d) is satisfied ; and (3) one or more of the four content standards set forth in 11
10 CFR 109.21(c) is satisfied. *See* 11 CFR 109.21(a) and (b)(1). In addition, coordinated
11 contributions, like other in-kind contributions, are treated as expenditures under 11 CFR
12 100.111.

13 **Payment Source**

14 The first prong of the "coordinated communication" test specifies that the
15 communication is paid for by "a person other than that candidate [or] authorized
16 committee." 11 CFR 109.21(a)(1). In the circumstances you present, although the
17 opinion columns would be written by you, they would be paid for by Spirit Publications,
18 Inc. As a result, your opinion columns would satisfy the "payment" prong of the
19 "coordinated communication" test.

20 **Conduct Standard**

21 The next prong of the "coordinated communication" test is a "conduct standard"
22 that focuses, in relevant part, on whether the candidate or the candidate's agents "request

1 or suggest" or are "materially involved" in the making and airing of a communication, or
2 engage in "substantial discussion" about the communication. 11 CFR 109.21(a)(3) and
3 (d)(1) through (3). Because you would be, simultaneously, the author of the opinion
4 columns in the Periodicals, the editor of the Periodicals, and a candidate for Federal
5 office, Spirit Publications, Inc.'s continued publication of your opinion columns would
6 satisfy these conduct standards.

7 **Content Standard**

8 The last prong of the "coordinated communication" test is the "content standard."
9 *See* 11 CFR 109.21(a)(2).[2] Four types of communications satisfy the content standard:
10 (1) a public communication that expressly advocates the election or defeat of a clearly
11 identified Federal candidate (no matter when made); (2) a public communication that
12 disseminates, distributes or republishes campaign materials (no matter when made); (3)
13 electioneering communications; and (4) a public communication that refers to a political
14 party or clearly identified Federal candidate that is disseminated 120 days or fewer before
15 a primary, general, special or runoff election and is directed to voters in the candidate's
16 jurisdiction. *See* 11 CFR 109.21(c).

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[2] The content standard of the "coordinated communication" test has been the subject of ongoing litigation in *Shays v. FEC*, 337 F. Supp. 28 (D.D.C. 2004), *aff'd*, No. 04-5352 (D.C. Cir. Jul. 15, 2005). Although the United States Court of Appeals for the District of Columbia Circuit held that it was permissible for the "coordinated communication" regulation to contain a content standard, it found that the one promulgated by the Commission did not meet the requirements of the Administrative Procedure Act. Slip op. at 39.

Prior to the Court of Appeals ruling, the Commission decided to initiate a rulemaking to determine whether to amend the coordinated communication regulation, or to provide a new explanation and justification for the current regulation. Please note that pending the outcome of further litigation, a change in the regulation, or a new explanation and justification, the Commission's current regulation in 11 CFR 109.21 defining "coordinated communication" remains in full force and effect. Accordingly, the guidance in this advisory opinion may be relied upon while the current coordination rule remains in effect. *See* 2 U.S.C. 438(e).

1 Because your opinion columns constitute "public communications,"[3] if any of
2 your future opinion columns expressly advocate the election or defeat of you or any other
3 clearly identified Federal candidate, those columns will satisfy the "express advocacy"
4 content standard in 11 CFR 109.21(c)(3). Similarly, if any of your future opinion
5 columns disseminates, distributes, or republishes, in whole or in part, campaign materials
6 prepared by you, by any other Federal candidate, or by an agent of you or any other
7 Federal candidate, it will satisfy the "republication" content standard in 11 CFR
8 109.21(c)(2), unless such dissemination, distribution, or republication qualifies for one of
9 the exceptions described in 11 CFR 109.23(b).

10 To meet the "120 day public communication" content standard, a communication
11 must: (1) satisfy the definition of "public communication" in 11 CFR 100.26; (2) refer to
12 a political party or to a clearly identified candidate for Federal office; (3) be directed to
13 voters within the jurisdiction of the clearly identified candidate; and (4) be publicly
14 distributed or disseminated within 120 days of an election for Federal office. 11 CFR
15 109.21(c)(4). With regard to the first requirement, as explained above, your opinion
16 columns are "public communications" under 11 CFR 100.26. As to the second
17 requirement, the Commission notes that previous opinion columns that have appeared in
18 the Periodicals contain your full name and photograph in the byline. Your name and
19 photograph in the byline of your opinion columns are both references to a clearly
20 identified candidate for Federal office while you are a candidate. *See* 2 U.S.C. 431(18)
21 (defining "clearly identified"). With respect to the fourth requirement, you have

[3] Communications, including opinion columns, in a newspaper or magazine are within the definition of "public communication" in 11 CFR 100.26.

1 indicated that the circulation area of the Periodicals is within Arkansas' 2nd Congressional
2 District. As such, your opinion columns would satisfy the fourth requirement of the "120
3 day public communication" content standard.

4 Having satisfied the first, second, and third requirements, opinion columns in the
5 Periodicals containing a byline with your name and photograph that are publicly
6 distributed or disseminated within 120 days of an election for Federal office would meet
7 the "120 day public communication" content standard. Conversely, opinion columns in
8 the Periodicals that do not bear a byline with your name or photograph and do not contain
9 any other reference to a clearly identified Federal candidate or to a political party would
10 not meet this content standard, regardless of when they are publicly distributed or
11 disseminated.

12 Therefore, any editorial or commentary in the Periodicals, including your opinion
13 column, that satisfies any of the content standards discussed above would be an
14 impermissible in-kind contribution.[4] As such, it would also be an impermissible
15 corporate expenditure. *See* 2 U.S.C. 441b(b)(2) and 11 CFR 100.111.

16

17 *Question 2. Would the costs of publishing and distributing bona fide news stories*
18 *about Federal elections and local candidates in The East Ender newspaper be*
19 *contributions or expenditures?*

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[4] Because the press exemption does not apply to *any* editorial or commentary appearing in periodicals owned or controlled by a Federal candidate, editorials and commentaries that are coordinated with other Federal candidates (*i.e.* that satisfy the payment, conduct and content standards of coordinated communication) are also impermissible in-kind contributions to those other Federal candidates.

1 No, under the circumstances you describe, these costs would not be contributions
2 or expenditures by Spirit Publications, Inc.
3 Although the press exemption does not apply to certain commentaries and
4 editorials that are distributed through facilities that are owned or controlled by a political
5 party, political committee, or candidate, as discussed above, it does apply to the costs of
6 news stories that are *bona fide* new accounts subject to certain conditions even if the
7 newspaper or magazine is owned or controlled by a candidate. *See* 11 CFR 100.73 and
8 100.132. Thus, the expenses of publishing and distributing editions of *The East Ender*
9 containing *bona fide* news stories about Federal elections and candidates are not
10 contributions or expenditures because the news stories are part of a general pattern of
11 campaign-related news accounts that give reasonably equal coverage to all opposing
12 candidates in the circulation area. *Id.*
13
14 *Question 3. May the Committee purchase advertising space in "The East Ender" at*
15 *the same standard rate that such space is sold to other advertisers?*
16 Yes, the Committee may purchase advertising space in *The East Ender* at the
17 same standard rates that Spirit Publications, Inc. sells such space to other advertisers, so
18 long as that rate is the usual and normal charge for such advertising, and normal practices
19 for assigning advertising space are followed, and payment terms for the Committee
20 follow normal billing practices. *See* 11 CFR 100.111(e).
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

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any
2 of the facts or assumptions presented, and such facts or assumptions are material to a
3 conclusion presented in this advisory opinion, then the requestor may not rely on that
4 conclusion as support for its proposed activity.

5
6 Sincerely,
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8
9
10 Scott E. Thomas
11 Chairman