

GAO

Report to the Subcommittee on
Interior, Environment, and Related
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Representatives

December 2006

**SMITHSONIAN
INSTITUTION**

**Additional
Information Should Be
Developed and
Provided to
Filmmakers on the
Impact of the
Showtime Contract**





Highlights of [GAO-07-275](#), a report to the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives

Why GAO Did This Study

In March 2006, the Smithsonian Institution (Smithsonian) announced that it had entered into a 30-year contract with Showtime Networks Inc., (Showtime) to create a digital on-demand television channel. Members of Congress and other interested parties, particularly filmmakers, raised issues about the contract's potential effects on public access to and use of the Smithsonian's collections, its confidential nature, and the process by which the Smithsonian negotiated it. This report discusses (1) the extent to which the Smithsonian followed its internal contracting guidelines, (2) what the Smithsonian gave up and received in return under the contract, (3) the Smithsonian's implementation of the contract, and (4) the contract's potential impact on outside parties. GAO reviewed the contract and pertinent documents, and interviewed Smithsonian and Showtime officials.

What GAO Recommends

GAO recommends that the Smithsonian better document its key decisions regarding filming applications and that it update the "Frequently Asked Questions about Filming at the Smithsonian Institution" on its Web site to better describe what the contract means for filmmakers.

The Smithsonian generally agreed with GAO's findings and recommendations.

www.gao.gov/cgi-bin/getrpt?GAO-07-275.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Robin M. Nazzaro at (202) 512-3841 or nazzaror@gao.gov.

SMITHSONIAN INSTITUTION

Additional Information Should Be Developed and Provided to Filmmakers on the Impact of the Showtime Contract

What GAO Found

The Smithsonian followed its internal contracting guidelines regarding competition, oversight, and conflicts of interest. When it began exploring a television venture in 2002, it approached 18 major media companies and negotiated with two before reaching a deal with Showtime. The process was overseen by Smithsonian Business Ventures' (SBV) Board of Directors and the Smithsonian's Board of Regents, who approved the contract in November 2005. When SBV's Chief Executive Officer disclosed a potential conflict of interest, the Smithsonian's Ethics Officer reviewed the disclosure in accordance with Smithsonian policies and concluded that no conflict existed. GAO's Ethics Officer concurred with the Smithsonian's decision.

The Smithsonian granted the new venture a 30-year, semiexclusive right to produce and commercially distribute audiovisual programs using Smithsonian trademarks and/or content in exchange for national television exposure and new revenue. The Smithsonian projects that the new channel will reach more than 31 million households by 2010 and will have a total value of over \$150 million after 10 years. The Smithsonian's major concession is a noncompete clause that generally prohibits it from engaging in activities that would compete with the new venture. The Smithsonian negotiated exceptions for various news and educational programs.

The Smithsonian has been working to implement policies and procedures necessary under the contract since it became effective in January 2006, but the information that it has provided to interested parties has been insufficient. The Smithsonian and Showtime waited until March 2006 to publicly announce the new venture and did not implement internal processes to review filming requests for compliance with the contract until after the public announcement. The Smithsonian has created a committee to review filming requests, but does not document in detail its rationale for key decisions or attempt to synthesize these decisions over time. Also, the "Frequently Asked Questions" on the Smithsonian's Web site provides little information for filmmakers about the new contract.

It is too early to determine the long-term impact of the contract. Access to the Smithsonian's collections and staff for research purposes remains unchanged, but the direct impact on filmmakers will depend largely on how many request permission to use a substantial amount of Smithsonian content. So far, 6 of 117 filming requests have involved a substantial amount of Smithsonian content—2 were denied and 4 were approved as exceptions. The Smithsonian contends that it will be able to accommodate the same level of filming activity as it has in the past based on its historical analysis of filming contracts. GAO found that this analysis was unreliable because it was based on incomplete data and oversimplified criteria. In addition, concerns have been raised about damage to the Smithsonian's image and the appropriateness of limiting the use of the collections held in trust for the American public.

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Abbreviations

CEO	Chief Executive Officer
FAR	Federal Acquisition Regulation
PIO	Public Information Officer
SBV	Smithsonian Business Ventures

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United States Government Accountability Office
Washington, DC 20548

December 15, 2006

The Honorable Charles H. Taylor
Chairman
The Honorable Norman D. Dicks
Ranking Minority Member
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
House of Representatives

On December 22, 2005, the Smithsonian Institution (Smithsonian) entered into a 30-year contract with Showtime Networks Inc., (Showtime) to form a limited liability company that would create new television channels and related businesses, the first of which is intended to be a digital on-demand channel called Smithsonian on Demand. The new on-demand channel will feature, among other things, programs developed using Smithsonian content, including the Smithsonian's vast archives, collections, and experts. Smithsonian Networks (the new venture) is a new independent joint venture between the Smithsonian and Showtime, and it was created to develop, launch, and operate the new channel.¹ After the public announcement of the contract in March 2006, filmmakers, historians, archivists, librarians, and others began raising issues about the potential effects of the contract on the public's continued access to and use of the Smithsonian's collections. These interested parties and some in Congress have also questioned the confidential nature of the contract and the process by which Smithsonian officials solicited and negotiated the contract. Smithsonian officials stated that they were surprised by the reaction to the contract. The Smithsonian believes that keeping contract provisions confidential is necessary to prevent the disclosure of proprietary business information. Furthermore, officials believe that the

¹The creation and operation of the new venture is memorialized primarily in four separate agreements: (1) an agreement between the Smithsonian and Showtime to create a limited liability company that will, among other things, create a new digital on-demand television channel called Smithsonian on Demand; (2) a licensing agreement from the Smithsonian to the new venture for the use of Smithsonian content and Smithsonian trademarks; (3) an agreement between the Smithsonian and the new venture that governs the new venture's access to Smithsonian content; and (4) a management agreement between Showtime and the new venture for the management of the new venture. We will refer to these four separate agreements collectively as the contract for purposes of this report. In the contract, the legal name of the new venture is SNI/SI Networks L.L.C.

venture provides an excellent opportunity to harness new digital technology to further the Smithsonian’s mission while generating revenue to support other activities. The contract illustrates the delicate balance entrusted to stewards of a public trust—managing collections for the public good, while at the same time utilizing that resource to creatively generate revenue to support those stewardship responsibilities.

Congress established the Smithsonian in 1846 to administer a large bequest left to the United States by James Smithson, an English scientist. In accordance with James Smithson’s will, Congress established the institution in Washington, D.C., “for the increase and diffusion of knowledge among men.” To that end, the act provided for the administration of the trust by a Board of Regents and a Secretary, who were given broad discretion to carry out the business of the Smithsonian.² The Board of Regents is composed of 17 members.³ The board’s bylaws provide that it “shall hold meetings at such times and places as [it] may from time to time determine,” and, as such, the board generally holds three business meetings annually. In addition, the Board of Regents’ Executive Committee—composed of three Board of Regents members elected by the full board—can exercise all powers of the Board of Regents when the full board is not in session.

While the Smithsonian has grown greatly since its founding 160 years ago, it retains its essential character as a trust establishment of the United States, and it is often referred to as “the nation’s attic.” The Smithsonian is now the world’s largest museum and research complex, consisting of 19 museums and galleries, the National Zoo, and 9 research facilities. In fiscal year 2005, the Smithsonian had operating revenues of just under \$1 billion, with about 75 percent from federal sources and the remaining 25 percent from other sources, including revenues from business activities. The Smithsonian’s business activities include *Smithsonian* and *Air & Space* magazines, museum stores, restaurants, IMAX theaters, the Smithsonian Gift Catalogue, consumer product licensing, e-commerce, and commercial media enterprises.

²Act of August 10, 1846, ch. 178, 9 Stat. 102 (1846) (codified at 20 U.S.C. §41). A trust is a property interest held by one entity for the benefit of another.

³The board is composed of the Chief Justice of the United States, the Vice President, three senators appointed by the President of the Senate, three representatives appointed by the Speaker of the House, and nine citizens appointed by Joint Resolution of Congress—two from the District of Columbia and seven from the states.

In 1998, the Board of Regents authorized the Secretary of the Smithsonian to reorganize the various business activities within the Smithsonian into a centralized business entity, Smithsonian Business Ventures (SBV). SBV's mission is to generate revenue from business activities to support the Smithsonian's mission. SBV is funded by the revenue from its business activities and does not use federal funds for any of its activities, including employee salaries. SBV's structure is very similar to that of a private company, with a chief executive officer, chief financial officer, and a board of directors. The SBV board of directors acts within the authority granted to it by the Board of Regents to provide advice and recommendations to the Board of Regents and Secretary concerning the operation of SBV. In addition, the chief executive officer must consult with and seek the recommendations of the SBV board of directors concerning issues including, but not limited to, industry standard business deals, joint ventures, licensing, and perceived trade-offs between commercial and traditional approaches to accomplishing the overall mission of the Smithsonian. The Smithsonian's Board of Regents exercises its authority over SBV by reviewing plans for and approving major new initiatives. SBV, in conjunction with the Smithsonian's Office of General Counsel, were the primary Smithsonian entities involved with negotiating the contract.

The new venture brings together, in a public-private partnership, the Smithsonian's wealth of staff resources and collections with Showtime's production and distribution capabilities and experience. Because the Smithsonian's contract with Showtime was not a federal procurement contract, standard federal contracting guidelines that the Smithsonian generally uses for guidance for contracts involving federal funds, such as the Federal Acquisition Regulation (FAR), were not used.⁴ The Smithsonian does not have any written guidance regarding how nonprocurement contract negotiations should be conducted; however, SBV's guidelines state that SBV should follow commercial business practices in its contracting. While SBV's guidelines do not define commercial business practices, according to SBV, the underlying principles include, among other things, fostering competition, leveraging

⁴The Smithsonian manages two different types of funds—federal funds and trust funds, which are nonfederal funds arising from donations, revenue-generating activities, interest on investments, and other sources. The Smithsonian has elected to follow the FAR provisions for contracts involving the expenditure of federal funds. For business contracts that involve neither the expenditure nor receipt of federal funds and for which the FAR is inapplicable, such as the contract with Showtime, the Smithsonian has elected to follow commercial business practices.

purchasing power to get the best value, and operating in a highly ethical manner. In the absence of specific Smithsonian-wide guidelines or policies, SBV works closely with the Office of General Counsel and the Office of Contracting to negotiate contracts.

According to Smithsonian officials, every year hundreds of people request to film or photograph the Smithsonian's premises, collections, or staff. In 2001, the Smithsonian created institutionwide guidance to streamline procedures and standardize fees for processing and approving these filming and photography requests across the institution. This included a standard application that filmmakers had to submit to the museum Public Information Officer (PIO). When reviewing these applications, museum PIOs considered several factors such as compatibility with Smithsonian's mission and availability of staff, before deciding whether to approve or decline the request. While the policies and procedures governing filming requests are still in effect, they have been supplemented by new procedures developed since the contract became effective. Audiovisual programs developed with footage of Smithsonian content are now classified into several categories: news, public affairs, academic, curriculum-based, scholarly, and commercial programs.⁵

The contract specifies that the Smithsonian cannot engage in activities that would compete with the new venture, nor can it allow other filmmakers to use Smithsonian content to produce programs for commercial distribution that would directly compete. Direct competitors include, but are not limited to, Public Broadcasting Service (PBS), Arts and Entertainment (A&E), The History Channel, National Geographic Channel, and The Discovery Channel. In addition, the contract limits the number of programs that can be accessed on a single Smithsonian Web page within a Smithsonian Web site, since the availability of a collection of programs via the Internet is also considered competition with the new venture. These provisions are generally referred to as the noncompete clauses. Key exceptions to the noncompete provisions include (1) nonrecurring news and public affairs programs; (2) academic, curriculum-based, and scholarly programs; (3) programs with only incidental use of

⁵Scholarly programs are defined in the contract as programs that are (1) developed in conjunction with a scholar, academic, or expert who is employed by the Smithsonian or otherwise formally associated with the Smithsonian; (2) derived from the scholar's, academic's, or expert's work in association with the Smithsonian; and (3) developed for educational purposes and that would, to a reasonable person, appear to be of interest primarily to scholarly and academic viewers.

Smithsonian content;⁶ and (4) an initial annual allotment of six programs that the Smithsonian can produce with entities other than the new venture, referred to as one-offs. While the contract contains definitions for the terms academic, curriculum-based, and scholarly, it does not specifically define incidental use.

Following the inception of the new venture with Showtime in 2006, the Smithsonian updated the guidelines for processing and approving filming and photography requests to align them with the noncompete clauses of the contract. For nonrecurring news and public affairs programs, the process that was in place before the contract has not changed. Filming applications are not required for nonrecurring news and public affairs programs, and decisions regarding acceptance of those requests are still made at the museum level. For the other types of requests—academic, curriculum-based, scholarly, and commercial—a filming application is still required and an additional review step has been added. If the museum PIO reviews the application and determines that the museum can accommodate the request, the PIO forwards the application to the Office of Public Affairs review committee—composed of three PIOs and two museum representatives—which decides on a case-by-case basis whether or not the proposed film falls within one of the exceptions to the noncompete clauses.⁷ The review committee approves filming applications that fall within one of the exceptions and must either deny those that do not or pursue the film as a one-off. For applications that the committee chooses not to pursue as a one-off and denies because the request is to use more than an incidental amount of Smithsonian content, filmmakers have the option of reducing the amount of Smithsonian content to incidental, or they may independently contact the new venture to discuss producing the film. Appendix II contains a flowchart illustrating the Smithsonian’s filming application review process.

Filmmakers and other interested parties have raised issues about the Smithsonian’s process of entering into the contract with Showtime, as well as the changes in the Smithsonian’s filming procedures and other potential

⁶Smithsonian content includes Smithsonian collections, exhibitions, archival materials, research materials, publications, audiovisual works, Web site content, and other works of authorship; Smithsonian personnel; Smithsonian events; and Smithsonian buildings and grounds.

⁷A proposed use is excepted from these rules when it is for an academic, curriculum-based, scholarly, or news program, or a program that will not be distributed by a commercial distributor. In these cases, more than incidental use of Smithsonian content is permitted.

impacts resulting from the contract. In this context, you asked us to (1) evaluate the extent to which Smithsonian followed its internal guidelines with respect to competition, oversight, and protecting against conflicts of interest when negotiating the contract with Showtime; (2) identify what the Smithsonian gave up and received in return under the contract; (3) evaluate the Smithsonian's implementation of the contract; and (4) identify what, if any, impacts the contract has had on outside parties. This report is nearly identical to the sensitive, but unclassified report you received on December 15, 2006. However, the original report contains confidential, business sensitive information identified by the Smithsonian and Showtime. Therefore, certain details, such as specific dollar amounts, percentages, and time frames related to the financial value of the contract, have been generalized or omitted to enable the public release of this document. In total, eight numbers were generalized and three sentences were omitted.

To examine the extent to which the Smithsonian followed its internal guidelines for competition, oversight, and conflicts of interest, we obtained and reviewed meeting minutes for the Smithsonian's Board of Regents and SBV's Board of Directors, as well as Smithsonian guidelines regarding conflicts of interest and contracting. We also interviewed the Smithsonian and Showtime officials involved in negotiating the contract. To determine what the Smithsonian gave up and received in return, we reviewed the contract and other Smithsonian documents, interviewed Smithsonian and Showtime officials that were involved in the contract negotiations, and conducted an independent economic analysis to estimate the value of the contract. We also attempted to identify contracts of a similar nature for comparison, but we were not able to find suitable analogies. To examine how the Smithsonian has implemented the contract and what, if any, impact it has had on the Smithsonian's operations and outside parties, we reviewed relevant Smithsonian documents, analyzed historical and current film request data, and interviewed Smithsonian staff that have been involved with implementing changes resulting from the contract. We also reviewed position papers and interviewed a selective sample of interested parties that could potentially be affected by the contract. We selected the individuals with whom we spoke from a wide range of disciplines, including filmmakers, curators, and historians. Appendix I provides a more detailed description of our scope and methodology. We conducted our work from June to November 2006 in accordance with generally accepted government auditing standards.

Results in Brief

In entering into the contract, the Smithsonian generally followed its internal guidelines regarding competition, oversight, and conflicts of interest. In adhering with the commercial business practice of fostering competition, the Smithsonian reached out to 18 major media companies when it began exploring the idea for a television venture in 2002. The Smithsonian negotiated for nearly a year with the only company that expressed interest at that time. When that deal fell through, the Smithsonian was approached by and had preliminary discussions with a second interested company that ultimately decided not to pursue the opportunity because it was concerned that developing a new Smithsonian channel might undercut its existing channel. Finally, in 2004, a third company—Showtime—expressed an interest in the idea, and the two entities engaged in serious negotiations for more than a year to finalize the contract. According to SBV officials, the Board of Regents oversight for the Showtime contract was similar to its oversight on other contracts. The board gave approval for SBV to pursue the venture in 2002. Since that time, the minutes of the Board of Regents meetings show that the board was periodically informed of the efforts to find a suitable business partner and enter into a contract, and these minutes were provided to Congress. In November 2005, the board approved the contract based on a summary sheet of the key provisions. During the contract negotiations, SBV's Chief Executive Officer disclosed a potential conflict of interest regarding his indirect ownership interest in the Sundance Channel. One of the owners of the Sundance Channel, through which the SBV Chief Executive Officer had his interest in the channel, was in negotiations with Showtime and the other owner of the Sundance Channel to sell his interest. In accordance with Smithsonian policies, the Smithsonian's Ethics Officer reviewed the disclosure and concluded that no conflict existed as long as SBV's Chief Executive Officer was only a silent partner and did not participate in the Sundance Channel sales negotiations. GAO's Ethics Officer reviewed the documentation and the Smithsonian's decision and concurred with the findings.

The Smithsonian granted the new venture a 30-year, semiexclusive right to produce and commercially distribute certain audiovisual programs using Smithsonian trademarks and/or content in exchange for national television exposure and a new revenue stream. The Smithsonian projects that the new channel will reach more than 31 million households by 2010, and it is hoping that the increased national television exposure will increase its brand recognition and have a synergistic effect on other revenues by increasing memberships, merchandise sales, and concession sales through increased visitation to the museums. The Smithsonian's new revenue stream from the contract includes four components: (1) minimum annual

payments of \$500,000 for the early years that gradually increase to millions of dollars per year as the contract progresses (undiscounted and nominal); (2) a share of revenues to the extent that the share exceeds the minimum annual payment; (3) an initial 10 percent equity interest in the venture; and (4) an option to acquire an additional equity interest. The annual payments will total a minimum of \$99 million (undiscounted and nominal) over the 30-year term of the contract. The Smithsonian estimates that the cumulative value of the contract after 10 years will be more than \$150 million, of which only a small portion will be from the minimum annual payments. The major contract concession by the Smithsonian is the noncompete clauses. While most of these provisions are relatively straightforward, Smithsonian and Showtime officials had different understandings of a provision on the commercial use of scholarly programs. The provision states that before scholarly programs can be distributed by a commercial distributor, they must first be offered to the new venture; but the language is silent about whether it applies only to Smithsonian-generated scholarly programs, or if it also applies to third-party generated scholarly programs. Smithsonian officials stated that it was their intent and understanding that the provision would not apply to third-party generated programs, whereas Showtime officials had a different view. Upon raising this issue during our review, the Smithsonian and Showtime reached an agreement that the provision does not apply to third-party generated scholarly programs.

Since the contract became effective in January 2006, the Smithsonian has been working to put in place policies and procedures necessary to implement the contract, but the information it has provided about the contract's impact to interested parties has been insufficient. The Smithsonian and Showtime waited more than 2 months after the contract became effective to publicly announce the creation of the new venture. The Smithsonian did not establish a central committee in the Office of Public Affairs to review filming requests for compliance with the contract and make determinations about the incidental use of Smithsonian content until March 2006, so decisions regarding filming requests received in early 2006 were delayed. The committee has since developed a spreadsheet to track filming requests, but it does not contain a detailed rationale for decisions in which a film request is either denied due to more than incidental use or pursued as a one-off. As a result, it may be difficult for the Smithsonian to provide useful information to filmmakers about what constitutes incidental use and ensure accountability with consistent decision making over the term of the contract. Some of the key characteristics of effective and efficient government programs are transparency and clear criteria that are consistently applied. However, the

Smithsonian has not yet developed a mechanism or process to synthesize its decisions over time into a record of precedents that would provide filmmakers with additional guidance for their use in developing future filming requests. The review committee members mentioned that they direct filmmakers to the Smithsonian's Web site for answers to "Frequently Asked Questions," but the site provides little information about Smithsonian on Demand. As a result, filmmakers and other interested parties remain uncertain about the Smithsonian's criteria for making decisions about filming requests and about the contract's impact in general. More recently, in August 2006, the Smithsonian established a separate Smithsonian on Demand Committee to provide recommendations regarding content review and approval of programs for the new channel. Since this newest committee had not reviewed any films as of September 30, 2006, it is not clear how the review and approval issues will be resolved.

The impact of the contract on interested parties is uncertain because it only has been in effect since January 1, 2006, and it is still too early to tell what the long-term impact of the contract will be. While access to the Smithsonian's collections and staff for research purposes remains unchanged, the direct impact on filmmakers will depend largely on how many filming applications the Smithsonian receives annually requesting to use a substantial amount of Smithsonian content that are not otherwise permitted by the noncompete clauses. If the number of those requests is small and the Smithsonian decides to accommodate them within their annual allotment of one-offs, then any direct impact on filmmakers will be minimal. However, if the number of those requests is large, then some filmmakers' requests will be denied. During the first 9 months of the contract, from January 1, 2006, through September 30, 2006, 2 out of 117 filming requests were denied due to the contract, and 4 were approved as one-offs. Based on an historical analysis of filming contracts over a 6-year period from 2000 through 2005, the Smithsonian contends that it will be able to accommodate the same level of filming activity as it has in the past. However, we found that this analysis was unreliable for the purpose of estimating the contract's potential impact because it was based on incomplete data and oversimplified criteria. For example, in some cases, projected run-time was not available on the spreadsheet used for the analysis. Moreover, the criterion used in the analysis was not the same as the criteria being used in practice by the review committee. In the analysis, the Smithsonian defined incidental use as 15 percent or less of projected run-time of Smithsonian content in the film. However, the review committee considers multiple factors about the proposed use of Smithsonian content in making the actual decisions about incidental use.

Aside from direct potential impacts on filmmakers, larger concerns have been raised about damage to the Smithsonian's image and goodwill. Concerns have been raised by filmmakers, curators, and other interested parties regarding the appropriateness of the Smithsonian limiting the use of the collections held in trust for the American public, as well as other potential impacts, including hampering collaborative partnerships and future donations.

To improve the implementation of the contract and increase the information available to interested parties, we recommend that the Secretary of the Smithsonian (1) fully document decisions for filming applications that are denied because they involve more than incidental use or are approved as one-offs to establish a record of precedents, which will define over time what constitutes incidental use and help to ensure consistent decision making by the review committee, and (2) update the "Frequently Asked Questions about Filming at the Smithsonian Institution" on the Smithsonian's Web site to better describe what the contract means for filmmakers, especially as it relates to incidental use of Smithsonian content. We requested comments on the draft report from the Smithsonian and Showtime. The Smithsonian commented in writing that it generally agrees with our findings and recommendations and will take actions to implement our recommendations. Showtime also generally agreed with the report and endorsed the Smithsonian's comments. The Smithsonian's and Showtime's written comments are in appendixes III and IV, respectively. The Smithsonian and Showtime also provided joint technical comments, which we incorporated as appropriate.

Background

The Smithsonian is a unique entity possessing a dual nature, described by former Chief Justice Taft, the Chancellor of the Board of Regents in 1927, as a "private institution under the guardianship of the Government." Initially established by Congress in 1846 to carry out the federal government's trust responsibilities under the bequest of James Smithson, the Smithsonian is a privately endowed institution, largely funded by federal appropriations and governed by a Board of Regents composed of federal officials and private citizens. In fiscal year 2005, the Smithsonian had operating revenues of just under \$1 billion and about 6,000 employees. Approximately 75 percent of the Smithsonian's operating revenues were from federal sources—60 percent from direct congressional appropriations and 15 percent from government grants and contracts—and the remaining 25 percent was from restricted and unrestricted trust funds. Restricted trust funds include gifts, grants, and earnings on endowments from individuals, foundations, organizations, and

corporations that specify the purpose of the funds. Generally, they support a particular exhibit or program, or are used to manage the collections or support research projects. Sources of unrestricted trust funds include investment income, earnings on unrestricted endowments, membership programs, and net proceeds from business activities. Unrestricted trust funds can be used to support any Smithsonian activity or need. Revenue generated by the contract with Showtime will be unrestricted trust fund revenue.

The Smithsonian has about 136.5 million objects in its collections, but only a small percentage of the objects are on display in the museums at any given time. The museums recorded about 24 million visits in fiscal year 2005, which was down significantly from the 33.7 million visits recorded in fiscal year 2001. In the years since the 9/11 terrorist attacks, visitation has fluctuated around 20 million to 25 million annually. While most of the Smithsonian's exhibited collections are in or around Washington, D.C., Smithsonian content was viewed by 109 million visitors to its 447 Web sites in fiscal year 2005—12 million more Web visitors than in 2004. In addition, *Smithsonian* magazine has a readership of more than 7 million monthly. Smithsonian officials saw the new channel as an opportunity to bring more Smithsonian content to a television viewing audience.

A Smithsonian directive on collections management states that the Smithsonian will provide reasonable access to its collections and collections information, consistent with its stewardship responsibilities.⁸ Access, as defined by this directive, is the opportunity for the general public, scholars, and Smithsonian staff to utilize the diverse collection resources of the Smithsonian. To carry out its mission “for the increase and diffusion of knowledge among men,” the directive states that the Smithsonian promotes access to its collections and associated information through research opportunities, traditional and electronic exhibitions, educational programs and publications, reference systems, loan exchange of collections, and electronic information services. Smithsonian directives allow access fees to be charged and also allow restrictions to accessing collections and collections information due to resource limitations, object availability, intellectual property rights, applicable restrictions, and

⁸Smithsonian Directive SD-600: *Collections Management* defines collections to include objects, natural specimens, artifacts, and other items that are acquired, preserved, and maintained for public exhibition, education, and study.

preservation constraints. The Board of Regents retains ultimate oversight authority and fiduciary responsibility for Smithsonian collections.

The Smithsonian's statutory charter gives broad discretion in the conduct of its affairs, including managing the Smithsonian's authority to enter into contracts. In 1846, Congress authorized the Board of Regents to conduct the "business of the Institution."⁹ The Board of Regents has the authority to accept funds from private sources, use the interest earned on the trust fund to further the Smithsonian's purpose, and acquire, display, restore, loan, sell, or otherwise dispose of items of historical or artistic interest. These authorities have been delegated to various individuals within the Smithsonian, including the Deputy Secretary/Chief Operating Officer of the Smithsonian, SBV's Chief Executive Officer, and the Office of General Counsel.

The new venture is tasked with creating new programming services, the first of which is expected to be a digital on-demand television channel—Smithsonian on Demand. Digital television is a new television delivery technology that uses digital technology to capture images and sounds, in contrast to traditional analog television service. Digital television allows a broadcaster to offer multiple programs (multicasting) or a single program of high definition television. Images and sound are captured using digital technology, providing a better picture resolution, a wider screen, CD-quality sound, and better color rendition. This technology represents the most significant development in television technology since the advent of color television in the 1950s. In February 2006, the Digital Television Transition and Public Safety Act of 2005 established a deadline of February 17, 2009, for the complete transition from analog television to digital television.¹⁰ A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond February 17, 2009. In February 2005, we reported that about 86 million households view television via a cable service or have a subscription to a direct broadcast satellite service,

⁹Act of August 10, 1846, ch. 178, §3, 9 Stat. 103 (1846) (codified at 20 U.S.C. §42).

¹⁰Pub. L. No. 109-171, title III, § 3002(b), 120 Stat. 21 (2006).

and approximately 21 million households rely exclusively on free over-the-air broadcasting.¹¹

As of September 2006, the new venture had developed a list of 74 potential programs for the new channel's initial season. The list included (1) 15 "mission critical" programs selected by the new venture from a list of 30 potential programs proposed by the Smithsonian; (2) 36 programs that the new venture was working on with individual Smithsonian units and a few existing programs that contain Smithsonian content that the new venture proposed acquiring the rights to; and (3) 23 programs to be acquired that contain no Smithsonian content but feature content with which the Smithsonian is generally associated, such as arts and culture, history, and science. On or around June 1 of each calendar year, during the first 29 years of the contract, the Smithsonian will provide the new venture with 30 or more written program ideas.¹² The new venture is required to select at least one-half, but no more than 15 of the program ideas to develop, produce, and exhibit during the next calendar year. The Smithsonian also generally has the right to review rough and final program cuts to ensure that the program's content is factually, historically, and scientifically accurate and in compliance with the other quality control requirements in the contract, including consistency with the high standards, quality, and image of the Smithsonian.

While the Smithsonian has not earmarked how the revenue from the new venture will be spent, it has a number of pressing funding needs. For example, in April 2005, we reported on the deteriorated condition of several of the Smithsonian's facilities.¹³ At that time, the Smithsonian estimated that its planned capital and maintenance projects for 2005 through 2013 would cost about \$2.3 billion. However, we cautioned that this estimate could grow because it was largely based on preliminary assessments. We also noted that the Smithsonian's historical funding levels, from federal appropriations and trust funds, would be insufficient to cover the facility projects planned for 2005 through 2013. We

¹¹GAO, *Digital Broadcast Television Transition: Estimated Cost of Supporting Set-Top Boxes to Help Advance the DTV Transition*, [GAO-05-258T](#) (Washington, D.C.: Feb. 17, 2005).

¹²Should the Smithsonian submit fewer than 30 program treatments, the new venture's obligations are reduced proportionately.

¹³GAO, *Smithsonian Institution: Facilities Management Reorganization Is Progressing, but Funding Remains a Challenge*, [GAO-05-369](#) (Washington, D.C.: Apr. 25, 2005).

recommended that the Smithsonian establish a process for exploring funding options with the Administration and the Congress, leading to the development and implementation of a strategic funding plan to address the Smithsonian's revitalization, construction, and maintenance needs. The Smithsonian agreed with our findings and recommendation and informed us that Smithsonian's Board of Regents has established an ad hoc committee to identify various ways to raise additional funds for the Smithsonian. The committee's work is ongoing.

In Negotiating the Contract with Showtime, the Smithsonian Generally Followed Its Internal Guidelines Regarding Competition, Oversight, and Conflicts of Interest

In entering into the contract with Showtime, the Smithsonian generally followed its internal guidelines regarding competition, oversight, and conflicts of interest. Regarding competition, only SBV's limited written contracting guidance, which promotes the use of commercial business practices and consultation with the Office of General Counsel, was applicable to the solicitation of a strategic business partner in this case. SBV officials applied a general principle of commercial business practices—fostering competition—by initially reaching out to multiple major media companies, and they relied heavily on consultation with the Office of General Counsel to guide their actions. In addition, the Board of Regents has broad oversight responsibility for all Smithsonian programs and activities, including the establishment of any new program or activity. The Board of Regents exercised this authority over SBV by periodically reviewing documents related to the contract terms and approving the final contract terms. SBV's Board of Directors acts under the authority granted to it by the Board of Regents to provide advice to the chief executive officer on a variety of issues. Finally, the potential conflict of interest that arose during the contract negotiations was disclosed and reviewed in accordance with the Smithsonian's Standards of Conduct for employees.

In adhering with the commercial business practice of fostering competition, SBV reached out to 18 major media companies when they began exploring the idea for a television venture in the spring of 2002. This initiated a 3-year search process for a strategic business partner and a final deal (see fig. 1). In August 2002, one company expressed interest in proceeding beyond initial discussions toward developing a more definitive structure and offered terms that the Smithsonian found favorable. For the next 9 months, SBV and the media company negotiated a term sheet and letter of intent. While SBV and the company were negotiating the final terms of the agreement, the company's board declined to proceed with the investment, and the deal fell through. In the final months of 2003 and early months of 2004, the Smithsonian had conversations with a second company, which also ended without reaching an agreement because the company became concerned that developing a new Smithsonian channel

may undercut its existing channel. Soon after this, the Smithsonian was approached by, and had preliminary discussions with, several companies that expressed renewed interest. Finally, in August 2004, the Smithsonian began negotiations with Showtime because its initial investment offer was the most favorable. The two entities engaged in serious negotiations for more than a year to finalize the contract; the final terms of which are comparable with, or in some cases more favorable than, the deal that Smithsonian had previously negotiated in 2003.


Figure 1: Timeline of Key Negotiation and Oversight Actions

Smithsonian Board of Regents actions	SBV Board of Directors actions
<p>Spring 2002 SBV developed a preliminary business plan for a television venture.</p> <p>Late spring 2002 SBV developed a concept package and sent it out to prospective media partners.</p>	
<p>June 17, 2002 Board of Regents meeting: SBV Chief Executive Officer (CEO) introduced the concept of "Smithsonian on Demand" television.</p>	
<p>Summer 2002 SBV explored the concept with 18 major media companies.</p> <p>August 2002 Negotiations commenced with the one company that expressed interest in developing a more definitive structure and offered initial terms favorable to the Smithsonian.</p>	
<p>May 5, 2003 Board of Regents meeting: SBV CEO reported that he had been in negotiations with a company for 9 months and that it was the only company of those solicited that offered to provide the degree of investment in programming and distribution needed, while also allowing the Smithsonian to share in the revenue stream and retain certain editorial controls. Board authorized the Secretary to enter into a licensing and joint venture agreement as proposed with the media company for the formation and operation of a television channel.</p>	<p>September 3, 2002 SBV Board of Directors meeting: Board members discussed the video on demand television initiative.</p> <p>November 18, 2002 SBV Board of Directors meeting: SBV CEO presented potential business opportunities for SBV, including the video on demand television initiative.</p> <p>January 27, 2003 SBV Board of Directors meeting: SBV CEO reported the receipt of a letter of intent from one of the top three cable television companies. He stated that his intent was to finalize the letter and bring it back to the board for approval. He also said that he would consult with the Secretary and members of the Board of Regents.</p> <p>March 5, 2003 SBV Board of Directors meeting: The board discussed issues related to the video on demand initiative and letter of intent including tax and political implications of the Smithsonian owning an equity interest in a for-profit entity and whether this was the best deal the Smithsonian could get. The board unanimously consented to a resolution endorsing the proposal.</p> <p>April 28, 2003 SBV Board of Directors meeting: SBV CEO reported that the video on demand proposal is pending the consent of the Board of Regents, to be considered at its meeting on May 5, 2003.</p>
<p>June 2003 SBV and media company signed formal term sheet.</p>	
<p>September 22, 2003 Board of Regents meeting: Secretary and SBV CEO updated the board on the negotiations. The board reviewed the preliminary term sheet and deemed it consistent with the structure and principal business terms contemplated at the last Board of Regents' meeting.</p>	<p>September 29, 2003 SBV Board of Directors meeting: SBV CEO reported that finalization of the video on demand deal has been delayed by the company with which SBV was negotiating.</p>

Smithsonian Board of Regents actions	SBV Board of Directors actions
<p>November 2003 Media company board of directors declined to proceed with the proposed investment and discussions with the Smithsonian ceased.</p>	
<p>January 5, 2004 Board of Regents meeting: SBV CEO reported that discussions with the first media company fell through, but indicated that other companies expressed continued interest and have reopened discussions with SBV.</p> <p>May 4, 2004 Board of Regents meeting: A Regent reported that there is additional renewed interest in the Smithsonian cable television initiative and that it had attracted interest from the two largest cable distributors.</p>	<p>November 12, 2003 SBV Board of Directors meeting: SBV CEO reported that the company with which SBV was negotiating ultimately declined to invest in the video on demand initiative.</p> <p>January 26, 2004 SBV Board of Directors meeting: SBV CEO reported that he had contacted a number of media companies that had formerly expressed interest and that he remained optimistic that the Smithsonian would find a suitable business partner.</p> <p>April 26, 2004 SBV Board of Directors meeting: SBV CEO reported that the video on demand proposal was being discussed with a second company.</p>
<p>August 2004 Serious discussions commenced with Showtime.</p>	
<p>February 2005 Term sheet between SBV and Showtime approved by Board of Regents.</p> <p>May 9, 2005 Board of Regents meeting: Board of Regents authorized its Executive Committee to empower the Secretary to enter into definitive agreements with Showtime.</p> <p>September 19, 2005 Board of Regents meeting: SBV CEO reported on the state of final negotiations with Showtime and indicated that the terms of the agreement would be presented to the Regents' Executive Committee within weeks.</p> <p>November 22, 2005 Regents' Executive Committee meeting: Regents' Executive Committee voted unanimously to approve final terms of the contract.</p>	<p>January 19, 2005 SBV Board of Directors meeting: SBV CEO reported on the status of negotiations.</p> <p>March 24, 2005 SBV Board of Directors meeting: SBV CEO reported that SBV had reached an agreement in principle with Showtime that conformed substantially to the agreement reached in 2003 approved by both the SBV board and the Board of Regents, with key financial terms being more favorable to the Smithsonian. SBV board approved a motion recommending that SBV proceed to definitive agreements with Showtime.</p> <p>June 20, 2005 SBV Board of Directors meeting: SBV CEO reported on the status of negotiations, and urged management to focus on the operational strategy for implementation of the venture within the Smithsonian.</p> <p>September 26, 2005 SBV Board of Directors meeting: An SBV official reported that SBV had reached an agreement with Showtime with the exception of a few points still under review. Key terms were discussed, and the complicated link between the term of the contract, the nature of the Smithsonian, and the economics of the business was recognized. Despite the complexity and potential impact, Smithsonian management was prepared to endorse the deal and move forward.</p>
<p>December 22, 2005 SBV and Showtime executed definitive agreements (signed the contract) to form the new venture effective January 1, 2006.</p>	
<p>January 1, 2006 Contract with Showtime became effective.</p>	

 Actions in the contract negotiations process

 Smithsonian Board of Regents actions

 SBV Board of Directors actions

Source: GAO analysis of Smithsonian data.

Smithsonian's Board of Regents and SBV's Board of Directors provided oversight of the activities regarding the television venture in accordance with their respective bylaws. The Board of Regents' meeting minutes show that the board was periodically informed of SBV's efforts to find a strategic business partner. Furthermore, SBV's Board of Directors' meeting minutes show that it was also engaged in the process (see fig. 1). SBV's Chief Executive Officer presented a business plan for the proposed venture to the Board of Regents in June 2002. In May 2003, the Board of Regents authorized the Secretary to enter into an agreement for the formation and operation of a television channel with the first company. SBV provided interim status updates to both its Board of Directors and the Board of Regents on its efforts to secure another partner for the initiative between the time that the first deal fell through and when it began negotiating with Showtime. The SBV Board of Directors forwarded a motion to the Secretary recommending that SBV finalize agreements with Showtime on terms as presented by the Chief Executive Officer. In May 2005, the Board of Regents signaled its agreement and authorized the Executive Committee to empower the Secretary to enter into definitive agreements with Showtime to form a joint venture. Six months later, the Board of Regents' Executive Committee approved the final terms of the agreement.

A potential conflict of interest that surfaced during contract negotiations was handled according to the Smithsonian's Standards of Conduct.¹⁴ Prior to working for the Smithsonian, SBV's Chief Executive Officer helped establish the Sundance Channel, a company in which Showtime is one of three owners. As part of that endeavor, he received an equity interest in the Sundance Channel from one of the two non-Showtime owners and retained that interest when he came to the Smithsonian. During the Smithsonian's negotiations with Showtime, one of the owners of the Sundance Channel—through which the SBV Chief Executive Officer had his interest in the channel—was in negotiations to sell some of his interests, with Showtime and the other owner of the Sundance Channel being potential buyers. SBV's Chief Executive Officer disclosed this potential conflict of interest to the Smithsonian's Ethics Officer. The Ethics Officer reviewed the disclosure and concluded that the interest did not represent a conflict under the Smithsonian's Standards of Conduct or a prohibited financial interest under federal law because SBV's Chief

¹⁴Smithsonian Directive *SD-103: Smithsonian Institution Standards of Conduct*, dated March 3, 1993, was in effect during the Smithsonian's contract negotiations with Showtime. A more current version, dated February 13, 2006, is now in effect.

Executive Officer did not have a general partnership interest in the Sundance Channel and was not participating in negotiations concerning the sale of interests in the channel.¹⁵ SBV's Chief Executive Officer confirmed that he had no role, and did not participate, in the sale negotiations involving the Sundance Channel. GAO's Ethics Officer reviewed the documentation and the Smithsonian's decision and concurred with the findings.

The Smithsonian Traded Semiexclusive Commercial Distribution Rights to Produce and Distribute Certain Audiovisual Programs Using Smithsonian Content for 30 Years for National Exposure and a New Revenue Stream

The Smithsonian granted the new venture a 30-year, semiexclusive right to produce and commercially distribute certain audiovisual programs using Smithsonian trademarks and/or content in exchange for national television exposure and a new revenue stream. According to a Smithsonian official, the goal was to extend the reach of the Smithsonian nationwide by participating in the development of programming about the Smithsonian's national collections and its research. The new channel is projected to reach more than 31 million households by 2010, which the Smithsonian hopes will increase its brand recognition and have a synergistic effect on other revenues by increasing memberships, merchandise sales, and concession sales through increased visitation to the museums. In soliciting a suitable business partner, the Smithsonian wanted to find a company that would support the Smithsonian's mission and have the financial and technical ability to develop new programs and launch a new digital television channel. Showtime was attracted to the vast amount of Smithsonian content and the Smithsonian's good reputation and widely recognized brand name. Both parties characterized the contract as unique and the year-long negotiations as long and hard fought. Terms of particular interest have been the contract's length, opportunities for contract termination, and the public's ability to access and use the collections, in contrast with the rights the Smithsonian retains over programming content, the revenue Smithsonian will receive, and the expectation of increased exposure to the Smithsonian brand.

The 30-year contract term raised many questions with members of Congress and the public because in relation to other contracts, particularly those that the Smithsonian has entered into for other business activities, it is unprecedented. However, according to officials involved in the contract negotiations, Showtime's joint venture contracts are normally in perpetuity. Generally—and in this case—this is because starting a new

¹⁵ 18 U.S.C. § 208.

channel is a high-risk endeavor that requires a significant investment. Showtime is investing 100 percent of the initial capital in the partnership and is therefore accepting all of the financial risk of the new venture. While Showtime agreed to a shorter term than most of its other media contracts, it has the right, through the new venture, to terminate the contract at certain intervals with or without cause. The Smithsonian may not terminate the contract without cause. However, the Smithsonian negotiated performance benchmarks in the contract that the new venture must meet. The Smithsonian may terminate the contract if the new venture fails to (1) launch its first channel by a specific date, (2) invest a minimum amount of money in programming to be exhibited on the new channel within an initial phase of the contract, and (3) earn a specific amount of average gross revenues by a specific date.

Another question raised has been continued access to and use of the collections by the public. The contract contains no restrictions on public access to the collections. However, the noncompete clauses generally prohibit the Smithsonian from entering into agreements or engaging in activities that would compete with the new venture. Of particular concern is that PBS is identified as a directly competitive service. Additional noncompete clauses provide that the Smithsonian must:

- cease operation of a Smithsonian Web portal called Smithsonian.tv, which was an aggregation of programming available through the Smithsonian's Web site;¹⁶
- not allow others to produce programs of The Smithsonian Associates' "Campus on the Mall" events; and
- not provide any other provider of audiovisual programming with pan-Institutional, "priority" guided access to Smithsonian content similar to that provided to the new venture.

In return, the Smithsonian negotiated a number of exceptions to these noncompete clauses, which are designed to eliminate or minimize their impact on the Smithsonian's normal programming activities. For example, nonrecurring news and public affairs programs; academic and curriculum-based programs; and in certain cases scholarly programs, were all deemed

¹⁶According to Smithsonian officials, this content is being moved elsewhere on Smithsonian Web sites but in a nonaggregated format, which does not compete with the look and feel of an on-demand channel.

not to compete. The Smithsonian was also able to negotiate an exception that allows it to produce a fixed number of programs annually with other entities (one-offs). Initially the Smithsonian is allowed six one-offs annually, but the number is reduced to five when the new channel is available to at least 25 million households. There are a number of other detailed parameters regarding the one-off programs.

While most of the noncompete provisions are relatively straightforward, a provision related to the commercial distribution of scholarly programs was unclear, and Smithsonian and Showtime officials had different understandings of this provision. Under section 6.2.4, the distribution of scholarly materials generally does not constitute competition, with the following limitation:

[the Smithsonian] will not permit any Scholarly Program to be exhibited or exploited by a Commercial Distributor unless [the Smithsonian] first offers such Scholarly Program to the [new venture] for no additional charge to the [new venture], for exhibition and/or distribution by the [new venture].

The provision states that before scholarly programs can be distributed by a commercial distributor, they must first be offered to the venture, but the language is silent about whether it applies only to Smithsonian-generated scholarly programs, or if it also applies to third-party generated scholarly programs. Smithsonian officials stated that it was their intent and understanding that the provision would not apply to third party-generated programs. In contrast, Showtime officials stated that it was their intent to cover the unlikely possibility, however remote, that a scholarly program would be marketed commercially after it was distributed for scholarly purposes. According to Showtime's interpretation, even if the idea for the program was generated by a third party, the Smithsonian would be required to acquire the commercial distribution rights to this program and offer them to the new venture at no cost or not allow the third party to commercially distribute the program. After we raised this issue during our review, the Smithsonian and Showtime reached an agreement stating that the Smithsonian is not required to offer third-party generated scholarly programs to the venture, but it does stipulate that if such program is commercially distributed, it will be counted as a one-off.

In exchange for the concessions made by the Smithsonian and the rights granted to the new venture, the Smithsonian also received a new revenue stream that consists of four components: (1) minimum annual payments starting at \$500,000 for the early years and growing to millions of dollars per year as the contract progresses; (2) a share of revenues to the extent

that the share exceeds the minimum annual payment; (3) an initial 10 percent equity interest in the venture; and (4) an option to acquire an additional equity interest. The annual payments will total a minimum of \$99 million over the 30-year term of the contract.¹⁷ The net present value of the minimum required annual payments is \$45 million.¹⁸ However, a significant amount of the contract's value is more likely to be in the revenue sharing and equity interest components. In addition to the minimum annual payments, the Smithsonian is entitled to a percentage of gross revenues to the extent it exceeds the minimum annual payment. The Smithsonian has the right to sell its equity interest to Showtime for cash for a period after each of the 8th, 10th and 12th anniversaries, subject to certain restrictions. If the Smithsonian exercised this right in year 10, it estimates that the cumulative value of the contract would be more than \$150 million, assuming that it acquired the additional equity in year 5 and sells its total equity in year 10. Of the total estimate, only a small portion would be from the minimum annual payments.

The Smithsonian Has Been Working to Implement the Contract, but It Has Provided Insufficient Information to Interested Parties

Since the contract became effective in January 2006, the Smithsonian has been working to put in place policies and procedures necessary to implement the contract, but the information it has provided about the contract's impact to interested parties has been insufficient. The contract was signed on Thursday, December 22, 2005, and it became effective 10 days later on January 1, 2006. The Smithsonian did not have in place the policies and procedures necessary to implement the contract when it became effective on January 1, 2006, and it did not publicly announce the creation of the new venture with Showtime until March 9, 2006. As a result, decisions on some filming requests received in early 2006 were delayed until March 2006 when the Smithsonian established a central review committee in the Office of Public Affairs to review filming requests for compliance with the contract and began informing its PIOs about the changes to the filming application process.

¹⁷All dollar values in this report are undiscounted and not adjusted for inflation, except when otherwise noted.

¹⁸A 4.55 percent discount rate was used to calculate the present value of the stream of minimum annual payments the Smithsonian will receive under the contract. The source for this discount rate is the nominal (not inflation-adjusted) yield (interest rate) on a U.S. Treasury 30-year bill at the time the contract was signed. See the table "Treasury Bonds, Notes and Bills, January 3, 2006," *The Wall Street Journal*, Jan. 4, 2006, p. C11.

The news of the contract was first reported in *The New York Times* and *The Washington Post* on March 31, 2006, and April 4, 2006, respectively.¹⁹ These and subsequent newspaper articles expressed a number of concerns by filmmakers and other interested parties about the contract. In addition, in late April 2006, the Smithsonian received correspondence from Congress and a group of more than 200 filmmakers, producers, academics, and others expressing concerns about the lack of transparency in the Smithsonian's process and their understanding of certain contract terms. The group noted that there has been an explosion in the creation of documentary films in recent years and that limiting the use of Smithsonian resources will have a chilling effect on creativity, and it argued that the contract violates the mission and purpose of the Smithsonian. In a separate letter to the Smithsonian, the American Historical Association expressed concerns regarding the secretive nature of the contract and the potential violation of the trust of Americans who have donated materials to which they believed the public would have free, open, equal, and nondiscriminatory access in perpetuity.

In response to these concerns and growing criticism of the contract, the Smithsonian responded with letters and mounted a public affairs initiative. In April 2006, the Smithsonian issued a "Statement on Smithsonian on Demand," and on May 4, 2006, it issued a fact sheet on Smithsonian on Demand. The Smithsonian also posted on its Web site a revised list of "Frequently Asked Questions about Filming at the Smithsonian Institution" along with a new filming application form. In response to congressional concerns, the Smithsonian provided a copy of the contract to Congress; and the Secretary of the Smithsonian, along with other Smithsonian staff, appeared before the House Committee on Administration on May 25, 2006, at a hearing about the contract. However, the information that has been disseminated has lacked the specificity necessary to dispel the concerns of interested parties, whether legitimate or based on misinformation; and it has, in some cases, failed to reassure them that the impact will be as limited as the Smithsonian has repeatedly asserted.

To monitor the impact of the contract on filmmakers, the review committee that was established in March 2006 to review filming applications for compliance with the Smithsonian's obligations under the

¹⁹*The New York Times*, "Smithsonian-Showtime TV Deal Raises Concerns," by Edward Wyatt (Mar. 31, 2006); and *The Washington Post*, "Smithsonian Deal With Showtime Restricts Access By Filmmakers," by Jacqueline Trescott (Apr. 4, 2006).

contract developed a spreadsheet to track filming requests. The tracking spreadsheet includes basic information about each filming application, such as the name of the film, producer, distributor, date requested, proposed run-time of Smithsonian content, description of the program, and the review committee's decision to approve or deny an application. While there is a place for the committee to record why an application was declined, the committee does not provide a detailed rationale for decisions in which a film request is either denied because it involved more than incidental use or approved as a one-off. Since the contract does not define the term incidental use, Smithsonian officials said it will be interpreted over time, in practice, by the precedents that the review committee will set with its decisions on individual filming applications. The vast majority of the filming applications involve minimal use of Smithsonian content, so the rationale used for decisions on these applications is not particularly useful in defining what constitutes incidental use. Conversely, the handful of decisions each year in which the review committee determines that more than incidental use is being requested by a filmmaker will be useful in clarifying the Smithsonian's interpretation of incidental use. If the Smithsonian does not document these key decisions in detail, it may be difficult to provide useful information to filmmakers about what constitutes incidental use and ensure accountability with consistent decision making over the term of the contract.

Some of the key characteristics of effective and efficient government programs are transparency and clear criteria that are consistently applied to ensure accountability. Similarly, the Smithsonian should have a process in place for reviewing filming requests that, to the extent possible, is transparent to filmmakers and that has clear criteria that are consistently applied over the term of the contract. However, the Smithsonian has not yet developed a mechanism or process to synthesize its decisions over time to provide filmmakers with additional guidance for their use in developing future filming requests. A review committee member mentioned that the committee directs filmmakers to the Smithsonian's Web site for answers to "Frequently Asked Questions," but it provides little information about Smithsonian on Demand. As a result, filmmakers and other interested parties remain uncertain about what factors the Smithsonian will use in its decision-making process regarding filming requests and in general about the impact of the contract.

In August 2006, the Smithsonian established a separate Smithsonian on Demand Committee to coordinate the Smithsonian's program concepts for submission to the venture, coordinate the Smithsonian's review of programming content, and provide recommendations regarding content

review and other administrative issues related to the contract. As of September 30, 2006, this committee had not had its first meeting to discuss the list of initial programs proposed by the new venture, so it is too early to assess how well this process will work. See figure 2 for a timeline summarizing some of the key events that have occurred during the first 9 months of the contract.

Figure 2: Timeline of Key Contract Implementation and Related Events

2006	Action taken
January	
1	The Smithsonian's contract with Showtime became effective.
March	
Early	Committee was formed to review filming requests for incidental use.
9	The Smithsonian and Showtime publicly announced the new venture.
27	The Smithsonian distributed an internal memorandum regarding implementation of the new contract, and the Office of Public Affairs held its first internal meeting with PIO's to provide information and answer questions about the contract and how it would affect filming requests.
31	<i>The New York Times</i> printed article "Smithsonian-Showtime TV Deal Raises Concerns."
March to June	SBV and the Office of General Counsel conducted several meetings with individual units to explain and answer questions about the venture.
April	
Late March/Early April	The Smithsonian reexamined and enhanced its previous historical use analysis of films (which was conducted for contract negotiation purposes in November and December 2005) to determine how many would have been subject to the terms of the contract.
4	<i>The Washington Post</i> printed article "Smithsonian Deal With Showtime Restricts Access By Filmmakers."
14	The American Historical Association expressed concerns regarding the secretive nature of the contract and the potential violation of the trust of Americans who have donated materials to which they believed the public would have free, open, equal, and nondiscriminatory access in perpetuity.
17	More than 200 filmmakers, producers, academics, and others expressed concerns about the lack of transparency in the Smithsonian's process and their understanding of certain contract terms in a letter to the Smithsonian.
19	The Office of Public Affairs held its second internal meeting with PIO's to provide information and answer questions about the contract and how it will affect filming requests.
24	The Smithsonian sent a written reply to the American Historical Association.
27	In a letter to the Secretary of the Smithsonian, the House Appropriations Subcommittee on Interior, Environment, and Related Agencies requested that the Board of Regents review the contract to determine if it violated the spirit of the Trust.
May	
4	The Office of Public Affairs distributed a fact sheet to the news media regarding the new venture.
5	The Smithsonian provided copies of the contract to the six members of Congress on the Board of Regents.
9	The Board of Regents responded to the House Interior Appropriations Subcommittee's April 27, 2006, letter and stated that the contract was consistent with the Smithsonian's mission.
16	The Office of Public Affairs held its third internal meeting with PIO's to provide information and answer questions about the contract and how it will affect filming requests.
19	The Office of Public Affairs sent a memorandum to PIOs emphasizing the new guidelines for filming at the Smithsonian. The Smithsonian provided redacted copies of the contract to its congressional oversight and appropriations committees.
24	The Smithsonian provided an unredacted copy of the contract to the Committee on House Administration and offered the same to its other oversight and appropriations committees.
25	The Committee on House Administration held a public hearing on the contract.
June	
	A revision of Smithsonian's standard filming agreement was put into use.
August	
10	The Smithsonian established a Smithsonian on Demand Committee to develop program ideas, coordinate the Smithsonian's review of programming content, and provide recommendations regarding content review and other administrative issues related to the contract.

Source: GAO analysis of Smithsonian data.

In general, the Smithsonian has been working to implement the contract. The first priority was to get a process in place to resolve filming requests and now other policies and procedures are being implemented to deal with actual production issues with the new venture. While the Smithsonian on Demand Committee had not yet met to discuss the list of proposed programs as of September 30, 2006, committee members had seen the list and requested additional information on eight of the programs that the new venture is considering for possible exhibition on the new channel that do not involve any Smithsonian content. The provisions of the contract state that, the Smithsonian can comment on the factual, historical, and scientific accuracy of a program and whether the program is consistent with the reputation of the Smithsonian. In response to the Smithsonian's comments on these topics, the new venture must either (1) edit the programs based on the Smithsonian's comments or (2) choose not to exhibit the program. Again, it is too early to know how those discussions and negotiations will play out regarding these eight programs.

The Impact of the Contract on Interested Parties Is Uncertain

The impact of the contract on interested parties is uncertain because it only has been in effect since January 1, 2006, and it is still too early to tell what the long-term impact of the contract will be. Specifically, we reviewed the impact, or potential impact, of the contract in three areas: (1) the direct impact on filmmakers during the first 9 months of the contract; (2) the projected impact on filmmakers based on the Smithsonian's historical analysis of filming contracts for a 6-year period, from 2000 through 2005; and (3) other potential impacts raised by interested parties. During the first 9 months of the contract, from January 1, 2006, through September 30, 2006, two filming requests were denied due to the contract and four were approved as one-offs out of a total of 117 filming requests reviewed by the central review committee. However, it is too early to assess the total impact of the first year of the contract until the remaining 3 months of the year are concluded. Regarding the Smithsonian's historical analysis of filming contracts, we found the Smithsonian's analysis to be unreliable for the purpose of estimating the contract's potential impact, primarily due to incomplete data and oversimplified selection criteria. For example, in some cases, projected run-time was not available on the spreadsheet used for the analysis. Moreover, the criterion used in the analysis was not the same as the criteria being used in practice by the review committee. In the analysis, the Smithsonian defined incidental use as less than 15 percent of projected run-time of Smithsonian content in the film. However, the review committee considers multiple factors about the proposed use of Smithsonian content in making the actual decisions about incidental use. Aside from direct potential impacts on filmmakers, larger

concerns have been raised about damage to the Smithsonian’s image and goodwill. Concerns have been raised by filmmakers, curators, and other interested parties regarding the appropriateness of the Smithsonian limiting the use of the collections held in trust for the American public, as well as other potential impacts, including hampering collaborative partnerships and future donations.

Direct Impact on Filmmakers during the First 9 Months Was Minimal

The direct impact to filmmakers during the first 9 months of the contract has been minimal because, for the requests it has wanted to pursue, the Smithsonian has been able to accommodate those involving more than incidental use of Smithsonian content within its annual allotment of one-offs. During the first 9 months of the contract, the Smithsonian’s central review committee reviewed 117 filming applications, of which 2 were denied due to the contract and 4 were approved as one-offs. The four one-offs were approved to air in various years—one in 2006, one in 2007, and two in 2008. See table 1 for the decisions on remaining applications through September 30, 2006. It is too early to assess the total impact of the first year of the contract until the remaining 3 months of the year are concluded.

Table 1: Filming Application Decisions from January 1, 2006, through September 30, 2006

Action taken on filming application	Number of applications	Percent of applications
Accepted	48	41%
Accepted as a one-off	4	3
Denied for reasons unrelated to the contract ^a	34	29
Denied due to the contract	2	2
Withdrawn or closed ^b	26	22
Pending	3	3
Total	117	100%

Source: GAO analysis of Smithsonian data.

^aReasons for denials at the museum level unrelated to the contract include issues regarding availability of collections or staff or appropriateness of the request.

^bApplications may be withdrawn or closed for reasons such as the filmmaker deciding that they are not going to pursue the film or the Smithsonian not receiving the required information from the filmmaker.

Some interested parties have raised the issue that having a cap on the number of one-offs will cause the Smithsonian to be more selective in the

programs it approves. The Smithsonian has denied two requests due to the contract, even though there was still space available under its one-off allocation. The contract initially included separate limits for “branded” and “nonbranded” one-off programs. A branded program is defined by the contract as a program containing a Smithsonian mark in its title, in its main credits, or, under certain circumstances, in its end credits. The contract originally specified that the initial allotment of six one-offs annually could include no more than three branded and no more than three nonbranded programs. To obtain more flexibility under the contract, the Smithsonian recently reached an agreement with Showtime on new contract language that would eliminate the current requirement that no more than three one-offs can be nonbranded in any given year. Under this agreement up to the total annual allotment of one-offs could be nonbranded, but the number of branded one-offs would still be limited. In addition, during any time period in which the distribution of the new channel reaches 25 million households, the number of branded one-offs allowed is reduced from three to two, and the total annual allotment of one-offs is reduced from six to five. Furthermore, these two branded one-offs can only be exhibited via a broadcast outlet, which is defined as “free, over-the-air broadcast television networks and local television stations.” The initial business plan for the new channel projected that it would reach the threshold of 25 million households by 2008. If the Smithsonian’s projection for the distribution of the new channel is realized, the Smithsonian will only be able to approve three more one-offs for initial airing during 2008.

The Smithsonian’s Historical Analysis of Filming Contracts Is Unreliable and It Should Not Be Used to Estimate the Contract’s Potential Impact

On the basis of a historical analysis of filming contracts over a 6-year period from 2000 through 2005, the Smithsonian contends that it will be able to accommodate the same level of filming activity as it has in the past. However, we found the Smithsonian’s analysis to be unreliable for estimating the potential impact of the contract, primarily due to incomplete data and oversimplified selection criteria. In April 2006, the Smithsonian conducted an in-depth historical analysis of about 350 filming contracts from 2000 through 2005 utilizing information provided in a spreadsheet by the Smithsonian’s Office of Contracting, with input from the Office of General Counsel, to estimate the number of programs that contained more than incidental use of Smithsonian content. In some cases, the actual filming contracts were reviewed by Smithsonian staff to confirm and supplement the information in the spreadsheet. The following criteria were applied to the 350 filming contracts to identify programs with more than incidental use of Smithsonian content:

-
- news, public affairs, academic, curriculum-based, scholarly, and local access programs were excluded from the analysis;
 - programs distributed exclusively on DVD/home video, as a streaming video or webcam or by a foreign distributor without a domestic partner were excluded from the analysis; and
 - of the remaining programs, those projected to use Smithsonian content during more than 15 percent of the program's total run-time were identified as using more than incidental use of Smithsonian content (i.e., 6 minutes of Smithsonian content in a 60-minute program would equal a run-time of 10 percent).

Upon completion of this review, the Smithsonian initially determined that filming contracts for 17 programs involved more than incidental use of Smithsonian content over the 6-year period. This analysis has been a cornerstone of the Smithsonian's assertion that its annual allotment of six one-offs, totaling 36 programs over 6 years, would more than accommodate future demand from filmmakers who wish to use more than an incidental amount of Smithsonian content. The Smithsonian later revised the number of programs on the list from 17 to 23, after asking its museums in June 2006 to provide any additional programs they thought contained more than incidental use that were not accounted for in the original analysis. The individual museums provided six additional contracts that neither the Smithsonian Office of Contracting or the Office of General Counsel had record of.

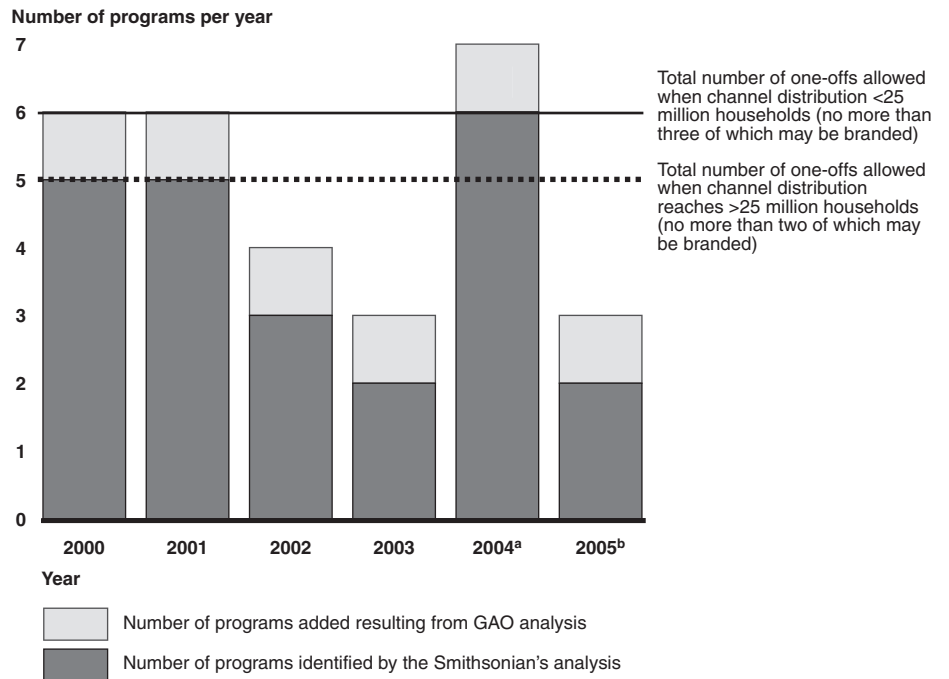
When we attempted to replicate the Smithsonian's analysis, we found several problems with the analysis, which led us to conclude that it is not a reliable measure of the contract's potential impacts. Specifically, we found that the data used in the analysis were incomplete and the selection criteria were oversimplified. Calculating run-times of Smithsonian content was an integral part of the analysis, however run-times were not available for some of the entries in the spreadsheet. Also, some of the filming contracts could not be located to verify or supplement the information in the spreadsheet; and when the filming contracts were available, they did not consistently contain projected run-times for Smithsonian content. Furthermore, the run-times used in the analysis were projected run-times based on the filming contracts and not the actual run-times of Smithsonian content in the final programs. Examples of the oversimplified selection criteria include the following:

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- The Smithsonian used a projected run-time of 15 percent or less of Smithsonian content as its definition for incidental use. However, this criterion is not being used in practice by the central review committee to make decisions about requests to film Smithsonian collections or staff. The central review committee told us that it has not defined the percentage of run-time in a program that would constitute incidental use, but it is instead using a combination of run-time and content to determine what constitutes incidental use. To illustrate the sensitivity of the analysis, using a run-time threshold of just 13 percent, a deviation of 2 percentage points, would add at least nine filming contracts to the list of programs that would have been affected by the contract.
 - Programs distributed via the Internet were excluded from the analysis, but this distribution method may compete with the new venture's activities under the contract. Therefore, at least one program distributed via the Internet should have been included in the analysis.

Through our evaluation of the Smithsonian's analysis, we found at least 6 additional programs that we believe the Smithsonian should have included on its list of 23, raising the total to at least 29 programs. According to the Smithsonian, all of the 29 programs were nonbranded programs.²⁰ To estimate the potential impact of the contract, the 29 programs can be analyzed in two different ways—(1) in aggregate against the total number of one-offs allowed over a 6-year period, which could range from 30 to 36 programs and (2) on an annual basis against the annual allotment of five or six one-offs. By comparing the Smithsonian's original result of 17 programs to a 6-year allotment of 30 to 36 one-offs, the Smithsonian asserted that the contract would have no major impact on outside filmmakers. However, comparing the revised figure of at least 29 programs to the 30 programs at the lower end of the one-off allotment indicates that it is much more likely that outside filmmakers may be impacted by the contract. The annual distribution of the 29 programs exceeded the annual limit of six one-offs in 1 year, and it exceeded the lower limit of five one-offs per year in 3 of the 6 years (see fig. 3).

²⁰A Smithsonian official stated that branded programs generally use the Smithsonian's name in the title of the program, such as "Smithsonian's National Zoo" or "Smithsonian Presents..." or in its main credits.

Figure 3: Annual Distribution of 29 Programs from 2000 through 2005 with More than Incidental Use Based on Smithsonian Filming Contracts



Source: GAO analysis of Smithsonian data.

Note: Like the Smithsonian's analysis, our evaluation was limited by the incomplete data provided in the spreadsheet and cases in which original contracts could not be located to validate information. In addition, while the contract stipulates that the one-off programs will be counted in the year that they are first exhibited or distributed, the Smithsonian's analysis used the year the filming contract was awarded instead, causing an inaccurate estimate of the annual distribution.

^aThe Smithsonian's analysis included one program for which the contract was dated December 2003.

^bThe Smithsonian's analysis included one program for which the contract has not been finalized.

Regardless of the problems with the Smithsonian's historical analysis, the underlying assumption of the analysis that the past demand for filming will be a good forecast of the future demand, may also be flawed. If the new channel is successful and there is an increased demand for programs featuring Smithsonian content, particularly as important historical milestones occur, the future demand may exceed that of the past. For example, one of the filmmakers with whom we spoke highlighted that 2008 will mark the 50th anniversary of the National Aeronautics and Space Administration (NASA), and that there is likely to be a number of requests to film at the National Air and Space Museum for programs commemorating the space program.

Other Potential Impacts Have Been Raised by Interested Parties

Aside from direct potential impacts on filmmakers, larger concerns have been raised about damage to the Smithsonian's image and goodwill. In the minds of stakeholders, these concerns have been exacerbated by the lack of information provided by the Smithsonian about the impact of the contract. Concerns have been raised by filmmakers, curators, and other interested parties regarding the appropriateness of the Smithsonian limiting the use of the collections held in trust for the American public for the direct benefit of a single commercial enterprise, as well as other potential impacts of the contract. Interested parties have also raised concerns and pointed to potential impacts of the contract that may not be directly related to filmmaking, including hampering collaborative partnerships with other entities, future donations, and future availability of Smithsonian material via the Internet. Specifically,

- A PBS member station official with whom we spoke indicated that the station regularly works with museums, such as the Smithsonian, and other entities to create well-known programming. Consequently it was troubling to the official when, in July 2006, a Smithsonian official declined the station's request for the Smithsonian to be listed as a strategic partner on a definitive historical documentary series that it was producing, citing that the contract prohibited it from entering into such a partnership with the station. Recently, however, the station official indicated that the Smithsonian has reopened discussions with the station to collaborate on the effort.
- Individual donors have inquired about the terms of the Showtime contract and how these terms might affect the availability of their donations for use by filmmakers and the general public. While access to the Smithsonian collections has always been controlled and subject to individual donor agreements, limits pertaining to more than incidental use of Smithsonian content, including collections and staff, for the purposes of filming, is a new limitation resulting from the contract. Organizations such as the American Historical Association have expressed concerns that the contract may be a violation of the trust of generations of Americans who have donated materials to which they believed the public would have free, open, equal, and nondiscriminatory access in perpetuity.
- Some interested parties have raised questions about the loss of Smithsonian.tv, which was an aggregation of various Smithsonian programs, and the impact the contract may have on future digitization of the Smithsonian collections for access by the public via the Internet. The Smithsonian has said that the programs formerly aggregated on

Smithsonian.tv are being moved to other pages of the Smithsonian Web site and that the contract will not affect its digitization efforts.

Conclusions

The question of whether or not the Smithsonian's contract with Showtime is in the best interest of the Smithsonian and the American public will only be answered after the passage of time, as events unfold. Moreover, the contract is final and is moving forward; as long as Showtime and the new venture abide by its terms and meet the performance benchmarks, the Smithsonian cannot terminate the contract. If the new channel does well, the Smithsonian could reap significant financial benefits through revenue sharing and the appreciation of its equity interest. If the channel does poorly, the Smithsonian would not lose any money directly because it did not invest any initial capital into the partnership; however, its image and goodwill could be damaged, and opportunities for making alternate use of Smithsonian content during the contract period may be lost.

The Smithsonian recognizes that its public relations have suffered throughout the implementation of the contract, as evidenced by the numerous negative newspaper articles over the past year. While the Smithsonian provides Board of Regents meeting minutes to Congress, they are voluminous and lack tables of contents, and thus may not, by themselves, be the most ideal communication mechanism for alerting Congress to significant policy decisions made by the Smithsonian. Moreover, the Smithsonian did not conduct any additional congressional or public outreach to solicit input or provide information about the television venture concept prior to the contract becoming effective. As such, the Smithsonian lost opportunities to address concerns proactively, and it has instead had to address issues as they arise within the framework of the contract.

We recognize the difficulty associated with trying to establish a clear definition of incidental use of Smithsonian content and understand that the parties to the contract made a conscious decision not to define it in the contract. In practice, the Smithsonian's decisions on the hundreds of filming requests it receives each year, over time, will set the precedent for how the term is defined. However, the Smithsonian does not have a mechanism or process in place to (1) document those key decisions in detail, (2) synthesize those decisions over time into a record of precedents of what constitutes more than incidental use that could be used as guidelines for filmmakers submitting filming requests, and (3) communicate those guidelines to the filmmakers that need it. Without such a process, it may be difficult to provide useful information to

filmmakers about what constitutes incidental use and ensure accountability with consistent decision making over the 30-year term of the contract. Consequently, filmmakers and other interested parties may remain uncertain about what factors the Smithsonian will use in its decision-making process regarding filming requests.

Recommendations for Executive Action

To improve the implementation of the contract and increase the information available to interested parties, we recommend that the Secretary of the Smithsonian take the following two actions:

- fully document decisions for filming applications that are denied because they involve more than incidental use or are approved as one-offs to establish a record of precedents, which will define over time what constitutes incidental use and help to ensure consistent decision making by the review committee;
- update the “Frequently Asked Questions about Filming at the Smithsonian Institution” on the Smithsonian’s Web site to better describe what the contract means for filmmakers, especially as it relates to incidental use of Smithsonian content.

Agency Comments and Our Evaluation

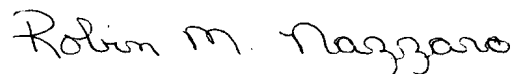
GAO provided a draft of this report to the Smithsonian and Showtime for review and comment. The Smithsonian commented that it generally agreed with our findings and recommendations and will take actions to implement our recommendations. Showtime also generally agreed with the report and endorsed the Smithsonian’s comments. The Smithsonian’s and Showtime’s written comments are in appendixes III and IV, respectively. The Smithsonian and Showtime also provided joint technical comments, which we incorporated as appropriate.

While the Smithsonian generally agreed with our findings and conclusions and intend to take actions to implement both recommendations, the Secretary of the Smithsonian commented on our observations regarding the Smithsonian’s historical analysis of filming contracts. Specifically, the Smithsonian believes that the historical data support its conclusion that the contract’s potential impact will be minimal and that the actual impact to date has been minimal as well. In addition, during the May 25, 2006, House hearing, the Secretary used the Smithsonian’s analysis to assert that under the contract, the Smithsonian had “almost double the capacity” necessary to accommodate future filming requests involving more than incidental use of Smithsonian content. We concluded that the

Smithsonian's historical analysis was not sufficiently reliable to support such an assertion. Notwithstanding any historical analysis, we agree that if the number of filming requests for more than incidental use of Smithsonian content averages around five per year, the Smithsonian will be able accommodate those requests. During the first 9 months of the contract there were six such requests—two were denied and four were approved as one-offs. We acknowledge that the direct impact on filmmakers to date has been minimal. However, because the 30-year contract has been in effect for less than a year, it is still too early to judge the potential impact that the contract may have on interested parties in the future.

We are sending copies of this report to interested congressional committees, as well as the Secretary of the Smithsonian, and Showtime. We will also make copies available to others upon request. In addition, this report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-3841 or nazzaror@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix V.



Robin M. Nazzaro
Director, Natural Resources and Environment

Appendix I: Objectives, Scope, and Methodology

We were asked to (1) evaluate the extent to which the Smithsonian Institution (Smithsonian) followed its internal guidelines with respect to competition, oversight, and protecting against conflicts of interest when negotiating the contract with Showtime Networks Inc., (Showtime); (2) identify what the Smithsonian gave up and received in return under the contract; (3) evaluate the Smithsonian's implementation of the contract; and (4) identify what, if any, impacts the contract has had on outside parties.

To evaluate the extent to which the Smithsonian followed its internal guidelines for competition, oversight, and conflicts of interest, we obtained and reviewed bylaws and meeting minutes for the Smithsonian's Board of Regents and Smithsonian Business Venture's (SBV) Board of Directors, documentation related to a potential conflict of interest, and Smithsonian guidelines regarding contracting and conflicts of interest. We also interviewed the Smithsonian and Showtime officials involved in negotiating the contract. To evaluate the extent to which the Smithsonian followed its guidelines regarding competition, we analyzed information from the boards' meeting minutes and conducted interviews to understand the process by which the Smithsonian developed and solicited the on-demand television concept to potential partners and compared that with SBV's contracting guidelines. Regarding board oversight, we reviewed meeting minutes from both boards to determine the frequency and extent of board involvement in the process. Finally, regarding conflicts of interest, the GAO Ethics Officer reviewed the Smithsonian's Standards of Conduct in effect during the time of the negotiations, the SBV's chief executive officer's disclosure of a potential conflict, and the Smithsonian Ethics Officer's opinion regarding the potential conflict.

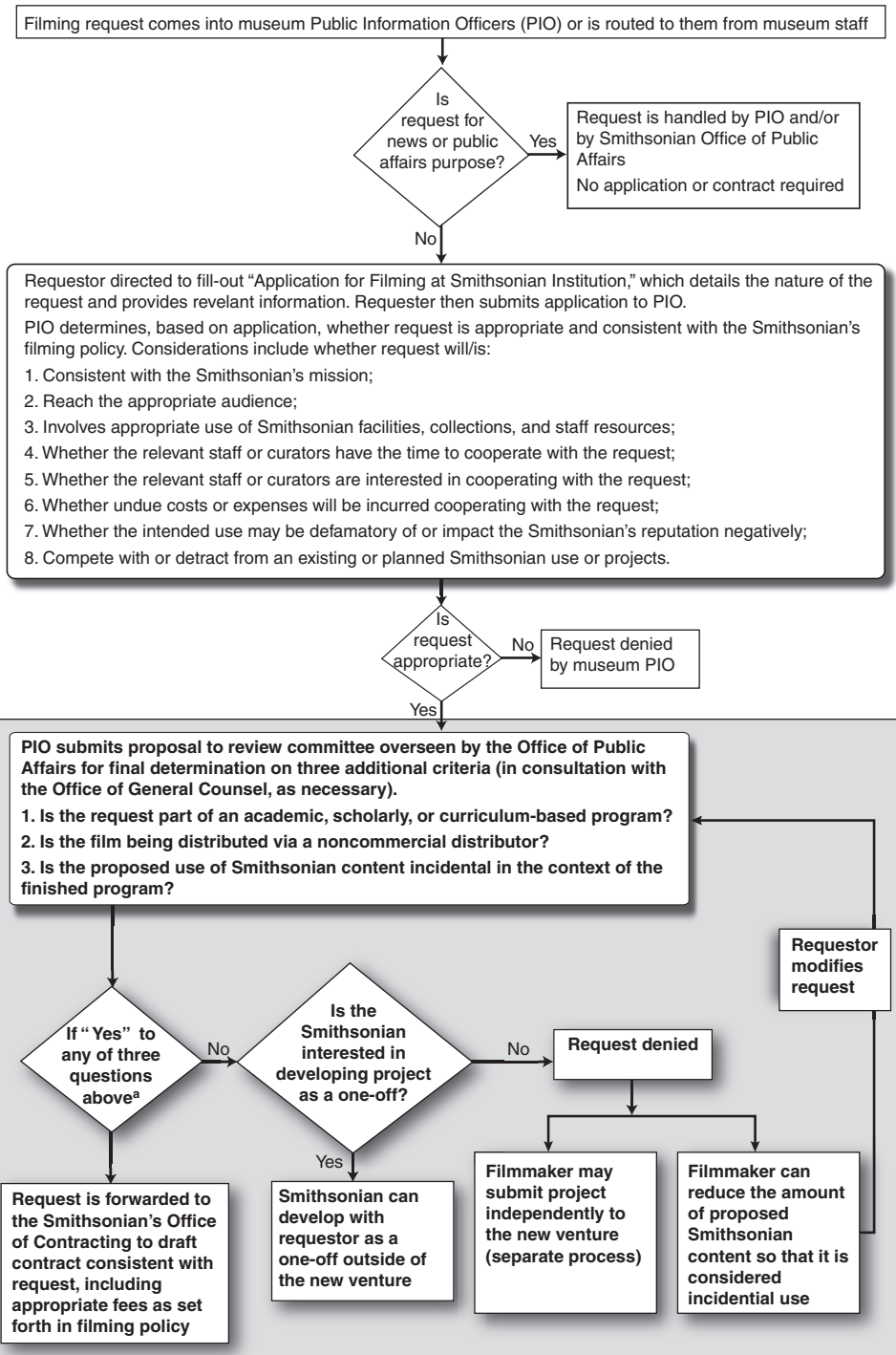
To determine what the Smithsonian gave up and received in return, we reviewed the contract and other Smithsonian documents such as existing directives governing access to the Smithsonian collections. We also interviewed Smithsonian and Showtime officials who were involved in the contract negotiations to determine each party's interpretation of certain contract provisions. We also attempted to evaluate the reasonableness of the contract's term in relation to its economic provisions by comparing the Showtime contract with those of a similar nature, but were not able to identify suitable analogies. We were, however, able to obtain information on typical media contract lengths and provisions through interviews with media industry experts. Finally, we conducted an economic analysis to determine the net present value of the minimum annual payments.

To evaluate how the Smithsonian has implemented the contract, we reviewed relevant Smithsonian documents and interviewed Smithsonian staff that have been involved with implementing changes resulting from the contract. Specifically, we obtained and analyzed the Office of Public Affairs review committee's spreadsheet that is used to track filming requests to determine the total number of filming applications the Smithsonian received between January 1, 2006, and September 30, 2006, the number of applications that were accepted, declined, withdrawn or closed, or pending, and the reasons for the committee's decisions. We also interviewed public information officers from the National Museum of Natural History, the National Museum of American History, and the National Air and Space Museum, which are the museums that receive the majority of filming requests, to get their perspectives on how the filming request process has changed as a result of the contract. In addition, we reviewed other Smithsonian documents pertaining to actions it has taken in response to the contract, such as establishing a committee to develop program ideas, coordinate the Smithsonian's review of programming content, and provide recommendations regarding content review and other administrative issues related to the contract.

To identify what, if any, impact the contract has had on the Smithsonian's operations and outside parties, we reviewed the methodology and results of the Smithsonian's analysis of filming contracts from 2000 through 2005 to determine the reliability of the analysis. We discovered several problems with the Smithsonian's analysis that led us to determine that the analysis was unreliable, and we discuss those limitations in this report. We also interviewed Smithsonian staff that have been involved with implementing changes resulting from the contract and reviewed statements from individuals and organizations that have spoken out about the contract. Finally, we interviewed a selective sample of interested parties that could potentially be affected by the contract. We selected the individuals with whom we spoke from a wide range of disciplines, including filmmakers, curators, and historians.

We conducted our work from June to November 2006 in accordance with generally accepted government auditing standards.

Appendix II: Smithsonian's Filming Application Review Process



Source: GAO analysis of Smithsonian data.

**Appendix II: Smithsonian's Filming
Application Review Process**

Note: The shaded area represents new review procedures put in place as a result of the contract.

^aIn the case of scholarly programs, questions 1 and 2 above must be answered "yes" for the program to be approved.

Appendix III: Comments from the Smithsonian Institution



Smithsonian Institution

Lawrence M. Small
Secretary

December 1, 2006

Robin M. Nazzaro
Director, Natural Resources and Environment
U.S. Government Accountability Office
Washington, DC 20548

Re: GAO's Report on Smithsonian Institution's Contract with Showtime

Dear Ms. Nazzaro:

The Smithsonian Institution is pleased to receive this report from the United States Government Accountability Office (GAO) on the Institution's contract with Showtime Networks Inc (Showtime). We appreciate the time that GAO and its staff took to understand this complicated issue and to approach this topic in a fair and unbiased way.

Overview of Response: Smithsonian Will Implement GAO Recommendations

Aside from the few exceptions discussed below, we believe the report accurately describes the events surrounding the negotiation and execution of the contracts with Showtime, as well as the establishment and implementation of the new filming policies that this contract necessitates. In addition, we agree with both of GAO's "Recommendations for Executive Action" detailed at the end of its report: First, although we currently document decisions on filming requests, we will document them in more detail for the reasons you suggest. Second, we will update our website to provide filmmakers and other interested parties with more information about what the contract means for filmmakers.

Smithsonian Statement on Creation of Smithsonian Networks/Smithsonian On Demand

The Smithsonian Board of Regents, which governs and administers the Smithsonian Institution, is guided in its decisions by the mission described by James Smithson in his will — "for the increase and diffusion of knowledge." Since its inception, the Institution has sought ways to further this mission by bringing attention to its research and collections and by giving Americans every opportunity to share in this wealth of knowledge. For decades, we have attempted to pursue this goal by expanding our outreach initiatives into television and beyond into new technologies. However, due to lack of funding and expertise, this goal was never fully realized and as a result the Smithsonian's research and collections have been the focus of only the occasional television program or documentary film.

Expanding Smithsonian Outreach Into Television Was Long Overdue

In the last few years, the Board of Regents determined that the Institution's significant foray into television was long overdue. They also realized that the only way to secure the investment and expertise necessary to establish a meaningful media presence was to

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partner with a large, established multimedia corporation. Given these requirements, only a limited number of media companies in the world were suitable for this kind of partnership. The process, which was overseen by the Smithsonian Board of Regents and the Board of Smithsonian Business Ventures, was fair and transparent. Only after much research and deliberation, and adherence to standard commercial business practices, was Showtime selected as the partner for this groundbreaking venture. In partnering with Showtime to create Smithsonian Networks, the Board of Regents created a significant opportunity to further the mission of the Institution. This opportunity is being realized in a number of ways.

Benefits of the Smithsonian/Showtime Agreement

First, the agreement already is generating an exponential growth in filming projects featuring Smithsonian content that ultimately will be available to millions of people via the venture's networks, the first of which is expected to be *Smithsonian On Demand*. Right now many of our museums are assisting in the production of dozens of new films featuring Smithsonian objects, Smithsonian curators, and Smithsonian buildings. Examples of these films are:

- ❖ *America's Hangar*: The story of the National Air and Space Museum, home to the largest collection of aircraft and spacecraft in the world.
- ❖ *Saving Stuff*: The Smithsonian's leading preservation expert and best-selling author Don Williams explains how to preserve family histories and heirlooms.

This current filming activity far exceeds anything we have seen in the past and is providing an unprecedented opportunity to share Smithsonian research and collections with a television audience. Also, this filming activity is already generating millions of dollars of work for many filmmakers, offering them the opportunity to produce and distribute new or existing films through Smithsonian Networks.

Second, due to Showtime's significant investment of capital, the agreement allows the Smithsonian to participate in the creation of television programming about the Institution in a way never possible before. The contract requires Smithsonian Networks to produce annually as many as 15 programs based on ideas proposed by the Smithsonian. These programs will feature areas of research and of the collections of the Smithsonian that the Institution especially wants to be presented to the public. Examples of these programs are:

- ❖ *Smithsonian Treasures*: A look at 150 unique objects in the Institution's collections that have defined American culture over the last 200 years. The film will tell the story behind objects such as Jackie Kennedy's inaugural gown, Muhammad Ali's boxing gloves, and Lewis and Clark's compass.
- ❖ *Ghost Cat: Saving the Clouded Leopard*: This film will spotlight the work of Smithsonian National Zoo veterinarian Dr. JoGayle Howard and her extraordinary reproductive research on the elusive Clouded Leopard. The film draws attention to the Smithsonian's role as a leading scientific institution that is pioneering procedures to save endangered species.

Third, the contract specifies that the Smithsonian has the right to review all programming to be aired by Smithsonian Networks and approve each program for factual accuracy and consistency with the reputation and integrity of the Smithsonian name. To facilitate these responsibilities, the Smithsonian has chosen to create a pan-Institutional committee made up of Smithsonian scientists and curators which is reviewing the rough and final cut of films for factual accuracy and consistency with the Institution's reputation. The committee also solicits and recommends ideas from around the Institution for the programs that the Smithsonian submits to the venture each year. In sum, the partnership with Showtime is enabling the Smithsonian to participate significantly in the creation of substantial amounts of television programming about the Institution for the first time in its history.

Fourth, the agreement provides substantial financial benefits for the Institution. As GAO confirmed, the agreement requires Showtime to make all of the financial investments in Smithsonian Networks and *Smithsonian On Demand*. Given the Institution's budget situation, it would have been impossible for the Smithsonian to expand its outreach into television and new technologies without this commitment. Only with Showtime's major investment of capital, and their accompanying technical and business expertise, will we be able to realize this goal. Furthermore, the contract's required licensing and royalty payments to the Institution are projected to generate millions in unrestricted trust revenue for the Institution, enabling it to better fulfill its mission by enabling improved and expanded research, exhibitions, and outreach programs.

Access To Smithsonian Collections Is Not Affected; Restrictions On Use of Smithsonian Collections Are Minimal And Rare

The substantial benefits provided by the establishment of Smithsonian Networks and *Smithsonian On Demand* far outweigh the cost of agreeing not to undertake certain activities. We understand that this contractual commitment has caused great concern for many researchers and filmmakers who have worked with the Institution in the past and hope to work with us in the future. We value these relationships and want these individuals and groups to know that, as in the past, they are always welcome to request access to our collections and they can continue to rely on the Smithsonian for our expertise and participation in their research or filming projects.

As is our responsibility, and has always been the case, the Institution maintains the right to restrict access to and use of our collections for many reasons (for example, if it would cause damage to an item in our collections, if it would interfere with the Institution's intended use for its collections, if it would be beyond the Institution's administrative or staffing resources, or if it would cause harm to the Institution's reputation). These usual restrictions aside, the arrangement with Showtime has no impact on "access" to our collections and staff, while "use" of our collections and staff by commercial filmmakers is only minimally affected. (In this context, "access" is the ability to view, research, read, or interview, while "use" refers to the ability to photograph or film with the intent to distribute commercially.)

Ultimately it is in our best interest to encourage production of good films about the Smithsonian, which is why we approve dozens of filming requests across the Institution each year. When we decline filming requests, we almost always do so because of issues that have nothing to do with the Showtime contract (for example, the topic suggested is

not within our expertise, the object sought is not in our collections, or the curator sought is not available at that time). As GAO's report confirms, the vast majority of requests to film at the Institution are being evaluated and approved as always: Requests from news and public affairs programs, requests for the production of academic, scholarly or curriculum-based programs, and requests relating to the production of programs that will not be distributed commercially are outside the scope of this contract and are thus unaffected; commercial television and film projects which intend to use Smithsonian content in a way that is only "incidental" to the overall program are not affected either.

The only programming which could be affected by the "non-compete" provision in the contract is certain types of programs which contain "more than incidental use" of Smithsonian content. Thus far, as we expected based on past experience, the number of programs that fall within this narrow category of competitive programs is tiny: as of November 30, 2006, only two out of 130 filming requests have been denied on these grounds. In addition, for those filmmakers who seek to feature a substantial amount of Smithsonian content in a program to be exhibited by a commercial distributor, there are several options: First, the filmmaker may decide after consulting with the Smithsonian to reduce the amount of Smithsonian content so that it is "incidental" to the overall film. Second, the filmmaker may choose to (but is not required to) contact Smithsonian Networks to see if it would be interested in working on and airing the film. Third, the Smithsonian may choose to allow the program as one of its annual "one-offs" (a program that is permitted under the contract even though it may compete with the venture but which the Smithsonian deems an important project and wants to allow). Thus far, we have selected a total of four programs as "one-offs" which will be counted against our allotments in the years in which these programs are expected to air. Based on our predictions, and supported by the actual requests we have received this year, it appears that the annual one-off allotment is sufficient to meet the demand for outside commercial projects featuring "more than incidental" Smithsonian content.

Only if these three outcomes are not viable – which occurs in only a very small number of cases as the data above support – would a filming proposal be rejected for reasons related to the contract. However, given these many options, we are confident that filmmakers will continue to work successfully with the Smithsonian for many years to come.

In sum, the contract with Showtime enables the Smithsonian to further its mission via the creation and distribution of hundreds of hours of quality television programming while approving each program's factual accuracy and consistency with the Institution's reputation, incurring no financial risk, generating millions in revenue, permitting traditional access to Smithsonian collections, and only rarely restricting the use of Smithsonian collections in competing filming projects. The Smithsonian Board of Regents weighed the advantages and constraints of the new partnership and concluded it was overwhelmingly more likely to allow the Institution to "increase and diffuse knowledge" and provide significantly increased benefits to the millions of Americans whom we inform, educate and enlighten each year.

Responses to Issues Raised by GAO

1. Current Data Supports Expectations Based On Historical Review of Smithsonian Filming Requests

GAO contends in its report that the Smithsonian's historical review (2000-2005) of filming contracts was unreliable and not a good indicator of how the Showtime agreement will impact future filming requests. Specifically, GAO states that the true number of programs potentially affected during this period was not 17, as the Smithsonian contended in its initial statements, but was actually closer to 30.

The purpose of this historical analysis initially was to inform the Smithsonian's contract negotiations with Showtime, and later to provide some estimated figures for how future filming requests might be affected by the contract's "non-compete" provisions. We acknowledge that the statistics gleaned from this analysis were not perfect. One reason for the discrepancies noted by GAO is that in the past the process for filming requests was decentralized and unit-specific, an obstacle that no longer exists under the newly established central oversight for this process. (Beginning earlier this year, the Smithsonian created a pan-Institutional committee, overseen by the Smithsonian Office of Public Affairs and reporting to the Deputy Secretary, to track written filming requests at all of our museums and research centers and to review filming requests for compliance with the contract. This new centralized process, which was not in place during the period of this historical review, is enabling us to track more accurately and respond more consistently to requests to film at the Smithsonian.) In addition, the historical analysis was imperfect because it was based only on paper records of filming requests. In many cases the information missing from these paper records would have been available by talking with a filmmaker. Those personal interactions were not possible for this historical analysis, but are routine when a Smithsonian public information officer evaluates an actual filming request.

These explanations notwithstanding, it is important to note that whether this historical analysis yielded 17 or 30 potentially affected programs, the fact remains that the contract's potential impact on filming projects was minimal and that its actual impact to date, which is supported by the data cited above and by GAO, is minimal as well. It bears repeating that since the contract has been in place, only two projects have been denied as a result of the non-compete provisions. Even if, as GAO surmises, the demand for filming at the Institution increases, there is no reason to suspect that these requests will not mirror the type of requests we have received in the past and thus will be able to be accommodated as allowed by the contract. In fact we hope and expect that the number of filming requests will grow and that the increased exposure for our collections and research will outweigh the rare need to decline a request because it would compete with the venture. Therefore, although the specific number of potentially affected programs drawn from the historical analysis may have been imprecise, the conclusions drawn from this number are reliable and are supported by the current data.

2. Delayed Contract Announcement and Implementation Was Inevitable

GAO contends that the Smithsonian's delay in announcing the formation of the contract and in explaining and implementing new filming policies caused undue public confusion.

The public announcement of the Showtime contracts, and the explanation and implementation of new policies based on the contracts, was delayed after the contracts were signed in late December 2005. Part of the reason for this delay was the need to make initial decisions about the hiring of key staff. To announce the agreement and the formation of the venture before these basic elements were in place would have been

premature. In addition, the unique and complicated nature of this deal made it difficult for the Smithsonian to anticipate the kinds of revisions to its policies and procedures that would be needed to implement this pan-Institutional contract. Without prior experience in television production on this scale, it took some time for the Institution to decide how best to implement these new procedures and explain them to internal and external audiences.

These explanations notwithstanding, we may not have done enough initially to inform others about how the contract would affect existing Smithsonian policies and procedures. We have since addressed most of these misunderstandings with the groups most affected by the agreement (researchers and scientists, filmmakers, television networks, and Smithsonian staff) through numerous meetings, conversations and written correspondence. Nonetheless, we accept GAO's criticism here and will strive to be more informative and inclusive in the future as we seek input from and provide information to Congress, Smithsonian staff, the academic community and filmmakers.

3. Smithsonian Will Enhance Information Provided to Filmmakers and Other Interested Parties

GAO contends that the Smithsonian is not providing enough information to filmmakers and other interested parties about the contract's requirements and the rationale for filming request decisions.

Although the Smithsonian is not a federal agency, we strive for transparency and rationality in our policies and decisionmaking. Therefore we agree with GAO's "Recommendations for Executive Action" that we should enhance the information about the contract available on our website to filmmakers and others, and should commence a more detailed recording of the rationale for decisions on filming requests.

As to GAO's first recommendation, we are now documenting in more detail our decisions on filming applications. These decisions will help illustrate, among other things, how the term "incidental use" of Smithsonian content is being applied with respect to actual filming requests, and what kinds of programming proposals are being approved as oneoffs.

As to GAO's second recommendation, we have begun to update our websites to provide filmmakers and other interested parties with more information about what the contract means for filmmakers. This updated information — which will be available on both our public website (www.smithsonian.org) and our press website (newsdesk.si.edu) — will include a revised and enhanced "Fact Sheet" about *Smithsonian On Demand* and descriptions of the kind of programming that will be shown on *Smithsonian On Demand*. In addition, we plan to add new "Frequently Asked Questions" specifically focused on the issues of how the contract operates and what impact it may have on filming requests. Lastly, we are crafting a short document that would describe the criteria the Institution may consider when evaluating whether a filming request would require "more than incidental use" of Smithsonian content. As additional questions and issues arise, we will continue to update and enhance the materials on our website so that they are current, useful, and informative.

**Appendix III: Comments from the
Smithsonian Institution**

Smithsonian Retains Flexibility to Evaluate Filming Requests on Case-by-Case Basis

In support of both of these recommendations, GAO expressed concern that filmmakers do not currently understand what constitutes “incidental use” of Smithsonian content as described by the contract. Throughout contract negotiations with Showtime, we indicated our preference to not adopt a rigid formula to define the term “incidental use,” and have resisted attaching a specific run-time percentage to this assessment. We continue to believe that having a flexible standard which can be assessed on a case-by-case basis will enable a more thorough and tailored application of this requirement, ultimately benefiting both the Smithsonian and outside filmmakers.

As for how filmmakers will navigate this standard, it is important to note that the consideration of filming requests often takes the form of a dialogue between Smithsonian’s Public Information Officers (PIOs) and filmmakers. During these discussions, a PIO can ask detailed questions about the filming request and may offer, among other things, advice as to how a particular request might be amended to increase the chances that it will comply with the contract’s provisions. It is often easier for filmmakers to discuss the details of their specific project with a PIO rather than try to discern our likely response solely by reviewing written materials. We believe these conversations, combined with the enhanced information that GAO has recommended we add to our websites, will provide filmmakers with the information they need to adequately inform their requests for filming at the Smithsonian.

Thank you again for your detailed and balanced review of the issues surrounding this process. We hope that you found our responses forthcoming and we welcome the opportunity to work with you again in the future.

All the best,

A handwritten signature in black ink, appearing to be 'S. M.', is written below the text.

Appendix IV: Comments from Showtime Networks Inc.



Matthew C. Blank
Chairman and
Chief Executive Officer

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Via Email and Air Courier

December 1, 2006

Robin M. Nazzaro
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street N.W.
Washington, D.C. 20548

Re: GAO Report - Smithsonian's Contract with Showtime

Dear Ms. Nazzaro:

Showtime Networks Inc. (Showtime) would like to express its appreciation to the U.S. Government Accountability Office (GAO) for taking the time to talk with several of us and to thoughtfully analyze the various agreements relating to our venture with the Smithsonian Institution, SNI/SI Networks LLC (also referred to in this letter as Smithsonian Networks or the venture).

We know that the agreements are dense and complicated and that the concerns expressed by some filmmakers, historians, members of Congress and others about the venture are genuinely felt. Some of these concerns relate solely to the Smithsonian Institution, and some relate to the effect the venture may have on third parties. Given the difficult task assigned to GAO, we believe that it has done a thorough job of identifying these concerns and explaining the contractual provisions that pertain to these concerns. As the GAO report indicates, the Smithsonian Institution agreed to refrain from certain activities deemed competitive with the venture, but it did so in order to receive the numerous benefits afforded by the venture. These benefits include an unprecedented opportunity to fulfill its mission to "increase and [diffuse] knowledge" by obtaining national television exposure for Smithsonian research, scholars and collections, extending the recognition of its brand, and receiving substantial direct financial returns from the venture, which in turn can be used to fund the myriad other activities of the Institution. We trust that GAO's considered and dispassionate report will be helpful in connection with any future public dialogue about the venture.

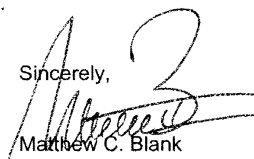
**Appendix IV: Comments from Showtime
Networks Inc.**

Several of the concerns cited in the GAO report relate specifically to policies and practices of the Smithsonian Institution, and we believe those topics are best addressed by the Institution itself. Accordingly, our partner, the Smithsonian Institution, is today submitting to GAO a response covering these points. As partners in this new venture, however, we will gladly do our part in providing the Institution with any assistance it may desire as it implements the GAO recommendations discussed in its response.

As managing partner of Smithsonian Networks, we look forward to devoting our time and energy to the exciting tasks of creating dynamic programs, designing our new channels, and securing distribution agreements for these channels so that millions of Americans will, for the first time, be able to see hundreds of hours of great programs about the Smithsonian and other family-appropriate, high-quality programs on historical, scientific, and cultural subjects.

Thank you again for soliciting our views and for so carefully considering the various venture agreements.

Sincerely,



Matthew C. Blank

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

Robin M. Nazzaro, (202) 512-3841, nazzaror@gao.gov

Staff Acknowledgments

In addition to the individual named above, Jeffery D. Malcolm, Assistant Director; Jean Cook; Michele Fejfar; Richard P. Johnson; Jamie J. Meuwissen; and Anne Stevens made key contributions to this report. Also contributing to the report were John Finedore, Carol Kolarik, Alison O'Neill, Jena Y. Sinkfield, and William Woods.

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