FEDERAL ELECTION COMMISSION
Washington, DC 20463

CERTIFIED MAIL
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December 19, 2003

ADVISORY OPINION 2003-34

Jan Witold Baran, Esq.
Wiley, Rein & Fielding, LLP
1776 K Street, N.W.
Washington, D.C. 20008

Dear Mr. Baran:

This responds to your letters dated October 16 and October 29, 2003, requesting an advisory opinion on behalf of Viacom, Inc. ("Viacom"), its wholly owned subsidiary, Showtime Networks, Inc. ("Showtime"), and TMD Productions, Inc. ("TMD"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the funding, production, airing, and other distribution of a "reality documentary series" entitled *American Candidate*.

Background

You state that Viacom is a global media company. Showtime owns and operates the Showtime television network. Showtime has contracted with TMD to produce *American Candidate*. Neither Viacom, Showtime, any of their corporate affiliates or subsidiaries, nor TMD is owned or controlled by any political party, political committee or candidate.

Showtime intends to produce and distribute a fictional depiction of a presidential campaign entitled *American Candidate*. *American Candidate* will simulate a presidential campaign involving American citizens who compete in a series of events designed to test their political skills while being filmed over a three-to-four month period. You assert that the program will serve as social commentary on the American political system as well as political leadership and character in America in an "entertaining reality format."

You assert that the contestants will not be actual candidates and will not be "testing the waters" for a candidacy for public office. Each potential contestant must sign a release that provides that he or she will be automatically disqualified from participation in the *American Candidate* series if the contestant becomes a candidate or explores an actual candidacy for any public office. Contestants may be depicted soliciting donations to charitable organizations; all

such donations would be donated directly to the charities. There will be no fundraising related to actual Federal candidates, officeholders, or committees. Also, each contestant will be prohibited from receiving any monetary contributions to his or her *American Candidate* campaign.

It is possible that the series will depict actual Federal candidates on the campaign trail, and include appearances by Federal candidates to enhance the competition between the contestants. These appearances, as well as reactions by the contestants or other guest commentators, may include references to actual Federal officeholders or candidates, again in the context of engaging the contestants in a realistic simulation.

Viacom and Showtime will operate two websites related to the *American Candidate* series. The first website will serve as an "application website" featuring contestant application forms, entry rules, other contestant related materials, and press releases promoting the series. The second website will serve as the "series website." The websites will be used to promote the series, feature the contestants, track the series and provide updates, and educate the public about actual political campaigns. Each of the final contestants may be provided a personalized page on the series website to advertise his or her simulated campaign and interact directly with viewers and fans.

Legal Analysis and Conclusions

You ask several questions pertaining to the application of the Act and Commission regulations to the *American Candidate* series. Under the factual circumstances described in your request, the Commission concludes that the series, a work of fiction that is not intended to influence a Federal election, is generally not subject to regulation under the Act. Thus, editorial and production decisions, including such decisions as with whom to consult and to employ in the production of the series (e.g., the selection and use of consultants and advisors), are outside the scope of the Act.

To the extent that an actual Federal candidate or officeholder is depicted or discussed in the series as it is promoted, broadcast, cablecast, or webcast, including depictions or discussions that constitute "express advocacy," the Commission concludes that there will be no contribution, expenditure, or electioneering communication under the "press exemptions." 2 U.S.C. 431(9)(B)(i), 434(f)(3)(B)(i). The Act prohibits "any corporation whatever" from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or "anything of value" for the purpose of influencing a Federal election.

The Act and Commission regulations exempt from the definition of "contribution" and "expenditure":

> Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcast station (including a cable television operator,

> programmer, or producer), newspaper, magazine, or other periodical publication, is not a contribution [or expenditure] unless the facility is owned or controlled by any political party, political committee, or candidate . . .

11 CFR 100.73 and 100.132; 2 U.S.C. 431(9)(B)(i). The Act and Commission regulations also include a similar exemption at 2 U.S.C. 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2) with respect to electioneering communications, which would otherwise be prohibited by a corporation.

Several factors must be present to conclude that the proposed activity falls within the press exemption of 2 U.S.C. 431(9)(B)(i) and 434(f)(3)(B)(i). First, the entity engaging in the activity must be a press entity as described by the Act and Commission regulations. *See* Advisory Opinions 2000-13, 1998-17, 1996-48, 1996-41, 1996-16 and advisory opinions cited therein. Furthermore, an application of the press exemption depends upon the two-part framework presented in *Reader's Digest Association v. FEC*, 509 F.Supp. 1210, 1215 (S.D.N.Y. 1981): (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"). *See also FEC v. Phillips Publishing*, 517 F.Supp.1308, 1312-1313 (D.D.C. 1981); Advisory Opinions 2000-13, 1996-48, and 1982-44.

The Commission concludes that the requestors are press entities[1], are not owned or controlled by a political party, political committee, or candidate, and that *American Candidate* is "commentary," within the meaning of the Act and the regulations. If the *American Candidate* series is produced as indicated in your request, Viacom, Showtime, or TMD will be engaging in a legitimate press function. *See Reader's Digest Association,* 509 F.Supp. at 1215.

Therefore, to the extent that actual Federal candidates or officeholders are depicted or discussed in the series or the websites, no contribution or expenditure will result from payments for the production (including payments received for "product placements"), promotion, distribution, or licensing of rights, even if statements that expressly advocate the election or defeat of a clearly identified Federal candidate are included. 2 U.S.C. 431(9)(B)(i). Similarly, no broadcast or cablecast of the series will constitute an electioneering communication. 2 U.S.C. 434(f)(3)(B)(i).[2]

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transactions or activities set forth in your request. *See*

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[1] The Commission assumes, without deciding, that TMD is 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 documentaries and other informational content, especially where, as here, final editorial discretion rests with an entity that is a press entity.

[2] If, notwithstanding a contestant's agreement to the release, a contestant explores an actual candidacy for public office, then funds received and payments made by the contestant solely for the purpose of "testing the waters" may be excluded from the definitions of "contribution" and "expenditure." 11 CFR 100.72 and 100.131. However, if a contestant becomes an actual candidate or makes public statements to that effect, then the exceptions in 11 CFR 100.72 and 100.131 will not apply. Only funds permissible under the Act may be used for the "testing the waters" activities permitted under 11 CFR 100.72 and 100.131.

2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this opinion, then the requestor may not rely on that conclusion as support for its proposed activity. The Commission does not undertake a constitutional analysis in this advisory opinion, since its interpretation of the press exemptions at 2 U.S.C. 431(9)(B)(i) and 434(f)(3)(B)(i), themselves clearly drawn with the First Amendment in mind, provide sufficient guidance.

The Commission expresses no opinion regarding the applicability of the Communications Act of 1934, or of regulations promulgated by the Federal Communications Commission, to the the proposed activities because those questions are outside the Commission's jurisdiction.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

Enclosures (AOs 2000-13, 1998-17, 1996-48, 1996-41, 1996-16, and 1982-44)