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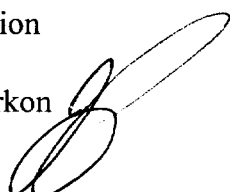



FEDERAL ELECTION COMMISSION
Washington, DC 20463


MEMORANDUM


March 25, 2004

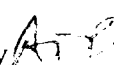
TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Associate General Counsel

Mai T. Dinh 
Acting Assistant General Counsel

Anthony Buckley 
Staff Attorney

Subject: Draft AO 2004-07

AGENDA ITEM
For Meeting of: 4-01-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 1, 2004.

DRAFT

1 ADVISORY OPINION 2004-07

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4

5 Elizabeth Kingsley, Esq.
6 Harmon, Curran, Spielberg & Eisenberg, LLP
7 1726 M Street, N.W.
8 Suite 600
9 Washington, DC 20036

10 Dear Ms. Kingsley:

11 This responds to your letters dated January 16 and February 5, 2004, requesting an
12 advisory opinion on behalf of Music Television (“MTV”), MTV Networks, Viacom, Inc.,
13 and Viacom International, Inc., concerning the application of the Federal Election
14 Campaign Act of 1971, as amended (“the Act”), and Commission regulations to certain
15 planned activities during the 2003-2004 election cycle.

16 ***Background***

17 You state that Viacom, Inc. (“Viacom”) is a global media company and that
18 Viacom International, Inc. is a wholly-owned subsidiary of Viacom. You further explain
19 that MTV Networks is a division of Viacom International and owns and operates several
20 cable television programming services, including MTV.

21 MTV will be conducting what it is calling a “Prelection.” This will involve an
22 online survey of young people to determine who they think should be President of the
23 United States. Persons who want to participate in the Prelection must sign-up online at

1 either www.chooseorlose.com, or www.mtv.com. It might be possible for persons to
2 sign-up using a toll-free telephone number.

3 On- and off-air promotion of the Prelection will be done in conjunction with
4 MTV's Movie Awards and Video Music Awards, and with concerts, grassroots
5 initiatives, and online.¹ Such promotion may include on-air communications encouraging
6 young people to sign-up for the Prelection, celebrities suggesting young people participate
7 in the Prelection, incentives tied to signing-up and/or "voting" in the Prelection, emails,
8 and linking to other websites. You state that it is likely that names and/or images of
9 major presidential candidates will be used on-air to encourage participation.

10 You state that voter education will be a critical part of the Prelection. The voter
11 education activities envisioned are: incorporating information on presidential candidates
12 compiled by Project Vote Smart on the Chooseorlose.com website, links to the
13 presidential candidates' websites, and links to nonpartisan sources of information on the
14 web. You may ask participating candidates to submit statements or position papers to
15 MTV for either on-air or online usage.

16 "Voting" in the Prelection will take place online and potentially via the toll-free
17 number for at least several days around the end of September and early October 2004.
18 The Prelection results would be announced shortly thereafter, but not later than
19 November 2, 2004. Two different sets of results will be derived: "total voters," meaning
20 the total number of people who "voted" in the Prelection regardless of age, resident

¹ Your letters do not describe the specific grassroots programming and initiatives that will be used to promote the Prelection.

1 status, or confirmed address; and “confirmed voters,” meaning the total number of people
2 who “voted” in the Prelection, are U.S. citizens 18 to 30 years old, and have been verified
3 to live at a specific address. Both sets of numbers will be published on the Internet and
4 announced on the air.

5 You further state that the results of the Prelection might be reported as the “vote”
6 of MTV’s audience, or as an endorsement of a presidential candidate by MTV News. In
7 this latter instance, MTV would use its audience to function as its editorial board.

8 Prelection participants will receive follow-up messages encouraging them to vote
9 in the November general election and to continue to educate themselves about the
10 candidates. These messages will be sent to all participants who are registered to vote in
11 the general election, regardless of whom they “voted” for in the Prelection. These
12 messages may refer to the results and/or analysis of the Prelection, but will not in any way
13 be coordinated with any candidate or political party or political committee.

14 You state that, with the exception of the possible announcement of an editorial
15 endorsement, none of MTV’s communications in connection with the Prelection will
16 expressly advocate the election or defeat of any candidate.

17 You state that MTV’s corporate advertisers and sponsors will have no role in
18 determining who the recipient of MTV News’ endorsement will be. Advertisers and
19 sponsors may choose to run advertisements on MTV during Prelection programming, just
20 as with any of MTV’s other programming, but they will not be given the ability to control
21 any of the content or other elements of that programming. Some of the corporate
22 sponsors will use some of that paid time to encourage participation in the Prelection.

1 MTV will also solicit corporate sponsors who will be identified in various Prelection
2 promotions and materials as sponsors of the project.

3 ***Questions Presented***

4 You ask whether various proposed activities will constitute corporate
5 contributions, expenditures, or electioneering communications, and whether certain
6 responses would differ if the communications contained an acknowledgement of MTV's
7 corporate sponsors.

8 ***Legal Analysis and Conclusions***

9 The Act prohibits "any corporation whatever" from making any contribution or
10 expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act and
11 Commission regulations define the terms "contribution" and "expenditure" to include any
12 gift of money or "anything of value" for the purpose of influencing a Federal election, but
13 exempt any cost "incurred in covering or carrying a news story, commentary, or editorial
14 by any broadcast station (including a cable television operator, programmer, or producer),
15 . . . unless the facility is owned or controlled by any political party, political committee, or
16 candidate." 2 U.S.C. 431(9)(B)(i); 11 CFR 100.73 and 100.132.² The Act and
17 Commission regulations also include a similar exemption at 2 U.S.C. 434(f)(3)(B)(i) and
18 11 CFR 100.29(c)(2) with respect to electioneering communications. Unless an
19 exception exists, a corporation may not make communications to the general public that

² You have orally confirmed that none of the requestors (Viacom, Inc.; Viacom International, Inc.; MTV Networks; or MTV) is owned or controlled by any candidate, political party, or political committee.

1 expressly advocate the election or defeat of a clearly identified Federal candidate. *See,*
2 *generally*, 11 CFR 114.4(c).

3 The Courts and the Commission, in considering the scope of the press exemption,
4 have concluded that several factors must be present for the press exemption to apply.
5 First, the entity engaging in the activity must be a press entity as described by the Act and
6 Commission regulations. *See* Advisory Opinions 2003-34, 2000-13, 1998-17, 1996-48,
7 1996-41, 1996-16 and advisory opinions cited therein. Second, an application of the
8 press exemption depends upon the two-part framework presented in *Reader's Digest*
9 *Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981): (1) Whether the press
10 entity is owned or controlled by a political party, political committee, or candidate; and
11 (2) Whether the press entity is acting as a press entity in conducting the activity at issue
12 (*i.e.*, whether the entity is acting in its "legitimate press function"). *See also* *FEC v.*
13 *Phillips Publishing*, 517 F. Supp. 1308, 1312-1313 (D.D.C. 1981); Advisory Opinions
14 2000-13, 1996-48, and 1982-44.

15 In *Reader's Digest*, the court noted that "if [the magazine] was acting in its
16 magazine publishing function, if, for example, the dissemination of the tape to television
17 stations was to publicize the issue of the magazine containing the . . . article, then it
18 would seem that the exemption is applicable." 509 F. Supp. at 1215. In *Phillips*
19 *Publishing*, a mailing soliciting subscriptions to a biweekly newsletter contained, *inter*
20 *alia*, a one-page combination subscription form and "opinion poll" that referred to a
21 clearly identified candidate for Federal office. The court found that, because "the purpose
22 of the solicitation letter was to publicize [the newsletter] and obtain new subscribers, both

1 of which are normal, legitimate press functions, the press exemption applies.”

2 517 F. Supp. at 1313.

3 In MUR 3657 (Multimedia Cablevision), Multimedia, a cable television provider,
4 broadcast an editorial over its cable systems urging the defeat of a clearly identified
5 candidate for Federal office. Multimedia also inserted fliers into its subscribers' cable
6 bills that urged the defeat of that Federal candidate. The Commission concluded that the
7 broadcasts were covered by the press exemption, but that the distribution of the fliers
8 violated 2 U.S.C. 441b(a) because Multimedia was “acting in a manner unrelated to its
9 cablecasting function” when it produced and distributed the fliers. *See* MUR 3657,
10 General Counsel's Report dated May 25, 1994; Certification of Commission Action dated
11 June 8, 1994.

12 We now turn to your questions as to whether the following activities would be
13 corporate contributions, expenditures or electioneering communications and, therefore,
14 would violate 2 U.S.C. 441b:

15 *1) Expending funds for the production or promotion costs of the Prelection.*

16 Because MTV is a press entity that is not owned or controlled by any political
17 party, political committee, or candidate, the costs it incurs in covering or carrying a news
18 story, commentary, or editorial are exempt from the definitions of “contribution” and
19 “expenditure.” The Commission considers funds expended to produce or promote the
20 Prelection to be exempt from the definitions of “contribution” and “expenditure,” and
21 thus MTV will not violate 2 U.S.C. 441b by expending funds for these purposes. *See*
22 11 CFR 100.73 and 100.132.

1 2) *Broadcasting Prelection activities.*

2 The broadcasting of Prelection activities constitutes “covering or carrying a news
3 story, commentary, or editorial,” and thus falls within the exemptions in
4 2 U.S.C. 431(9)(B)(i) and 434(f)(3)(B)(i) and would not violate 2 U.S.C. 441b.

5 3) *Promoting and encouraging participation in the Prelection, through
6 communications made on air, via the web, or at events.*

7 Promoting and encouraging participation in the Prelection would publicize the
8 program and would be within MTV’s legitimate press function. *See Reader’s Digest*,
9 509 F. Supp. at 1215; *Phillips Publishing*, 517 F. Supp. at 1313. Accordingly, the press
10 exemption would apply and such activity would not violate 2 U.S.C. 441b.

11 4) *Providing election-related educational materials online or as part of community
12 events across the country.*

13 Providing election-related educational materials via MTV’s website is within
14 MTV’s legitimate press functions because the news media disseminate their news stories,
15 commentaries or editorials, and information relating to their news stories, commentaries
16 or editorials, through their websites in addition to their broadcast and/or print outlets, and
17 because these materials will be distributed in conjunction with the Prelection. Providing
18 election-related educational materials at community events, however, does not qualify as
19 a press function because this activity is not one typically performed by a press entity. In
20 *McConnell v FEC*, the Supreme Court noted that the media exemption is “narrow” and
21 “does not afford *carte blanche* to media companies generally to ignore FECA’s
22 provisions.” *McConnell v. FEC*, 540 U.S. —, 124 S.Ct. 619, 697 (2003). Because the

1 dissemination of information at community events is not within MTV's press function,
2 the media exemption would not apply and MTV would be acting as a corporate entity
3 when engaging in such activity. Thus, when providing voter registration and
4 get-out-the-vote information at community events, MTV may not expressly advocate the
5 election or defeat of a clearly identified candidate or political party. Likewise, MTV may
6 provide voter guides that comply with 11 CFR 114.4(c)(5).

7 *5) Conducting on-air interviews or providing air time in equal amounts to all*
8 *qualifying candidates to encourage informed participation in the Prelection.*

9 You state that presidential candidates "may be asked to be interviewed on air, or
10 they may be provided given amounts of air time, to address specific issues that young
11 people have selected via MTV research or polling." You further state that each qualifying
12 presidential candidate will be afforded "an equal opportunity" to make his or her views
13 known.

14 In Advisory Opinion 1987-8, the Commission concluded that interviews of
15 candidates conducted for a magazine series and a television series were within the news
16 story exemption. Consequently, MTV may conduct on-air interviews of candidates and
17 that activity would not be a contribution or expenditure under 2 U.S.C. 441b. The
18 exemption would cover submissions of candidate position papers that are made public by
19 MTV in the context of its online broadcasting or through its website.

20 In Advisory Opinion 1998-17, the Commission determined that an incorporated
21 cable television provider could offer free air-time to Federal candidates without the
22 donated air-time constituting a prohibited corporate in-kind contribution. The

1 Commission “view[ed] the proposed activity as falling within the category of
2 commentary, which includes the concept of guest commentary.” Advisory Opinion
3 1998-17; *see also* Advisory Opinion 1982-44 (“In the opinion of the Commission,
4 ‘commentary’ was intended to allow third persons access to the media to discuss issues”).
5 In approving the proposed donation of air-time in Advisory Opinion 1998-17, the
6 Commission noted that its conclusion was based upon the understanding that the air-time
7 would be provided to the candidates on an equal basis and in accordance with the
8 applicable provisions of the Communications Act, 47 U.S.C. 315(a) and (b), and Federal
9 Communications Commission (“FCC”) regulations.

10 Consistent with these advisory opinions, the Commission concludes that MTV’s
11 proposal to interview candidates “on-the-air” and/or to provide airtime for candidates to
12 discuss issues fall within the media exception, provided that MTV will comply with all of
13 the applicable requirements of the Communications Act and FCC regulations.
14 Furthermore, MTV may use statements or position papers submitted by participating
15 candidates on-air or online if the statements or position papers are part of a news story,
16 commentary or editorial. *See* 11 CFR 109.23(b)(3).

17 *6) Announcing and publicizing the results of the Prelection on air, via the web, or*
18 *through other methods, whether or not they are framed as an endorsement by MTV News.*

19 Announcing and publicizing the Prelection results via a cable broadcast
20 constitutes “covering or carrying a news story, commentary, or editorial,” regardless of
21 whether the Prelection results are framed as an endorsement. Thus the costs associated
22 with such activity would not violate 2 U.S.C. 441b. As noted above, websites are a

1 common feature of many media organizations. The Commission considers posting news
2 stories, commentaries, and editorials on a press entity's website to be within the entity's
3 legitimate press functions. Accordingly, posting this information on MTV's website
4 would not violate 2 U.S.C. 441b.

5 The Commission concludes that MTV's proposal to announce and publicize the
6 Prelection results via electronic mail or text messages, contemporaneous with the on-air
7 broadcast of the results and the display of the results on MTV's website, would cause the
8 electronic mails and text messages to fall within the press exemption, but only to the
9 extent that MTV regularly disseminates news stories and related commentary in this
10 manner to those who sign up to receive these communications. *See Reader's Digest*,
11 509 F. Supp. at 1215; *Phillips Publishing*, 517 F. Supp. at 1313. If MTV has not used
12 these methods to disseminate news, such activities would not fall within the press
13 exemption and are analyzed as corporate communications to the general public under
14 11 CFR 114.4(c). A corporation may only communicate an endorsement of a candidate
15 to its restricted class through certain publications. 11 CFR 114.4(c)(6). Public
16 announcement of MTV News' endorsement of a candidate, when made outside of its
17 usual methods for disseminating news, must comply with the requirements of 11 CFR
18 114.4(c)(6). A public announcement that does not comply with these requirements and
19 that endorses a Federal candidate, or otherwise expressly advocates the election or defeat
20 of a clearly identified federal candidate, would be an impermissible corporate
21 expenditure. *See* 2 U.S.C. 441b.

1 7) *Sending follow-up messages to Prelection participants that refer to the results of*
2 *the Prelection to encourage them to vote in the general election;*

3 The Commission understands that the follow-up communications to Prelection
4 participants would be sent via electronic mail or text messages some time after the results
5 of the Prelection have already been announced. Given that these communications by
6 themselves will not constitute promotion or publicizing of the Prelection programming,
7 and given that these communications will be directed only to Prelection participants
8 whose voting preferences have already been ascertained by MTV, the follow-up
9 communications would not fall within the press exemption. *See* MUR 3657; *see also*
10 *Phillips Publishing*, 517 F. Supp. at 1313. Accordingly, such messages are corporate
11 get-out-the-vote activities subject to 11 CFR 114.4(c)(2).³ To the extent that the follow-
12 up messages contain express advocacy, such messages would violate 2 U.S.C. 441b.

13 8) *Sending follow-up messages to Prelection participants that do not refer to an*
14 *endorsement or the Prelection results but contain a general encouragement to vote.*

15 Any encouragement to vote made to the general public that does not expressly
16 advocate the election or defeat of a clearly identified candidate or a political party is
17 permissible under 11 CFR 114.4(c)(2).

18 With respect to acknowledgements of MTV's corporate sponsors in any of the
19 follow-up messages described in questions 6 through 8 above, the analysis above already

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³ The Commission is currently undertaking a rulemaking that may affect the analysis of such messages under 11 CFR 114.4. *See* Notice of Proposed Rulemaking, Political Committee Status, 69 FR 11736, 11743 (Mar. 11, 2004).

1 categorizes MTV's actions as either permissible or impermissible activity. Where such
2 activity is permissible, MTV may acknowledge its corporate sponsors.

3 Finally, the Commission concludes that none of the activities that you propose
4 would constitute an electioneering communication. The definition of an "electioneering
5 communication" applies only to broadcast, satellite or radio communications that are
6 publicly distributed for a fee. 11 CFR 100.29. Thus, any of your proposed activity that
7 does not involve a broadcast, satellite or radio communication, or is publicly distributed
8 free of charge, would not be an electioneering communication. *See* 11 CFR 100.29(c)(1).
9 Additionally, any broadcast, satellite or radio communication that MTV undertakes as
10 part of its press functions is exempt from the definition of electioneering communication.
11 2 U.S.C. 434(f)(3)(B)(i); 11 CFR 100.29(c)(2).

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

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transactions or activities set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a

20

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

3 Sincerely,

4

5 Bradley A. Smith
6 Chairman

7 Enclosures: (AOs 2003-34, 2000-13, 1998-17, 1996-48, 1996-41, 1996-16, 1987-8,
8 1982-44)