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FEDERAL ELECTION COMMISSION  
Washington, DC

**AGENDA DOCUMENT NO. 24-02-A**  
**AGENDA ITEM**  
**For meeting of Jan. 11, 2024**

January 4, 2024

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*  
Acting General Counsel

Neven F. Stipanovic *NFS*  
Associate General Counsel

Robert Knop *RMK*  
Assistant General Counsel

Scarlett Rufener *SR*  
Attorney

Subject: AO 2023-10 (Sony Pictures Television) - Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 p.m. (Eastern Time) on January 10, 2023.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2023-10

2

3 Caleb P. Burns, Esq.

4 Andrew G. Woodson, Esq.

5 Wiley Rein LLP

6 2050 M St NW

7 Washington, DC 20036

8

9

**DRAFT A**

10 Dear Messrs. Burns and Woodson:

11

12 We are responding to your advisory opinion request on behalf of Sony Pictures

13 Television Inc. regarding the application of the Federal Election Campaign Act, 52 U.S.C.

14 §§ 30101-45 (the “Act”), and Commission regulations to the production and distribution of a

15 fictional entertainment program that includes a candidate for U.S. Senate. The Commission

16 concludes that, under the facts presented here, the requestor’s production and distribution of *The*

17 *Good Doctor*, a fictional entertainment program, is exempt from regulation under the Act’ media

18 exemption.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on

21 November 6, 2023, and publicly available information.

22 Sony Pictures Television Inc. (“Sony”) is a subsidiary of Sony Pictures Entertainment

23 Inc., a global media company incorporated in Delaware, headquartered in Culver City,

24 California, and whose operations include motion picture production, acquisition, and

25 distribution; television production, acquisition, and distribution; digital content creation and

26 distribution; operation of studio facilities; and development of new entertainment products,

1 services and technology.<sup>1</sup> You state that Sony Pictures Entertainment Inc. is not owned or  
2 controlled by any political party, political committee, or candidate.<sup>2</sup>

3 Since 2017, Sony has produced and distributed a fictional television show called *The*  
4 *Good Doctor*.<sup>3</sup> Sony distributes older episodes of the show in syndication to local television  
5 stations across the country, as well as through a major online streaming platform and the Armed  
6 Forces Network.<sup>4</sup> Mr. Hill Harper has played a regular character on the show since its  
7 inception.<sup>5</sup>

8 On July 10, 2023, Mr. Harper filed as a candidate in the 2024 Democratic primary to  
9 represent Michigan in the U.S. Senate.<sup>6</sup> You state that no past or planned episodes of *The Good*  
10 *Doctor* refer to Mr. Harper's candidacy, nor do they advocate for his election.<sup>7</sup> Mr. Harper's  
11 name only appears on the show in the credit sequence at the opening of each episode.<sup>8</sup>

12 Further, you state that all of Sony's distribution agreements, whether with ABC, Hulu, or  
13 individual stations, predate Mr. Harper's decision to run for office, and that Sony has no plans to  
14 distribute *The Good Doctor* with any greater frequency in Michigan than it did prior to the

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<sup>1</sup> Advisory Opinion Request ("AOR") at AOR001.

<sup>2</sup> *Id.*

<sup>3</sup> AOR002.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Statement of Candidacy of Frank Eugene Hill Harper, filed July 10, 2023, <https://docquery.fec.gov/cgi-bin/forms/S4MI00553/1710574/>.

<sup>7</sup> AOR002.

<sup>8</sup> *Id.*

1 announcement of Mr. Harper’s candidacy.<sup>9</sup> Mr. Harper does not have any input or control over  
2 how Sony distributes *The Good Doctor*; he is merely an actor who portrays a character on the  
3 show.<sup>10</sup>

4 ***Question Presented***

5 *Is Sony’s production and distribution of a fictional entertainment program that includes a*  
6 *candidate for U.S. Senate as a cast member exempt from regulation under the Act’s*  
7 *media exemption?*

8  
9 ***Legal Analysis***

10 The Commission determines that, yes, under the facts described in the request, Sony’s  
11 production and distribution of a fictional entertainment program that includes a candidate for  
12 U.S. Senate as a cast member is exempt from regulation under the Act’s media exemption.

13 The Act and Commission regulations define the terms “contribution” and “expenditure”  
14 to include any gift of money or “anything of value” for the purpose of influencing a federal  
15 election.<sup>11</sup> An electioneering communication is defined as a broadcast, cable, or satellite  
16 communication that refers to a clearly-identified federal candidate, is not coordinated with a  
17 candidate, is disseminated within 30 days of a primary or 60 days of a general election, and is  
18 targeted to the candidate’s electorate.<sup>12</sup>

19 However, the Act and Commission regulations provide for a set of exclusions to these  
20 definitions known as the “press exemption” or the “media exemption.”<sup>13</sup> The Act states that

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<sup>9</sup> *Id.*

<sup>10</sup> AOR002.

<sup>11</sup> 52 U.S.C. §§ 30101(8)(A)(i), (9)(A)(i); 11 C.F.R. §§ 100.52(a), 100.111(a).

<sup>12</sup> 52 U.S.C. § 30104(f)(3); 11 C.F.R. 100.29(a).

<sup>13</sup> For the purposes of this opinion, the terms “press” and “media” are used interchangeably.

1 “[t]he term ‘expenditure’ does not include . . . any news story, commentary, or editorial  
2 distributed through the facilities of any broadcasting station, newspaper, magazine, or other  
3 periodical publication, unless such facilities are owned or controlled by any political party,  
4 political committee, or candidate.”<sup>14</sup> Commission regulations further stipulate that neither a  
5 “contribution” nor an “expenditure” results from “[a]ny cost incurred in covering or carrying a  
6 news story, commentary, or editorial by any broadcasting station (including a cable television  
7 operator, programmer or producer) . . . unless the facility is owned or controlled by any political  
8 party, political committee, or candidate[.]”<sup>15</sup> Similarly, Commission regulations exempt from  
9 the definition of “electioneering communication” any communication that “[a]ppears in a news  
10 story, commentary or editorial distributed through the facilities of any broadcast, cable or  
11 satellite television or radio station, unless such facilities are owned or controlled by any political  
12 party, political committee, or candidate.”<sup>16</sup> Thus, costs and communications coming within this  
13 exemption are not contributions, expenditures, or electioneering communications under the Act  
14 or Commission regulations.

15         The legislative history of the press exemption indicates that Congress did not intend to  
16 “limit or burden in any way the First Amendment freedoms of the press and of association.”<sup>17</sup>  
17 The exemption was enacted to “[assure] the unfettered right of the newspapers, TV networks,  
18 and other media to cover and comment on political campaigns.”<sup>18</sup> Six years later, in 1980, the

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<sup>14</sup> 52 U.S.C. § 30101(9)(B)(i).

<sup>15</sup> 11 C.F.R. §§ 100.73 and 100.132.

<sup>16</sup> 11 C.F.R. § 100.29(c)(2).

<sup>17</sup> H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974).

<sup>18</sup> *Id.*

1 Commission observed in an advisory opinion that the media exemption applies to publications  
2 “containing articles of news, information, opinion or entertainment.”<sup>19</sup>

3 The Commission has historically conducted a two-step analysis to determine whether the  
4 media exemption applies. First, the Commission asks whether the entity engaging in the activity  
5 is a press or media entity.<sup>20</sup> Second, the Commission applies the two-part analysis presented in  
6 *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires  
7 it to determine:

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

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

12 1. Sony is a Media Entity

13 The Act and Commission regulations exclude from the definition of contribution and  
14 expenditure costs for content produced by “any broadcasting station (including a cable television  
15 operator, programmer or producer).”<sup>22</sup> Excluded from the definition of “electioneering  
16 communication” is any communication that “[a]ppears in a news story, commentary or editorial

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<sup>19</sup> Advisory Opinion 1980-109 (Hansen) (this language was cited by the Commission in 2006, *see, Internet Communications*, 71 Fed. Reg. 18,589, 18, 610 (Apr. 12, 2006)).

<sup>20</sup> *See, e.g.*, Advisory Opinions 2011-11 (Colbert), 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield).

<sup>21</sup> *See also FEC v. Phillips Publ’g*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV).

<sup>22</sup> 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

1 distributed through the facilities of any broadcast, cable or satellite television or radio station.”<sup>23</sup>  
2 In advisory opinions from 1980 and 2003, the Commission concluded that both an entertainment  
3 periodical and a fictional television show were covered by the media exemption.<sup>24 25</sup> The  
4 Commission thus concludes that Sony is a media entity because it regularly produces television  
5 programming, including fictional entertainment, for distribution via broadcast and cable  
6 television.

7 2. The Two-Part *Reader’s Digest* Test

8 A. Sony is not Owned or Controlled by a Political Party, Political Committee, or  
9 Candidate

10 The requestor states that its parent company, Sony Pictures Entertainment Inc., is neither  
11 owned nor controlled by a political party, political committee, or candidate.<sup>26</sup> The Commission  
12 assumes this also means that no political party, political committee, or candidate owns or  
13 controls any of the entities in Sony’s entire ownership chain, including the ultimate parent  
14 corporation.

15 B. Sony is Acting in its Legitimate Press Function

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

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<sup>23</sup> 11 C.F.R. § 100.29(c)(2).

<sup>24</sup> Advisory Opinion 1980-109 (Hansen) (quoted later by the Commission in a 2006 rulemaking, *see*, Internet Communications, 71 Fed. Reg. 18,589, 18, 610 (Apr. 12, 2006)).

<sup>25</sup> Advisory Opinion 2003-34 (Showtime).

<sup>26</sup> AOR001.

1 available to the general public, and (2) whether the materials are comparable in form to those  
2 ordinarily issued by the press entity.<sup>27</sup>

3 In looking at these two factors, the Commission has also considered whether a press  
4 entity's press function is "distinguishable from active participation in core campaign or  
5 electioneering functions."<sup>28</sup> While the press exemption covers press or media activity, it does  
6 not cover campaign activity, even if the campaign activity is conducted by a press entity.<sup>29</sup>

7 The Commission concludes that Sony's production of *The Good Doctor* is part of its  
8 legitimate press function under the above factors. The materials that Sony produces are  
9 available to the general public as they are widely distributed via network television stations and  
10 major streaming platforms. *The Good Doctor* is comparable to materials ordinarily issued by  
11 Sony as it is a serial fictional program similar in form, function, and distribution method to the  
12 numerous other television shows the company has produced.<sup>30</sup> Finally, there is no indication  
13 that Sony's production, distribution, and marketing of *The Good Doctor* are campaign activities.  
14 The only mention of the candidate is his name in the credits and the candidate does not have  
15 input on business, advertising, or distribution decisions related to the show. Distribution

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<sup>27</sup> See Advisory Opinions 2011-11 (Colbert); 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life* ("MCFL"), 479 U.S. 238, 251 (1986)); and 2000-13 (iNEXTV).

<sup>28</sup> Advisory Opinion 2008-14 (Melothe) at 5.

<sup>29</sup> See *MCFL*, 479 U.S. at 251 (recognizing "the distinction of campaign flyers from regular publications"); *Reader's Digest Ass'n*, 509 F. Supp. at 1214 (the press exemption would not apply where, "for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers"); see also *McConnell v. FEC*, 540 U.S. 93, 208 (2003) (commenting that the press exemption "does not afford *carte blanche* to media companies generally to ignore [the Act's] provisions").

<sup>30</sup> Sony, Explore Our Titles, <https://www.sonypictures.com/tv-allshows>.



1 agreements predate Mr. Harper’s candidacy, and the requestor has no plans to distribute *The*  
2 *Good Doctor* with any greater frequency in Michigan than it did prior to the announcement of  
3 Mr. Harper’s candidacy. The Commission also assumes that Sony will continue to use its regular  
4 production facilities and staff for *The Good Doctor*.

5 ***Conclusion***

6 After applying the aforementioned factors, the Commission concludes that Sony’s  
7 production and distribution of *The Good Doctor* falls within the bounds of the Act’s media  
8 exemption.

9 This response constitutes an advisory opinion concerning the application of the Act and  
10 Commission regulations to the specific transaction or activity set forth in your request.<sup>31</sup> The  
11 Commission emphasizes that, if there is a change in any of the facts or assumptions presented,  
12 and such facts or assumptions are material to a conclusion presented in this advisory opinion, the  
13 requestor may not rely on that conclusion as support for its proposed activity. Any person  
14 involved in any specific transaction or activity that is indistinguishable in all its material aspects  
15 from the transaction or activity with respect to which this advisory opinion is rendered may rely  
16 on this advisory opinion.<sup>32</sup> Please note that the analysis or conclusions in this advisory opinion  
17 may be affected by subsequent developments in the law including, but not limited to, statutes,  
18 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available  
19 on the Commission’s website.

20 On behalf of the Commission,

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<sup>31</sup> See 52 U.S.C. § 30108.

<sup>32</sup> See *id.* § 30108(c)(1)(B).

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Sean J. Cooksey,

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Chairman