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FIRST GENERAL COUNSEL'S REPORT

**CELA
SENSITIVE**

MUR: 6320

DATE COMPLAINT FILED: June 24, 2010

DATES OF NOTIFICATION: June 29 and

September 14, 2010

LAST RESPONSE RECEIVED: August 16, 2010

DATE ACTIVATED: August 31, 2010

EXPIRATION OF SOL: May 8, 2015 (earliest)

November 12, 2015 (latest)

COMPLAINANT:

Jay S. Jacobs

RESPONDENTS:

John Gomez for Congress and Denise Passero, in
her official capacity as treasurer

John Gomez

Clear Channel Communications, Inc.

Premiere Radio Networks, Inc.

Sean Hannity

RELEVANT STATUTES:

2 U.S.C. § 431(9)(B)(i)

2 U.S.C. § 441b(a)

2 U.S.C. § 434(b)

11 C.F.R. § 100.73

11 C.F.R. § 100.132

11 C.F.R. § 114.2(f)

INTERNAL REPORTS CHECKED:

FEC Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint in this matter alleges that John Gomez, a 2010 candidate for Congress from New York's Second Congressional District, and his campaign committee, John Gomez for Congress and Denise Passero, in her official capacity as treasurer (collectively "the Committee"), violated 2 U.S.C. §§ 441b(a) and 434(b) of the Federal Election Campaign Act of 1971, as

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1 amended ("the Act"), by accepting an illegal in-kind corporate contribution in the form of a
2 fundraising e-mail from Clear Channel Communications, Inc. ("Clear Channel"), a media and
3 entertainment company; its wholly owned subsidiary, Premiere Radio Networks, Inc.
4 ("Premiere"); and radio talk show host, Sean Hannity; and by failing to disclose the in-kind
5 corporate contribution on its reports filed with the Federal Election Commission.

6 Correspondingly, the complaint alleges that Clear Channel, Premiere, and Sean Hannity made an
7 illegal in-kind corporate contribution by facilitating the making of a contribution to John Gomez
8 and his campaign committee through the use of an e-mail subscriber list to engage in fundraising
9 for Gomez's campaign, and by including in the e-mail a free hyperlink to donate to Gomez's
10 campaign, in violation of 2 U.S.C. § 441b(a). The complaint also alleges that because John
11 Gomez allegedly requested the fundraising e-mail, the communication was coordinated, and the
12 candidate and the Committee accepted an illegal in-kind corporate contribution on this basis as
13 well. In their responses, Hannity, Clear Channel and Premiere request that the matter be
14 dismissed because, *inter alia*, the e-mail falls within the media exemption. Mr. Gomez's
15 response denies the allegations in the complaint.

16 As discussed below, because the media exemption set forth in 11 C.F.R. §§ 100.73 and
17 100.132 applies to the e-mail, we recommend that the Commission find no reason to believe that
18 Clear Channel, Premiere, and Sean Hannity made, or that John Gomez and the Committee
19 accepted, an in-kind corporate contribution, and no reason to believe the Committee failed to
20 disclose the alleged contributions, and close the file.

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Background**

3 The complaint concerns a May 8, 2010, e-mail from “The Sean Hannity Show” website,
4 www.hannity.com, to subscribers who signed up to receive free e-mail updates called the
5 “Hannity’s Headlines Newsletter.” The e-mail forwarded a message from another radio talk
6 show host, Mark Levin. Complaint, at Attachment F. The first paragraph of the e-mail states,
7 “If you haven’t seen this yet, you really need to take a look. This is a great American who’s
8 working hard for a Conservative Victory in 2010.” *Id.* The second paragraph states, “A message
9 from Mark Levin” and begins with “Dear Friend.” *Id.* The text of the e-mail expressly
10 advocates for John Gomez’s candidacy to Congress, including phrases such as “I strongly
11 encourage you to help me get [John Gomez] elected to the House of Representatives in
12 November,” and “[y]ou can help us win a historic victory for liberty this Fall by supporting John
13 Gomez.” *Id.* The e-mail requests that the reader financially support Gomez’s candidacy, and a
14 “Donate Now” button appears at the end of the e-mail, which is a hyperlink to the Gomez
15 campaign site. *Id.* According to the complaint, Mark Levin wrote the e-mail at the request of
16 the candidate. Complaint, at 3 and Attachments F and H.

17 Clear Channel is a media and entertainment corporation specializing in radio
18 programming and outdoor advertising. Clear Channel/Premiere Response, at 1. Premiere is a
19 wholly owned subsidiary of Clear Channel, it syndicates approximately 90 radio programs, and it
20 provides services to more than 5,000 radio station affiliates that reach over 190 million listeners
21 weekly. *Id.* Neither Clear Channel nor Premiere is owned or controlled by any political party,
22 political committee, or candidate. *Id.* Since December 30, 2008, Premiere has contracted with
23 Mr. Hannity to nationally syndicate the Sean Hannity Show (the show’s national syndication

1 actually began on September 10, 2001 with another company). *Id.* The show discusses news,
2 current events, politics and other subjects, and features interviews with well-known public
3 figures. Hannity Response, at 2.

4 The show has a companion website, www.hannity.com.¹ Although anyone can view the
5 site, an individual must register online to receive free e-mail updates from the show. *See*
6 <http://www.hannity.com>. The e-mail updates are called the "Hannity's Headlines Newsletter"
7 and provide "news, articles, and announcements in your e-mail in-box." *See*
8 <http://www.hannity.com/pages/newsletter>. Registration is free. *Id.* In order to register, an
9 individual is required to enter an e-mail address, provide his/her first and last name, date of birth,
10 and zip code. *Id.* The website states, "[w]e do not sell or distribute email addresses," but it does
11 encourage recipients of the e-mail updates to "forward to a friend." *Id.* There are approximately
12 43,000 subscribers for the e-mail updates. Clear Channel/Premiere Response, at 2. Premiere
13 develops and updates the subscriber list for its media-related purposes. *Id.* Although the updates
14 are sent by a vendor of Premiere called Presslaff Interactive Revenue, the "From" line of each e-
15 mail update indicates that the e-mails are from "The Sean Hannity Show" at the e-mail address
16 headlines@hannity.com. *Id.*; *see also* Complaint, at Attachment C; Hannity Response, at
17 Exhibits 1, 2, and 3; Clear Channel/Premiere Response, at Exhibit 1. The updates typically
18 contain a "Hannity's Headlines" banner, recap the day's radio show, feature articles
19 summarizing subjects discussed on the show, and list the upcoming guests or topics on Mr.
20 Hannity's cable television program. *Id.*, *see also* Hannity Response at 2-3. However, some of
21 the e-mail updates simply promote Mr. Hannity's *Conservative Victory* book, *Id.* at Exhibits 2

¹ Mr. Hannity owns the domain name and website URL, but Premiere licenses the use of the site, it is hosted on Premiere's internet server, and Premiere is responsible for authorizing and maintaining the site. *Id.*

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1 and 3, and do not feature the "Hannity Headlines" banner, or any other content. "Conservative
2 Victory 2010" is a catch-phrase that Mr. Hannity used on his radio show to discuss his opinion
3 that politically-conservative candidates should be elected in the 2010 Congressional elections.
4 Hannity Response, at 3.

5 The same personnel at Presslaff who prepared and sent the other e-mail updates also
6 produced and distributed the May 8, 2010, e-mail at issue. Clear Channel/Premiere Response, at
7 7. They sent it to the same recipients who received the other e-mail updates. *Id.* While the May
8 8, 2010, e-mail update does not contain the "Hannity's Headlines" banner, the "From" line states
9 that it is from "The Sean Hannity Show." Complaint, at Attachment F.

10 According to the complaint, the costs associated with the production and distribution of
11 the e-mail were not exempt from the definition of "expenditure" at 2 U.S.C. § 431(9)(B)(i)
12 because respondents were not acting in their legitimate media function by sending the e-mail.
13 The complaint also contends that the communication was coordinated between respondents and
14 the Gomez campaign. In support of the coordination allegation, the Complainant refers to Mr.
15 Hannity's and Mr. Gomez's long-time friendship, cites to a news report alleging that Mr.
16 Hannity vowed to do all he could to promote and raise funds for Gomez's candidacy, and to the
17 fact that Mark Levin stated that he wrote the e-mail in question at Mr. Gomez's request to help
18 him raise money for his campaign. Complaint, at 2 - 3 and Exhibits B and H.

19 In their joint response to the complaint, Clear Channel and Premiere allege that the e-mail
20 communication falls within the media exemption, was made in the context of Mr. Hannity's
21 ongoing editorial endorsement of Mr. Gomez and his commentary on "Conservative Victory
22 2010," was distributed to the general public, and contained the same substance as other e-mail
23 updates from "Hannity's Headlines Newsletter" and Mr. Hannity's radio show. In addition, they

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1 allege that given that the media exemption applies, the friendship between Mr. Hannity and Mr.
2 Gomez and the issue of coordination are irrelevant to the Commission's determination of this
3 matter. In a separate response to the complaint, Sean Hannity asserts that the allegation that he
4 violated 2 U.S.C. § 441b(a) should be dismissed because the statute does not apply to individuals
5 and he is not an officer or director of Clear Channel or Premiere. Mr. Hannity also asserts that
6 the media exemption applies to the e-mail communication, that the coordination issue is
7 irrelevant, and that the costs associated with sending the e-mail communication are *de minimis*.

8 John Gomez's response denies the allegations of the complaint and states that Sean
9 Hannity was exercising his First Amendment freedom of speech. He further alleges that the
10 value of any services Mr. Hannity provided by producing and distributing the e-mail do not
11 constitute a contribution to the Committee, because it appears he was acting in his individual
12 capacity as an uncompensated volunteer for Gomez's campaign. 11 C.F.R. § 100.74. The
13 Committee did not file a response, and Mr. Gomez did not address the reporting violation or
14 coordination allegations in his response.

15 B. Legal Analysis

16 A corporation is prohibited from making a contribution in connection with a federal
17 election. *See* 2 U.S.C. § 441b(a). The Act also prohibits any candidate, political committee, or
18 other person from knowingly accepting a corporate contribution. *Id.* The Commission's
19 regulations further provide that a corporation may not facilitate the making of a contribution by
20 using its corporate resources to engage in fundraising activities for any federal election. *See* 11
21 C.F.R. § 114.2(f)(1). Examples of conduct that constitute corporate facilitation include the use
22 of a corporate customer list to solicit contributions from individuals not within the corporation's
23 restricted class without advance payment for the fair market value of the list. *See* 11 C.F.R.

1 § 114.2(f)(2); *see also Explanation and Justification: Corporate and Labor Organization*
2 *Activity*, 60 Fed. Reg. 6420, 64264 (Dec. 14, 1995) (examples of corporate facilitation include
3 soliciting contributions outside the restricted class). A corporation's restricted class consists of
4 its stockholders and executive or administrative personnel, and their families.² *See* 2 U.S.C.
5 § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(a)(2)(i) and 114.1(j).

6 Exempt from the Act's definitions of contribution and expenditure, however, are "any
7 cost[s] incurred in covering or carrying a news story, commentary, or editorial by any
8 broadcasting station (including a cable television operator, programmer or producer), Web site,
9 newspaper, magazine, or other periodical publication, including any Internet or electronic
10 publication, . . . unless the facility is owned or controlled by any political party, political
11 committee, or candidate[.]" 11 C.F.R. §§ 100.73 and 100.132. This exclusion is known as the
12 "media exemption." The media exemption has been extended to "media entities that cover or
13 carry news stories, commentary, and editorials on the Internet," *Explanation and Justification*
14 *for Final Rules on Internet Communications*, 71 Fed. Reg. 18589, 18,608 (April 12, 2006); *see*
15 *Advisory Opinions* 2010-08 (Citizens United), 2008-14 (Melothé), 2005-16 (Fired Up!), 2000-
16 13 (iNEXTV), and MUR 5928 (Kos Media, LLC).

17 The Commission conducts a two-step analysis to determine whether the media exemption
18 applies. First, the Commission asks whether the entity engaging in the activity is a media entity
19 within the meaning of the Act and regulations. *See Advisory Opinion* 2005-16 (Fired Up!).
20 Second, in determining the scope of the exemption, the Commission considers: (a) whether the
21 media entity is owned or controlled by a political party, political committee, or candidate; and,

² We note that Part 114 of the Commission's regulations may be addressed in the Commission's upcoming rulemaking to implement changes in the law arising from the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010).

1 if not, (b) whether the media entity is acting in its "legitimate press function." See *Reader's*
2 *Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). If the media entity is not
3 owned or controlled by any political party, political committee, or candidate, and if it is acting
4 as a media entity with respect to the conduct in question, then the Commission's inquiry is at an
5 end. *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981). Two
6 considerations in applying this analysis are whether the entity's materials are comparable in
7 form to those ordinarily issued by the entity and whether they are available to the general
8 public. See *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 251
9 (1986).

10 The available information indicates that Clear Channel and Premiere, which distribute
11 radio and television programs and internet communications, are *bona fide* media entities not
12 owned or controlled by any political party, political committee or candidate. See, e.g., MUR
13 6242 (J.D. Hayworth 2010); MUR 6089 (People with Hart, Inc.); MUR 5928 (Kos Media,
14 LLC). It also appears that Premiere was operating in its legitimate media function when it
15 distributed the May 8, 2010, e-mail because such e-mails appear to be a regular feature of the
16 website and provide another means by which Mr. Hannity communicates his commentary to
17 listeners of his radio program. Moreover, it appears that comparable websites are common in
18 the radio talk show industry.³ Hannity Response, at 3 and footnote 7; see also Advisory
19 Opinion 2004-07(MTV)(media entity's use of e-mail communication to disseminate the news
20 was typical and consistent with established industry practice). Although the May 8, 2010,
21 e-mail update did not contain the "Hannity's Headline" banner and did not include a recap of

³ See, e.g., <http://www.rushlimbaugh.com/home/newsletter.guest.html>;
<http://www.billoreilly.com/newsletter>; <http://www.glennbeck.com/content/newsletter>; and
<https://www.wegoted.com/signup/signup>.

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1 the radio show, other e-mails issued by Premiere from the www.hannity.com website also
2 lacked the banner and recap, specifically, those promoting Mr. Hannity's book. Hannity
3 Response, at Exhibits 2 and 3. Further, Hannity's explanation for the lack of a recap, *i.e.*, there
4 was no show to recap because the e-mail was sent on a Saturday when Hannity's show does not
5 air, appears reasonable. *See* Hannity Response, at 11. In addition, according to the
6 respondents, the e-mail was produced and distributed by the same personnel, in the same
7 manner, and to the same subscribers as the typical e-mail updates. We have no information to
8 the contrary.

9 The use of the subscriber e-mail list, in this context, appears consistent with the
10 application of the media exemption. The free e-mail updates are not restricted to certain
11 individuals or groups. On the contrary, they are available free of charge to any member of the
12 general public who subscribes to them. The Commission has identified free access to the
13 communication as a relevant factor in determining whether an entity's communication is
14 considered available to the general public. *See, e.g.*, MUR 5928 Factual and Legal Analysis to
15 Kos Media, LLC, DailyKos.com and Marcos Moulitsas Zuniga (individuals must register, for
16 free, to post responsive comments); Advisory Opinion 2005-16 (Fired Up!)(free sign-in feature
17 to become a registered user of the website). Moreover, the respondents maintain they did not
18 send the e-mail at issue to a specific sub-group on their subscriber list, such as those individuals
19 on the list residing within New York's Second Congressional District. Rather, they state they
20 disseminated the email in the usual manner to its entire subscriber list. We have no information
21 to the contrary.

22 Although the e-mail communication contains express advocacy, *see* 11 C.F.R. § 100.22,
23 the Commission has recognized that an entity otherwise eligible for the media exemption

1 “would not lose its eligibility merely because of a lack of objectivity in a news story,
2 commentary, or editorial, even if the news story, commentary, or editorial expressly advocates
3 the election or defeat of a clearly identified candidate for Federal office.” Advisory Opinion
4 2005-16 (Fired Up!) (Commission determined that the media exemption applied to a blogger
5 who covered and carried news stories, commentaries, or editorials); *see* MUR 5928 Factual and
6 Legal Analysis to Kos Media, LLC, DailyKos.com and Marcos Moulitsas Zunigu (blog entries
7 providing links to news, political commentary, and calls to action expressly advocating election
8 of federal candidates fell within the media exemption, given that website was available to
9 general public, those posting comments registered for free on the site, and respondents were not
10 owned or controlled by any political party, committee or candidate).

11 Mr. Hannity’s radio program consists primarily of the opinions and commentary of
12 himself, his guests, and of persons who call in to the program, and in the course of such
13 commentary, Mr. Hannity or his guests advocate the election of Federal candidates. *See*
14 Hannity Response, at 2, 3 – 4 and footnote 13; Clear Channel/Premiere Response, at 1. In
15 particular, in February or March 2010, Mr. Hannity asked Representative Peter King, a guest on
16 his radio program, if he would support Mr. Gomez. Hannity Response, at 4. On July 16, 2010,
17 Mr. Hannity expressed his support for Mr. Gomez and allowed him and Congresswoman
18 Michele Bachmann to solicit contributions to Gomez’s campaign. *Id.* Thus, the May 8, 2010,
19 e-mail update forwarding commentary from another radio talk show host supporting Gomez’s
20 candidacy is consistent with Mr. Hannity’s and his guests’ ongoing political commentary on his
21 radio show and website. *See, e.g.,* Clear Channel/Premiere Response, at 2-3 and Exhibit 1 (a
22 May 7, 2010, e-mail update included commentary from that day’s guest Karl Rove advocating
23 election of Republican candidates to Congress); *see also* Advisory Opinion 1996-48 (National

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1 Cable Satellite) (approving free rebroadcast of candidates' advertisements within a context that
2 "does not alter the basic nature of the programs as news stories, editorials or commentaries").

3 In addition, the Commission has concluded that media entities do not necessarily forfeit
4 the media exemption if they solicit contributions for candidates. *Explanation and Justification*
5 *for Final Rules on Internet Communications*, 71 Fed. Reg. at 18,609. A solicitation for
6 contributions may appear in a commentary that is a regular feature of a website, provided that
7 the solicitations themselves do not become a regular feature of its content. *See Advisory*
8 *Opinion 2008-14 (Melothe)* ("[T]he intermittent provision of a hyperlink directing a media Web
9 site's visitors to a campaign's contribution page. . . would not be prohibited.") (*citing Advisory*
10 *Opinion 1980-109 (Ruff Times)* (Commission held that the media exemption applied to a
11 commentary including a contribution solicitation that was contained in a subscription
12 periodical). Based on our review of the available pages of www.hannity.com website, it
13 appears that the May 8, 2010, e-mail update providing a hyperlink to donate to Gomez's
14 campaign was an example of an intermittent, not regular, feature on the show's website. *See*
15 *Sean Hannity Show website at <http://www.hannity.com>* (last visited November 17, 2010).

16 In sum, Clear Channel, Premiere, and Sean Hannity were acting within their legitimate
17 media functions when they disseminated the May 8, 2010, e-mail, and the Respondents are
18 covered by the media exemption. Accordingly, we recommend that the Commission find no
19 reason to believe that Clear Channel Communications, Inc., Premiere Radio Networks, Inc.,
20 Sean Hannity, John Gomez for Congress and Denise Passero, in her official capacity as
21 treasurer, and John Gomez violated 2 U.S.C. § 441b(a).

22 Because the communication at issue fell within the media exemption, the costs associated
23 with the e-mail were neither an "expenditure" nor a "contribution" under the Act or the

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1 Commission's regulations. See 2 U.S.C. 431(9)(B)(i); 11 C.F.R. §§ 100.73 and 100.132.
2 Therefore, because the media exemption applies to the alleged in-kind corporate contributions
3 in the present case, it is unnecessary to consider whether the activities constitute coordinated
4 expenditures under 11 C.F.R. § 109.21. The presence or absence of alleged coordination
5 between a media entity and a candidate or political party is irrelevant to determining whether
6 the Act's media exemption applies. See *Explanation and Justification for Final Rules on*
7 *Internet Communications*, 71 Fed. Reg. at 18,609 – 18,610, citing to Statement of Reasons of
8 Commissioners Toner, Mason and Smith in MURs 5540 and 5545 (CBS, Kerry/Edward 2004)
9 and Statement of Reasons of Commissioner Weintraub in MURs 5540, 5545, 5562, and 5570
10 (CBS, Kerry/Edwards 2004, Sinclair Broadcasting).

11 Given that Clear Channel and Premiere qualify as media entities, and were acting as
12 media entities in producing and distributing the May 8, 2010, e-mail update from
13 headlines@hannity.com, the costs associated with the communication were exempt from
14 disclosure. See Advisory Opinion 2010-08 (Citizens United)(costs of producing and
15 distributing films and associated marketing activities are exempt from disclosure, disclaimer,
16 and reporting requirements for "expenditures" and "electioneering communications" under the
17 media exemption). Therefore, we recommend that the Commission find no reason to believe
18 that John Gomez for Congress and Denise Passero, in her official capacity as treasurer, violated
19 2 U.S.C. § 434(b). Finally, we recommend that the Commission close the file as to all
20 respondents.

21 **III. RECOMMENDATIONS**

- 22 1. Find no reason to believe that John Gomez for Congress and Denise Passero, in her
23 official capacity as treasurer, violated 2 U.S.C. §§ 441b(a) and 434(b).
24
25 2. Find no reason to believe that John Gomez violated 2 U.S.C. § 441b(a).

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- 3. Find no reason to believe that Clear Channel Communications, Inc. violated 2 U.S.C. § 441b(a).
- 4. Find no reason to believe that Premiere Radio Networks, Inc. violated 2 U.S.C. § 441b(a).
- 5. Find no reason to believe that Sean Hannity violated 2 U.S.C. § 441b(a).
- 6. Approve the attached Factual and Legal Analyses.
- 7. Approve the appropriate letters.
- 8. Close the file.

Christopher Hughey
Acting General Counsel

11/23/10
Date

BY: Stephen A. Gura
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