

PUBLIC COMMENTS ON DRAFT ADVISORY OPINION 2011-11

The Federal Election Commission is now accepting public comments on DRAFT A AND DRAFT B OF ADVISORY OPINION 2011-11. Advisory Opinion 2011-11 was requested by Trevor Potter, Esq., Joseph M. Birkenstock, Esq., and Matthew T. Sanderson, Esq., on behalf of Mr. Stephen Colbert. The alternative drafts are scheduled to be considered by the Commission at its public meeting on Thursday, June 30, 2011.

If you wish to comment on DRAFT A OR DRAFT B OF ADVISORY OPINION 2011-11, please note the following:

- 1) Your comment must be in writing, must include your full name, and must be legible and complete.
- 2) Submit your comment via email to colbertAOR@fec.gov. **Submission via email is strongly encouraged** to ensure the prompt processing and consideration of comments. Persons without access to email may submit paper comments to the Office of the Commission Secretary, Federal Election Commission, 999 E Street, NW, Washington, DC 20463, via hand delivery or by fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel, ATTN: Rosemary C. Smith, Esq., Federal Election Commission, 999 E Street, NW, Washington, DC 20463, or by fax ((202) 208-3333), by hand delivery or fax ((202) 219-3923).
- 3) **If you email your comment to the Commission, please do not also submit it via hand delivery or fax.** Multiple submissions of the same comment may delay its processing and consideration.
- 4) All comments must be received by 5:30 p.m. (Eastern Time) on June 28, 2011.
- 5) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 6) All comments that have been accepted by the Commission will be made available to the public in the Commission's Public Records Office and will be posted on the Commission's website at <http://www.fec.gov/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Rosemary C. Smith
Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2011-11, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://www.fec.gov/searchao>.

AGENDA DOCUMENT NO. 11-38



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2011 JUN 23 P 6: 19

June 23, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

For Meeting of 6-30-11

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

David C. Adkins *AR for DCA*
Attorney

Peter Reynolds *PR*
Attorney

Subject: Draft AO 2011-11 (Colbert)

Attached are two proposed alternative drafts of the subject advisory opinion. We have been asked to place these drafts on the agenda for June 30, 2011.

Attachment

1 **ADVISORY OPINION 2011-11**

DRAFT A

2
3 **Trevor Potter, Esq.**
4 **Joseph Birkenstock, Esq.**
5 **Matthew T. Sanderson, Esq.**
6 **Caplin & Drysdale Chtd.**
7 **One Thomas Circle, NW**
8 **Suite 1100**
9 **Washington, DC 20005**

10
11 **Dear Messrs. Potter, Birkenstock, and Sanderson:**

12 **We are responding to your advisory opinion request on behalf of Mr. Stephen**
13 **Colbert concerning the application of the Federal Election Campaign Act of 1971, as**
14 **amended (the “Act”), and Commission regulations to Mr. Colbert’s plans to establish and**
15 **operate a political committee (the “Committee”). Mr. Colbert wishes to establish the**
16 **Committee to solicit and accept contributions in unlimited amounts from the general**
17 **public for the purpose of making independent expenditures. He also asks whether the**
18 **press exemption would cover costs incurred by the U.S. subsidiaries of Viacom, Inc. and**
19 **related entities (“Viacom”) for the following activities, or whether these costs must be**
20 **disclosed as contributions to the Committee:**

- 21 • **covering the Committee and its activities on *The Colbert Report* (the “Show”);**
22 • **producing independent expenditure advertisements for the Committee; and**
23 • **administering the Committee.**

24 **The Commission concludes that Mr. Colbert may establish and operate the**
25 **Committee, which plans to solicit and accept contributions in unlimited amounts for the**
26 **purpose of making independent expenditures from individuals, political committees,**
27 **labor organizations, and corporations (but not foreign nationals, Federal contractors,**
28 **national banks, or corporations organized by act of Congress). The Commission further**

1 concludes that while some of Viacom's activities would fall within the press exemption,
2 others would not. The Show's coverage of the Committee, and its production of
3 independent expenditure advertisements used solely in the Show's coverage of the
4 Committee, would fall within the press exemption. Thus, costs incurred by Viacom in
5 connection with these activities would not need to be disclosed by the Committee as in-
6 kind contributions. However, Viacom's production of independent expenditure
7 advertisements provided to the Committee to distribute outside of the Show (including
8 airing as paid advertisements on other shows and networks or as content for the
9 Committee's website), and Viacom's administration and operation of the Committee,
10 would not fall within the press exemption, because these activities are not legitimate
11 press functions. Consequently, all costs incurred by Viacom for these activities would
12 need to be disclosed by the Committee as in-kind contributions to the Committee.

13 ***Background***

14 The facts presented in this advisory opinion are based on your letters received on
15 May 13, 2011 and June 14, 2011.

16 You state that since 2005, Mr. Colbert has hosted the Show, a half-hour television
17 program that is distributed on cable television and through associated Internet sites. The
18 Show is owned, distributed, and produced by Viacom,¹ which is neither owned nor
19 controlled by any political party, political committee, or candidate. On the Show, Mr.
20 Colbert discusses political figures, issues, and news through on-air monologues and guest
21 interviews, as well as other methods. The Show has addressed campaign finance rules
22 and issues from time to time.

¹ Staff of the Show are employees of Hello Doggie, a production company that produces the Show under contract to Viacom.

1 You state that Mr. Colbert's activities off the set have also served as material for
2 the Show. For example, in 2008, the Show used Mr. Colbert's attempt to run in the
3 South Carolina Democratic presidential primary election as a vehicle to discuss and
4 provide commentary on campaign-related issues, such as ballot access rules and
5 paperwork. Similarly, Mr. Colbert co-hosted the "Rally to Restore Sanity and/or Fear" in
6 October 2010, which the Show covered extensively to provide commentary on political
7 discourse in the United States. Other examples of the Show's coverage of Mr. Colbert's
8 activities off the set include: his congressional testimony on immigration, his U.S.O.
9 Tour to Baghdad, his public dispute with the Associated Press about the word
10 "truthiness," and his sponsorship of the U.S. Speedskating Team. In all instances, these
11 activities have been funded by Viacom.

12 Most recently, Mr. Colbert discussed on the Show the idea of creating his own
13 political committee. To date, the idea of this Committee, which has been referred to as
14 the "Colbert SuperPAC" on the Show, has been a vehicle for Mr. Colbert to discuss
15 campaign finance rules and new developments in politics.

16 Mr. Colbert now plans to establish the Committee, the activities of which will be
17 covered on the Show and used by Mr. Colbert as an on-air premise for discussing
18 campaign finance rules and other aspects of American politics. Neither Viacom nor its
19 corporate management will control or direct the Committee's activities. The Show's
20 production, current format, and distribution will not be altered in covering or commenting
21 on the Committee.

22 You state that the Committee will file a Statement of Organization with the
23 Commission as a nonconnected committee. You represent that it will make only

1 independent expenditures and will not make monetary or in-kind contributions to any
2 candidate, political committee, or political party. It also will not coordinate its
3 expenditures with any candidate or political party. The Committee will solicit and accept
4 unlimited contributions from individuals, political committees, corporations, and labor
5 organizations. It will comply with all applicable requirements of the Act and
6 Commission regulations, including disclaimer and reporting rules.

7 You state that the Committee will have its own website, which will discuss
8 political events, offer opinions on political matters, and solicit contributions. The
9 Committee will pay for the costs associated with this website, as well as the Committee's
10 solicitation costs and some of its other expenses, including, for example, the cost of Mr.
11 Colbert's Committee-related travel and Committee mementos. Much of the cost of
12 operating the Committee, however, including costs to produce some of its independent
13 expenditure advertisements and to prepare and file the Committee's reports with the
14 Commission, will be incurred by Viacom either directly, or indirectly through payments
15 to its vendors.

16 While hosting the Show, Mr. Colbert plans to refer to the Committee's website,
17 describe the Committee's operations, mention audience participation opportunities, and
18 air the Committee's independent expenditure advertisements. These independent
19 expenditure advertisements will be created by the Show's staff using the Show's
20 production resources.

21 You state that these independent expenditure advertisements will be subject to
22 Viacom's regular review process. This review process is performed by lawyers and
23 executives from Viacom. It includes a review of scripts of the Show and, where

1 appropriate, specific proposals or subjects regarding content of the Show, to identify legal
2 and commercial issues and to ensure compliance with “standards and practices” for cable
3 shows. This process will also apply to the Show’s coverage of the Committee. As
4 Executive Producer of the Show, however, Mr. Colbert is and will remain principally
5 responsible for formulation of the Show’s content, subject to this review process.

6 You state that independent expenditure advertisements created by the Show’s
7 staff will be aired on the Show (or posted on the Show’s website) as part of the Show’s
8 coverage of the Committee. Some of these independent expenditure advertisements will
9 be provided to the Committee to air as paid advertisements on other shows and networks.
10 All of the independent expenditure advertisements will remain the intellectual property of
11 Viacom.

12 You state that the Show’s production resources and staff will also be used to
13 prepare and file the Committee’s reports with the Commission.

14 ***Questions Presented***

- 15 1. *May Mr. Colbert form an independent expenditure-only committee that accepts*
16 *unlimited contributions from individuals, political committees, corporations, and*
17 *labor organizations?*
- 18 2. *If the Committee is discussed on the Show, must airtime and related costs incurred by*
19 *Viacom be reported as in-kind contributions, or will these costs be exempt from*
20 *reporting requirements under the press exemption?*
- 21 3. *If the Committee receives in-kind contributions from Viacom, may it also solicit and*
22 *accept contributions from the general public?*

1 ***Legal Analysis and Conclusions***

2 ***Question 1. May Mr. Colbert form an independent expenditure-only committee that***
3 ***accepts unlimited contributions from individuals, political committees, corporations, and***
4 ***labor organizations?***

5 Yes, Mr. Colbert may form a political committee that makes only independent
6 expenditures² and does not make contributions. The Committee may accept unlimited
7 contributions from individuals, political committees, corporations, and labor
8 organizations but not from foreign nationals, Federal contractors, national banks, or
9 corporations organized by authority of any law of Congress.

10 A political committee that makes only independent expenditures may solicit and
11 accept unlimited contributions from individuals, corporations, labor organizations, and
12 other political committees, but not from foreign nationals, Federal contractors, national
13 banks, or corporations organized by act of Congress. *See* Advisory Opinion 2010-11
14 (Commonsense Ten) (corporations and labor organizations may contribute without limit
15 to political committees that make only independent expenditures); *see also Citizens*
16 *United v. FEC*, 130 S. Ct. 876, 913 (2010) (corporate-funded independent expenditures
17 are constitutionally protected speech); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir.
18 2010) (*en banc*) (individuals may contribute without limit to political committees that
19 make only independent expenditures). The political committee must register with the

² The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents. 2 U.S.C. 431(17); 11 CFR 100.16.

1 Commission³ and comply with all applicable reporting rules. *See SpeechNow*, 599 F.3d
2 at 698.

3 In Advisory Opinion 2010-11 (Commonsense Ten), the Commission concluded
4 that a nonconnected political committee that made only independent expenditures could
5 solicit and receive unlimited contributions from individuals, political committees,
6 corporations, and labor organizations. Like Commonsense Ten, the Committee plans to
7 register as a nonconnected political committee, plans to make only independent
8 expenditures, and will not make contributions or coordinated communications. You state
9 that it will comply with all applicable requirements of the Act and Commission
10 regulations, including disclaimer and reporting rules.

11 Accordingly, the Commission concludes that Mr. Colbert may establish and
12 operate the Committee. The Committee may solicit and accept unlimited contributions
13 from individuals, political committees, corporations, and labor organizations, but the
14 Committee may not solicit or accept contributions from foreign nationals, Federal
15 contractors, national banks, or corporations organized by authority of any law of
16 Congress. The Committee must comply with all applicable reporting and disclaimer
17 requirements.

18

19

³ The Committee has previously determined that such political committees may include a letter with their Form 1 Statements of Organization clarifying that they intend to accept unlimited contributions for the purpose of making independent expenditures. *See* Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten) and attachments thereto.

1 *Question 2. If the Committee is discussed on the Show, must airtime and related costs*
2 *incurred by Viacom be reported as in-kind contributions,⁴ or will these costs be exempt*
3 *from reporting requirements under the press exemption?*

4 If the Committee is discussed on the Show, airtime and related costs incurred by
5 Viacom for its coverage of the Committee on the Show will be exempt from reporting
6 requirements under the press exemption. Costs incurred by Viacom to produce
7 independent expenditure advertisements aired solely on the Show will also be exempt
8 from reporting requirements under the press exemption. If Viacom provides those
9 independent expenditure advertisements to the Committee to distribute outside of the
10 Show (including airing as paid advertisements on other shows and networks or as content
11 for the Committee's website), however, they will be in-kind contributions by Viacom to
12 the Committee and must be reported as such, as will any costs incurred by Viacom to
13 administer the Committee.⁵

14 The Act and Commission regulations define the terms "contribution" and
15 "expenditure" to include any gift of money or "anything of value" for the purpose of
16 influencing a Federal election. 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a) and
17 100.111(a). The Act and Commission regulations require political committees to report
18 all contributions received, whether monetary or in-kind, and expenditures made during a
19 given reporting period. See 2 U.S.C. 434(b); 11 CFR 104.3.

⁴ Nothing in the request indicates that an in-kind contribution from Viacom to the Committee would constitute a direct or indirect contribution or donation by a foreign national under 2 U.S.C. 441e.

⁵ The Commission assumes for the purposes of this advisory opinion that all costs incurred by Hello Doggie to produce the Show or administer the Committee are attributable to Viacom. Therefore, the Commission need not determine whether Hello Doggie would be making in-kind contributions to the Committee.

1 Under the Act, “[t]he term ‘expenditure’ does not include . . . any news story,
2 commentary, or editorial distributed through the facilities of any broadcasting station,
3 newspaper, magazine, or other periodical publication, unless such facilities are owned or
4 controlled by any political party, political committee, or candidate.” 2 U.S.C.
5 431(9)(B)(i). Commission regulations further provide that neither a “contribution” nor an
6 “expenditure” results from “any cost incurred in covering or carrying a news story,
7 commentary, or editorial by any broadcasting station (including a cable television
8 operator, programmer or producer) . . . unless the facility is owned or controlled by any
9 political party, political committee, or candidate[.]” These exclusions are known as the
10 “press exemption.” 11 CFR 100.73 and 100.132. Costs coming within this exemption
11 are not contributions or expenditures and are not subject to the reporting requirements of
12 the Act or Commission regulations.

13 The legislative history of the press exemption indicates that Congress did not
14 intend to “limit or burden in any way the First Amendment freedoms of the press and of
15 association. [The exemption] assures the unfettered right of the newspapers, TV
16 networks, and other media to cover and comment on political campaigns.” H.R. REP. NO.
17 93-1239, at 4 (1974).

18 The Commission has historically conducted a two-step analysis to determine
19 whether the press exemption applies. First, the Commission asks whether the entity
20 engaging in the activity is a press entity. *See, e.g.*, Advisory Opinions 2005-16 (Fired
21 Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission
22 applies the two-part analysis presented in *Reader’s Digest Ass’n v. FEC*, 509 F. Supp.
23 1210, 1215 (S.D.N.Y. 1981), which requires it to determine:

1 (A) Whether the entity is owned or controlled by a political party, political
2 committee, or candidate; and

3 (B) Whether the entity is acting as a press entity in conducting the activity at
4 issue (*i.e.*, whether the press entity is acting in its “legitimate press function”).

5 *See also* *FEC v. Phillips Publ'g*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981); Advisory
6 Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and
7 2004-07 (MTV).

8 1) Is Viacom a Press Entity?

9 The Commission has previously determined that Viacom is a press entity. *See*
10 Advisory Opinion 2004-07 (MTV). Nothing in the facts presented by Mr. Colbert or
11 otherwise available to the Commission would cause the Commission to reconsider this
12 prior determination at this time.

13 2) Ownership Criteria and Legitimate Press Function

14 A) Is Viacom Owned or Controlled by a Political Party, Political Committee, or
15 Candidate?

16 The Commission has previously determined that Viacom is not owned or
17 controlled by a political party, political committee, or candidate. *See* Advisory Opinion
18 2004-07 (MTV). Nothing in the facts presented by Mr. Colbert or otherwise available to
19 the Commission causes the Commission to reconsider this prior determination at this
20 time.

21 B) Is Viacom Acting in its Legitimate Press Function?

22 The Commission considers two factors in determining whether a press entity is
23 acting in its legitimate press function. They are (1) whether the press entity’s materials

1 are available to the general public, and (2) whether the materials are comparable in form
2 to those ordinarily issued by the press entity. Advisory Opinions 2005-16 (Fired Up!)
3 (citing *FEC v. Mass. Citizens for Life ("MCFL")*, 479 U.S. 238, 251 (1986)) and 2000-13
4 (iNEXTV) (concluding that a website was "viewable by the general public and akin to a
5 periodical or news program distributed to the general public").

6 In *MCFL*, the Supreme Court held that a "Special Edition" newsletter did not
7 qualify for the press exemption because it differed in certain "considerations of form"
8 from the press entity's regular newsletter. *MCFL*, 479 U.S. at 250-51. Among those
9 "considerations of form" enumerated by the Supreme Court were the fact that the Special
10 Edition was not published through the facilities of the press entity's regular newsletter
11 but by a staff that had prepared no previous or subsequent newsletters, and that the
12 Special Edition was distributed to a group far larger than the regular newsletter's
13 audience. *Id.*

14 In looking at these two factors, the Commission is also mindful that a press
15 entity's press function is "distinguishable from active participation in core campaign or
16 electioneering functions." Advisory Opinion 2008-14 (Melothe, Inc.). While the press
17 exemption covers press activity, it does not cover campaign activity, even if the
18 campaign activity is conducted by a press entity. See *MCFL*, 479 U.S. at 251
19 (recognizing "the distinction of campaign flyers from regular publications"); *Reader's*
20 *Digest Ass'n*, 509 F. Supp. at 1214 (the press exemption would not apply where, "for
21 example, on Election Day a partisan newspaper hired an army of incognito propaganda
22 distributors to stand on street corners denouncing allegedly illegal acts of a candidate and
23 sent sound trucks through the streets blaring the same denunciations, all in a manner

1 unrelated to the sale of its newspapers”); *see also* *McConnell v. FEC*, 540 U.S. 93, 208
2 (2003) (commenting that the press exemption “does not afford *carte blanche* to media
3 companies generally to ignore FECA’s provisions”).

4 As described further below, the Show’s coverage of the Committee’s activities is
5 part of Viacom’s legitimate press function. The other activities proposed by Mr. Colbert,
6 however, would result in Viacom engaging in “active participation in core campaign or
7 electioneering functions” and thus do not constitute Viacom acting in its “legitimate press
8 function.”

9 *1. Costs to Cover the Committee on the Show*

10 The Commission concludes that Viacom’s coverage of the Committee on the
11 Show, and its production of independent expenditure advertisements used solely in the
12 Show’s coverage of the Committee, are part of Viacom’s legitimate press function. Thus,
13 the costs of those activities need not be reported by the Committee as in-kind
14 contributions.

15 Coverage of the Committee on the Show includes producing and airing segments
16 of the Show that discuss the Committee’s operations, the Committee’s support for or
17 opposition to Federal candidates, the Committee’s website, audience participation
18 opportunities, and the Committee’s independent expenditure advertisements. These
19 segments will consist of news stories, commentary, and editorials in the context of
20 providing a continuing premise for the Show to cover and offer commentary on campaign
21 finance laws and other aspects of American politics.

22 Under *MCFL*’s “considerations of form” analysis, the production and distribution
23 of segments of the Show featuring discussions of the Committee and the Committee’s

1 independent expenditure advertisements will be comparable in form to previously
2 produced segments appearing on the Show. For example, these segments will be
3 produced through the regular production facilities of the Show. Thus, the staff that
4 produces these segments of the Show will be the same staff that produces other segments
5 of the Show that do not discuss the Committee. These segments will also be subject to
6 the same review by Viacom as other segments of the Show. Further, these segments of
7 the Show will be distributed on the same cable television channel, Comedy Central, and
8 during the same time slot, and their content will be made available on the same website,
9 as other segments of the Show. The format of the Show, which currently “discusses
10 political actors, issues, and news through on-air monologues and guest interviews,” will
11 not be altered. Therefore, Viacom will be acting within its legitimate press function
12 when it features on the Show discussions of the Committee, and costs incurred by
13 Viacom will not be in-kind contributions from Viacom to the Committee.⁶

14 2. *Costs Related to Independent Expenditure Advertisements Provided to the*
15 *Committee to Distribute Outside of the Show*

16 The Commission concludes that Viacom would not be acting within its legitimate
17 press function by providing independent expenditure advertisements to the Committee for
18 the Committee to distribute outside of the Show (including airing as paid advertisements
19 on other shows and networks or as content for its website). Thus, costs incurred by

⁶ A news story, commentary, or editorial that lacks objectivity or is satirical can still be considered part of a press entity’s legitimate press function, even if that news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office. See Advisory Opinions 2010-08 (Citizens United) and 2005-19 (Inside Track). Even if the materials produced and aired by Viacom contain express advocacy, Viacom’s coverage of them on the Show will be covered by the press exemption.

1 Viacom for this activity would need to be reported by the Committee as in-kind
2 contributions from Viacom to the Committee.

3 As noted above, the press exemption covers press activity, not campaign activity
4 by a press entity. *See MCFL*, 479 U.S. at 251; *Reader's Digest Ass'n*, 509 F. Supp. at
5 1214. Here, Viacom's provision of independent expenditure advertisements to the
6 Committee would constitute "active participation [by Viacom] in core campaign or
7 electioneering functions" outside the scope of the press exemption. *Advisory Opinion*
8 *2008-14 (Molothé, Inc.)*. This result would stretch the boundaries of the press exemption
9 far beyond those contemplated by Congress and the Supreme Court. *See, e.g., MCFL*,
10 479 U.S. at 251; *Reader's Digest Ass'n*, 509 F. Supp. at 1214; *see also McConnell*, 540
11 U.S. at 208. Thus, independent expenditure advertisements provided to the Committee
12 would be in-kind contributions to the Committee.

13 *3. Committee's Administration Costs*

14 The Commission similarly concludes that the administration of the Committee by
15 Viacom would constitute "active participation [by Viacom] in core campaign or
16 electioneering functions" and would therefore not be part of Viacom's legitimate press
17 function. Thus, costs incurred by Viacom to administer the Committee would need to be
18 reported by the Committee as in-kind contributions by Viacom.

19 There is no basis on which to conclude that the administration of a political
20 committee is part of the legitimate press function of a press entity. Accordingly, such
21 activities are beyond the scope of the press exemption and must be reported by the
22 Committee as in-kind contributions received from Viacom.

1 *Question 3. If the Committee receives in-kind contributions from Viacom, may it also*
2 *solicit and accept contributions from the general public?*

3 Yes, if the Committee receives in-kind contributions from Viacom, it may also
4 solicit and accept contributions from individuals, political committees, corporations, and
5 labor organizations (but not from foreign nationals, Federal contractors, national banks,
6 or corporations organized by act of Congress).

7 As discussed above, a political committee that makes only independent
8 expenditures may solicit and accept unlimited contributions from individuals,
9 corporations, labor organizations, and other political committees (but not from foreign
10 nationals, Federal contractors, national banks, or corporations organized by act of
11 Congress). *See* Advisory Opinion 2010-11 (Commonsense Ten); *see also* Advisory
12 Opinion 2010-09 (Club for Growth). The Committee's acceptance of contributions from
13 Viacom would thus not bar it from soliciting and accepting unlimited contributions from
14 other permissible sources.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a
19 conclusion presented in this advisory opinion, then the requestor may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the
22 transaction or activity with respect to which this advisory opinion is rendered may rely on
23 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the
2 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.
3 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
4 directly from the Commission's Advisory Opinion searchable database at
5 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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12

Cynthia L. Bauerly
Chair

1 ADVISORY OPINION 2011-11

2

3 Trevor Potter, Esq.

DRAFT B

4 Joseph Birkenstock, Esq.

5 Matthew T. Sanderson, Esq.

6 Caplin & Drysdale Chtd.

7 One Thomas Circle, NW

8 Suite 1100

9 Washington, DC 20005

10

11 Dear Messrs. Potter, Birkenstock, and Sanderson:

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13

We are responding to your advisory opinion request on behalf of Mr. Stephen

14

Colbert concerning the application of the Federal Election Campaign Act of 1971, as

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amended (the "Act"), and Commission regulations to Mr. Colbert's plans to establish and

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operate a political committee (the "Committee"). Mr. Colbert wishes to establish the

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press exemption would cover costs incurred by the U.S. subsidiaries of Viacom, Inc. and

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related entities ("Viacom") for the following activities, or whether these costs must be

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disclosed as contributions to the Committee:

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- covering the Committee and its activities on *The Colbert Report* (the "Show");

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- producing independent expenditure advertisements for the Committee; and

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- administering the Committee.

25

The Commission concludes that Mr. Colbert may establish and operate the

26

Committee if the Committee solicits and accepts contributions in unlimited amounts for

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the purpose of making independent expenditures from individuals, political committees,

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labor organizations, and corporations (but not foreign nationals, Federal contractors,

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national banks, or corporations organized by act of Congress). The Commission further

1 concludes that costs incurred by Viacom in connection with the Committee's activities
2 would be covered by the press exemption and would not need to be reported by the
3 Committee as in-kind contributions.

4 ***Background***

5 The facts presented in this advisory opinion are based on your letters received on
6 May 13, 2011 and June 14, 2011.

7 Since 2005, Mr. Colbert has hosted the Show, a half-hour television program that
8 is distributed on cable television and through associated Internet sites. The show is
9 owned, distributed, and produced by Viacom,¹ which is neither owned nor controlled by
10 any political party, political committee, or candidate. On the Show, Mr. Colbert
11 discusses political figures, issues, and news through on-air monologues and guest
12 interviews, as well as other methods. The Show has addressed campaign finance rules
13 and issues from time to time.

14 The off-set activities of Mr. Colbert have also served as material for the Show.
15 For example, in 2008, the Show used Mr. Colbert's attempt to run in the South Carolina
16 Democratic presidential primary election as a vehicle to discuss and provide commentary
17 on campaign-related issues, such as ballot access rules and paperwork. Similarly, Mr.
18 Colbert co-hosted the "Rally to Restore Sanity and/or Fear" in October 2010, which the
19 Show covered extensively to provide commentary on political discourse in the United
20 States. Other examples of the Show's coverage of Mr. Colbert's off-set activities
21 include: his congressional testimony on immigration, his U.S.O. Tour to Baghdad, his
22 public dispute with the Associated Press about the word "truthiness," and his sponsorship

¹ Staff of the Show are employees of Hello Doggie, a production company that produces the Show under contract to Viacom.

1 of the U.S. Speedskating Team. In all instances, these activities have been funded by
2 Viacom.

3 Most recently, Mr. Colbert discussed on the Show the idea of creating his own
4 political committee. To date, the idea of this Committee, which has been referred to as
5 the "Colbert SuperPAC" on the Show, has been a vehicle for Mr. Colbert to discuss
6 campaign finance rules and new developments in politics.

7 Mr. Colbert now plans to establish the Committee, the activities of which will be
8 covered on the Show and used by Mr. Colbert as an on-air premise for discussing
9 campaign finance rules and other aspects of American politics. Neither Viacom nor its
10 corporate management will control or direct the Committee's activities. The Show's
11 production, current format, and distribution will not be altered in covering or commenting
12 on the Committee.

13 The Committee will file a Statement of Organization with the Commission as a
14 nonconnected committee. It will make only independent expenditures. It will not make
15 monetary or in-kind contributions to any candidate, political committee, or political party.
16 It also will not coordinate its expenditures with any candidate or political party. The
17 Committee will solicit and accept unlimited contributions from individuals, political
18 committees, corporations, and labor organizations. It will comply with all applicable
19 requirements of the Act and Commission regulations, including disclaimer and reporting
20 rules.

21 The Committee will have its own website, which will discuss political events,
22 offer opinions on political matters, and solicit contributions. The Committee will pay the
23 costs associated with this website, as well as the Committee's solicitation costs and some

1 of its other expenses, including, for example, the cost of Mr. Colbert's Committee-related
2 travel and Committee mementos. Much of the cost of operating the Committee, however,
3 including costs to produce some of its independent expenditure advertisements and to
4 prepare and file the Committee's reports with the Commission, will be incurred by
5 Viacom.

6 While hosting the Show, Mr. Colbert plans to refer to the Committee's website,
7 describe the Committee's operations, mention audience participation opportunities, and
8 air the Committee's independent expenditure advertisements. These independent
9 expenditure advertisements will be created by the Show's staff using the Show's
10 production resources.

11 These independent expenditure advertisements will be subject to Viacom's
12 regular review process. This review process is performed by lawyers and executives
13 from Viacom. It includes a review of scripts of the Show and, where appropriate,
14 specific proposals or subjects regarding content of the Show, to identify legal and
15 commercial issues and to ensure compliance with "standards and practices" for cable
16 shows. This process will also apply to the Show's coverage of the Committee. As
17 Executive Producer of the Show, however, Mr. Colbert is and will remain principally
18 responsible for formulation of the Show's content, subject to this review process.

19 Independent expenditure advertisements created by the Show's staff will be aired
20 on the Show (or posted on the Show's website) as part of the Show's coverage of the
21 Committee. Some of these independent expenditure advertisements will be provided to
22 the Committee to be distributed at its cost and discretion on other networks and shows.

1 All of the independent expenditure advertisements will remain the intellectual property of
2 Viacom.

3 The Show's production resources and staff will also be used to prepare and file
4 the Committee's reports with the Commission.

5 ***Questions Presented***

6 1. *May Mr. Colbert form an independent expenditure-only committee that accepts*
7 *unlimited contributions from individuals, political committees, corporations, and*
8 *labor organizations?*

9 2. *If the Committee is discussed on the Show, must airtime and related costs incurred by*
10 *Viacom be reported as in-kind contributions, or will these costs be exempt from*
11 *reporting requirements under the press exemption?*

12 3. *If the Committee receives in-kind contributions from Viacom, may it also solicit and*
13 *accept contributions from the general public?*

14 ***Legal Analysis and Conclusions***

15 *Question 1. May Mr. Colbert form an independent expenditure-only committee that*
16 *accepts unlimited contributions from individuals, political committees, corporations, and*
17 *labor organizations?*

18 Yes, Mr. Colbert may form a political committee that makes only independent
19 expenditures and does not make contributions. The Committee may accept unlimited
20 contributions from individuals, political committees, corporations, and labor
21 organizations but not from foreign nationals, Federal contractors, national banks, or
22 corporations organized by authority of any law of Congress.

1 A political committee that makes only independent expenditures may solicit and
2 accept unlimited contributions from individuals, corporations, labor organizations, and
3 other political committees, but not from foreign nationals, Federal contractors, national
4 banks, or corporations organized by act of Congress. *See Citizens United v. FEC*, 130 S.
5 Ct. 876, 913 (2010) (corporate-funded independent expenditures are constitutionally
6 protected speech); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*)
7 (individuals may contribute without limit to political committees that make only
8 independent expenditures); *see also* Advisory Opinion 2010-11 (Commonsense Ten)
9 (corporations and labor organizations may contribute without limit to political
10 committees that make only independent expenditures). The political committee must
11 register with the Commission² and comply with all applicable reporting rules. *See*
12 *SpeechNow*, 599 F.3d at 698.

13 In Advisory Opinion 2010-11 (Commonsense Ten), the Commission concluded
14 that a nonconnected political committee that made only independent expenditures could
15 solicit and receive unlimited contributions from individuals, political committees,
16 corporations, and labor organizations. Mr. Colbert's Committee will in all material
17 respects be identical to Commonsense Ten. Mr. Colbert plans to register the Committee
18 as a nonconnected political committee and the Committee will make only independent
19 expenditures. The Committee will not make contributions or coordinated
20 communications. It will comply with all applicable requirements of the Act and
21 Commission regulations, including disclaimer and reporting rules.

² The Committee has previously determined that such political committees may include a letter with their Form 1 Statements of Organization clarifying that they intend to accept unlimited contributions for the purpose of making independent expenditures. *See* Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten) and attachments thereto.

1 Accordingly, the Commission concludes that Mr. Colbert may establish and
2 operate the Committee. The Committee may solicit and accept unlimited contributions
3 from individuals, political committees, corporations, and labor organizations, but the
4 Committee may not solicit or accept contributions from foreign nationals, Federal
5 contractors, national banks, or corporations organized by authority of any law of
6 Congress. The Committee must comply with all applicable reporting and disclaimer
7 requirements.

8 *Question 2. If the Committee is discussed on the Show, must airtime and related costs*
9 *incurred by Viacom be reported as in-kind contributions, or will these costs be exempt*
10 *from reporting requirements under the press exemption?*

11 If the Committee is discussed on the Show, airtime and related costs incurred by
12 Viacom would be exempt from reporting requirements under the press exemption.

13 The Act and Commission regulations define the terms “contribution” and
14 “expenditure” to include any gift of money or “anything of value” for the purpose of
15 influencing a Federal election. 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a) and
16 100.111(a). The Act and Commission regulations require political committees to report
17 all contributions received, whether monetary or in-kind, and expenditures made during a
18 given reporting period. See 2 U.S.C. 434(b); 11 CFR 104.3.

19 Under the Act, “[t]he term ‘expenditure’ does not include . . . any news story,
20 commentary, or editorial distributed through the facilities of any broadcasting station,
21 newspaper, magazine, or other periodical publication, unless such facilities are owned or
22 controlled by any political party, political committee, or candidate.” 2 U.S.C.
23 431(9)(B)(i). Commission regulations further provide that neither a “contribution” nor an

1 “expenditure” results from “any cost incurred in covering or carrying a news story,
2 commentary, or editorial by any broadcasting station (including a cable television
3 operator, programmer or producer) . . . unless the facility is owned or controlled by any
4 political party, political committee, or candidate[.]” These exclusions are known as the
5 “press exemption.” 11 CFR 100.73 and 100.132. Costs coming within these exemptions
6 are not subject to the reporting requirements of the Act or Commission regulations.

7 The legislative history of the press exemption indicates that Congress did not
8 intend to “limit or burden in any way the First Amendment freedoms of the press and of
9 association. [The exemption] assures the unfettered right of the newspapers, TV
10 networks, and other media to cover and comment on political campaigns.” H.R. REP. NO.
11 93-1239, at 4 (1974).

12 The Commission has historically conducted a two-step analysis to determine
13 whether the press exemption applies. First, the Commission asks whether the entity
14 engaging in the activity is a press entity. *See, e.g.*, Advisory Opinions 2005-16 (Fired
15 Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission
16 applies the two-part analysis presented in *Reader’s Digest Ass’n v. FEC*, 509 F. Supp.
17 1210, 1215 (S.D.N.Y. 1981), which requires it to determine:

18 (A) Whether the entity is owned or controlled by a political party, political
19 committee, or candidate; and

20 (B) Whether the entity is acting as a press entity in conducting the activity at
21 issue (*i.e.*, whether the press entity is acting in its “legitimate press function”).

1 *See also* *FEC v. Phillips Publ'g*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981); Advisory
2 Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and
3 2004-07 (MTV).

4 **1) Press Entity Status**

5 The Act and Commission regulations do not use or define the term “press entity.”
6 Therefore, when determining whether the term applies to a particular entity, the
7 Commission focuses on whether the entity in question produces on a regular basis a
8 program that disseminates news stories, commentary, and/or editorials. *See, e.g.*,
9 Advisory Opinions 2008-14 (Melothe, Inc.), 2007-20 (XM Radio), and 2005-19 (Inside
10 Track). Whether an entity qualifies as a press entity does not necessarily turn on the
11 presence or absence of any one particular fact. *See* Advisory Opinions 2007-20 (XM
12 Radio) and 2005-19 (Inside Track).

13 The Commission has previously determined that Viacom is a press entity.³ *See*
14 Advisory Opinion 2004-07 (MTV). Nothing in the facts presented by Mr. Colbert or
15 otherwise available to the Commission would cause the Commission to reconsider this
16 prior determination at this time.

17 **2) Ownership Criteria and Legitimate Press Function**

18 **A) Ownership or Control**

19 The Commission has previously determined that Viacom is not owned or
20 controlled by a political party, political committee, or candidate.⁴ *See* Advisory Opinion

³ The Commission assumes for the purposes of this advisory opinion that Hello Doggie, the production company that produces the Show under contract to Viacom, is also a press entity. However, even if it is not, it is the type of production company that press entities typically employ for the purposes of creating content. *See* Advisory Opinion 2003-34 (Showtime) (discussing TMD Production, which was also under contract to Viacom).

1 2004-07 (MTV). Nothing in the facts presented by Mr. Colbert or otherwise available to
2 the Commission would cause the Commission to reconsider this prior determination at
3 this time.⁵

4 **B) Legitimate Press Function**

5 The Commission considers two factors in determining whether a press entity is
6 engaging in its legitimate press function. They are (1) whether the press entity's
7 materials are available to the general public, and (2) whether the materials are
8 comparable in form to those ordinarily issued by the press entity. Advisory Opinions
9 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life ("MCFL")*, 479 U.S. 238, 251
10 (1986)) and 2000-13 (iNEXTV) (concluding that a website was "viewable by the general
11 public and akin to a periodical or news program distributed to the general public").

12 In *MCFL*, the Supreme Court held that a "Special Edition" newsletter did not
13 qualify for the press exemption because it differed in certain "considerations of form"
14 from the press entity's regular newsletter. *MCFL*, 479 U.S. at 250-51. Among those
15 "considerations of form" enumerated by the Supreme Court were the facts that the
16 Special Edition was not published through the facilities of the press entity's regular
17 newsletter, but by a staff that had prepared no previous or subsequent newsletters, and
18 that the Special Edition was distributed to a group far larger than the regular newsletter's
19 audience. *Id.*

⁴ Hello Doggie is also not owned or controlled by a political party, political committee, or candidate.

⁵ Mr. Colbert's roles as the executive producer, managing director, and host of the Show, and as director of the Committee, do not mean that either Mr. Colbert or the Committee owns or controls Viacom. See MUR 6242 (J.D. Hayworth 2010) (The Commission has never found that the host of a show carried by a press entity "owned or controlled" the press entity for purposes of the press exemption merely because the host had a role in determining program content.).

1 Here, Mr. Colbert proposes to use Viacom's resources to discuss the Committee
2 on the Show, which is both cablecast and available for viewing on Comedy Central's
3 public website. The discussions would provide information about the Committee's
4 website, descriptions of the Committee's operations, audience participation opportunities,
5 and examples of the Committee's independent expenditure advertisements. The
6 segments of the Show discussing the Committee and the Committee's activities would be
7 comparable in form to other segments of the Show. They would be produced through the
8 same production facilities, by the same staff, and would be subject to the same review by
9 Viacom. The segments would also be distributed on the same cable television channel,
10 during the same time slot, and would be made available on the same website. Thus, there
11 would be none of the differences in form that the Supreme Court found to be significant
12 in *MCFL*.

13 Nor would Mr. Colbert's proposed use of Viacom's staff and other resources to
14 create independent expenditure advertisements for the Committee differ significantly
15 from prior exempt activities of the Show. In the past, Mr. Colbert has frequently used
16 Viacom's staff and resources to support his off-set activities, and has then used those
17 activities as the basis for news, commentary and editorials on the Show. For example,
18 Viacom provided funding and other resources for Mr. Colbert's attempt to run in the
19 South Carolina Democratic presidential primary, his co-hosting of the "Rally to Restore
20 Sanity and/or Fear," his congressional testimony on immigration, his U.S.O. Tour to
21 Baghdad, his public dispute with the Associated Press about the word "truthiness," and
22 his sponsorship of the U.S. Speedskating Team. All of these activities were covered on
23 the Show.

1 The Committee would be the latest in a long line of vehicles for the Show to use
2 in providing news, commentary, and editorials to the public. Like the activities
3 enumerated above, the activities of the Committee will provide a continuing premise for
4 the Show to comment on current events and American politics. As such, costs incurred
5 by Viacom in covering the Committee,⁶ including costs associated with producing
6 independent expenditure advertisements for the Committee, would come within the press
7 exemption. A different conclusion would require the Commission to substitute its
8 judgment for that of the press entity on how best to deliver news, commentary, and
9 editorials. For the Commission to do so would be contrary to congressional intent to
10 ensure that the press exemption “assures the unfettered right of the newspapers, TV
11 networks, and other media to cover and comment on political campaigns.” *See* H.R. REP.
12 NO. 93-1239 at 4 (1974).

13 Costs incurred by Viacom to file the Committee’s reports with the Commission
14 are also part of Viacom’s legitimate press function. For the Committee to continue to
15 serve as a vehicle for the Show’s coverage of campaign finance rules and other aspects of
16 American politics, it must remain operational. As such, these activities are covered by
17 the press exemption.

⁶ A news story, commentary, or editorial that lacks objectivity can still be considered part of a press entity’s legitimate press function, even if that news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office. *See* Advisory Opinions 2010-08 (Citizens United) and 2005-19 (Inside Track). Accordingly, costs incurred by Viacom to produce and air materials containing express advocacy on the Show will be covered by the press exemption.

1 *Question 3. If the Committee receives in-kind contributions from Viacom, may it solicit*
2 *and accept contributions from the general public?*

3 Yes, if the Committee receives in-kind contributions from Viacom, it may solicit
4 and accept contributions from individuals, political committees, corporations, and labor
5 organizations (but not from foreign nationals, Federal contractors, national banks, or
6 corporations organized by act of Congress).

7 As discussed above, a political committee that makes only independent
8 expenditures may solicit and accept unlimited contributions from individuals,
9 corporations, labor organizations, and other political committees. *See Advisory Opinion*
10 *2010-11 (Commonsense Ten); see also Advisory Opinion 2010-09 (Club for Growth).*
11 The Committee's acceptance of contributions from Viacom would thus not bar it from
12 soliciting and accepting unlimited contributions from other permissible sources.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request. *See 2 U.S.C. 437f.* The Commission emphasizes that, if there is a change in any
16 of the facts or assumptions presented, and such facts or assumptions are material to a
17 conclusion presented in this advisory opinion, then the requestor may not rely on that
18 conclusion as support for its proposed activity. Any person involved in any specific
19 transaction or activity which is indistinguishable in all its material aspects from the
20 transaction or activity with respect to which this advisory opinion is rendered may rely on
21 this advisory opinion. *See 2 U.S.C. 437f(c)(1)(B).* Please note that the analysis or
22 conclusions in this advisory opinion may be affected by subsequent developments in the
23 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Cynthia L. Bauerly
Chair

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