



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

For Meeting of 9-29-16

SUBMITTED LATE

MEMORANDUM

September 29, 2016

To: Federal Election Commission

From: Commissioner Lee E. Goodman *LEG by BZ*

Re: Proposed Amendment to Technical Modernization NPRM

A draft NPRM (Agenda Doc. No. 16-43-B) addressing technological updates to the Commission's regulations has been circulated and is expected to be considered at today's public meeting. When the draft NPRM was circulated internally for commissioner review and ideas, I suggested language clarifying that books and motion pictures, in both traditional and electronic forms, be added to the press exemption. Unfortunately, this language was not included in Agenda Doc. No. 16-43-B.

Therefore, at the proper time, I intend to move that the attached language clarifying the Commission's press exemption be added to the proposed NPRM. Inserting these few words into the Commission's regulations will clarify that evolving press and media technologies, such as electronic books and documentary films streamed online, are exempt from regulation on the same basis as traditional print publications and broadcast television.

As amended, the Commission's press exemption would now exempt the following press and media from regulation under the following regulatory language:

11 CFR 100.73

Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable or satellite television or radio operator, programmer or producer), website, internet-enabled application, motion picture, book, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a contribution

11 CFR 100.133

Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable or satellite television or radio operator, programmer or producer), website, internet-enabled application,

motion picture, book, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not an expenditure

These amendments would update the Commission's press exemption regulations by codifying existing law established by Supreme Court decisions and Commission precedents. *See, e.g., Bantam Books, Inc. v Sullivan*, 372 U.S. 58, 64 n.6 (1963) (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."); *Final Rules on Internet Communications*, 71 Fed. Reg. 18589, 18608 (Apr. 12, 2006) ("[T]he media exemption protects news stories, commentaries, and editorials no matter in what medium they are published."); AO 2000-13 (iNEXTV) (concluding that internet video operator, programmer, and producer was press entity); Advisory Opinion 2003-34 (Showtime) (concluding that cable television network was press entity); Advisory Opinion 2005-16 (Fired Up!) (concluding that website was press entity); Advisory Opinion 2005-19 (Inside Track) (concluding that broadcast radio operator, programmer, and producer was press entity); Advisory Opinion 2007-20 (XM Radio) (concluding that satellite radio operator, programmer, and producer was press entity); Advisory Opinion 2008-14 (Melothe, Inc.) (concluding that internet TV station was press entity); Advisory Opinion 2010-08 (Citizens United) (concluding that documentary film producer was press entity); Advisory Opinion 2011-11 (Colbert) (concluding that cable television and internet show was press entity); Advisory Opinion 2016-01 (Ethiq) (concluding that internet application publisher was press entity).

Attachment

PROPOSED AMENDMENT TO TECHNICAL MODERNIZATION NPRM

Replace the proposed rule text for 11 CFR §§ 100.73 and 100.132 with the following:

32. Amend the introductory text of § 100.73 to remove “cable television operator, programmer or producer). Web site” and add, in its place, “cable or satellite television or radio operator, programmer or producer). website, internet-enabled application, motion picture, book”.

36. Amend the introductory text of § 100.132 to remove “cable television operator, programmer or producer). Web site” and add, in its place, “cable or satellite television or radio operator, programmer or producer). website, internet-enabled application, motion picture, book”.

Insert the following narrative text after Part F, Section 3:

4. Media Exemptions

The Commission proposes to update 11 CFR 100.73 and 100.132, which set out exceptions from the definitions of “contribution” and “expenditure,” respectively. These provisions, commonly called the “media exemptions,” cover the costs incurred in covering or carrying a news story, commentary, or editorial by any “broadcasting station (including a cable television operator, programmer or producer). Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication,” unless such media are owned or controlled by a political party, political committee, or candidate. 11 CFR 100.73, 100.132.

The Commission has traditionally applied a two-step analysis to determine whether the media exemptions apply.¹ First, the Commission asks whether the entity engaging in the activity is a press entity as described by FECA and Commission regulations. Second, in determining the scope of the exemption, the Commission considers (1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is acting as a press entity in conducting the activity at issue, *i.e.*, whether the entity is acting in its “legitimate press function.”²

The Commission has noted that “the media exemption protects news stories, commentaries, and editorials no matter in what medium they are

¹ See Internet Communications, 71 FR at 18607; see also Advisory Opinion 2016-01 (Ethiq) (explaining and applying the two-step analysis).

² See Internet Communications, 71 FR at 18607; see also 52 U.S.C. 30101(9)(B)(i) (enumerating certain press entities and excepting entities owned or controlled by candidates, political parties, or political committees); *Reader’s Digest Assoc. v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinion 2016-01 (Ethiq) (citing several other advisory opinions).

published.”³ In recent advisory opinions, the Commission has therefore applied the media exemptions to media that are not explicitly enumerated in the regulatory list, including internet and satellite television and radio stations,⁴ internet application publishers,⁵ and documentary film producers and distributors.⁶ These opinions have recognized evolutions in the technologies employed by press organizations to publish and disseminate their news and editorial content.

To more accurately codify the scope of the media exemption, the Commission proposes to include in the relevant regulations express references to:

- satellite television and radio operator, programmer or producer;
- internet-enabled applications;
- motion pictures; and
- books.

Thus, for both 11 CFR 100.73 and 100.32, the proposed rule would cover any cost incurred in covering or carrying a news story, commentary, or editorial by any “broadcasting station (including a cable or satellite television or radio operator, programmer or producer), website, internet-enabled application, motion picture, book, newspaper, magazine, or other periodical publication, including any Internet or electronic publication.”

The Commission seeks comment on this proposal. Is it clear that the revised list of media would draw no distinction between traditional and new media? For example, is it clear that “books” are exempt from regulation on the same basis as magazines and that electronic book publishers are included in the exemption recognized for “books”? Do the proposed revisions provide sufficient flexibility to include press entities in the exemptions as new media emerge without having to engage in serial amendments to Commission regulations?

³ Internet Communications, 71 FR at 18608. The Commission further noted that “the terms ‘Website’ and ‘any Internet or electronic publication’ are meant to address a wide range of technology that may be used by entities entitled to the press exemption.” *Id.* at 18610 n.60.

⁴ See, e.g., Advisory Opinion 2008-14 (Melothe) (concluding that internet television station was press entity); Advisory Opinion 2007-20 (XM Radio) (concluding that satellite radio company was press entity).

⁵ See, e.g., Advisory Opinion 2016-01 (Ethiq) (concluding that internet application publisher was press entity).

⁶ See, e.g., Advisory Opinion 2010-08 (Citizens United) (concluding that documentary film producer was press entity).