

**FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

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In Reply Refer to:

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EB-00-IH-0135/0136/0137/0138

CMW

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Dear Mr. Dean:

This letter terminates the Enforcement Bureau's investigation of NORML<sup>1</sup> Foundation's February 17, 2000, complaint against ABC Television Network ("ABC"), CBS Corporation ("CBS"),<sup>2</sup> National Broadcasting Company, Inc. ("NBC"); Fox Broadcasting Company, Inc. ("Fox"), and The WB Television Network ("WB") (collectively, the "Networks"). NORML alleges that the Networks entered into agreements with the Office of National Drug Control Policy ("ONDCP"), whereby the Networks received compensation from the ONDCP in return for airing programming that contained anti-drug or anti-alcohol themes. NORML further alleges that the Networks did not disclose such compensation in violation of the sponsorship identification requirements of 47 U.S.C. §§ 317 and 508, and 47 C.F.R. § 73.1211. The Enforcement Bureau issued letters of inquiry to the Networks on April 18, 2000, and each network filed a separate response. By letter dated, June 22, 2000, NORML filed a consolidated reply to the Networks' responses. For the reasons set forth below, we find no basis to take enforcement action.

**BACKGROUND**

In 1998, Congress passed legislation requiring the ONDCP to conduct a national media campaign in an effort to reduce and prevent drug abuse by young people in the United States. *See* 21 U.S.C. § 1801. The legislation required that funds spent by the ONDCP on its national media campaign must "be matched by

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<sup>1</sup> NORML is an acronym for the National Organization for the Reform of Marijuana Laws.

<sup>2</sup> Subsequent to the filing of the complaint, CBS Corporation merged with Viacom, Inc., with Viacom becoming the surviving parent corporation. Since this matter involves CBS Television Network programming, for clarity we will refer to the company as CBS throughout this letter.

an equal amount of non Federal funds for the national media campaign, or be matched with in-kind contributions of the same value.” 21 U.S.C. § 1802(c).

As part of its National Anti-Drug Media Campaign, the ONDCP entered into arrangements with the Networks, beginning in 1998 and continuing at least as of the date of the Networks’ responses, whereby the Networks would be compensated for airing anti-drug/anti-alcohol messages. There are apparently no written agreements between the ONDCP and the Networks. Rather, the Networks’ responses to our inquiries state that the understandings were reached through numerous memorandums, letters, e-mails, phone calls, meetings, and spot orders. In addition, the ONDCP’s expectations of the Networks are set forth in guidelines entitled “Statement of Pro-Bono Match Program and Guidelines,” “Pro Bono Media Match Guidelines,” and “ONDCP ‘Match’ Guidelines” (collectively referred to as the “Guidelines”), copies of which were attached to the responses submitted by CBS, NBC, and Fox. These Guidelines were revised periodically and apparently distributed to the Networks.

At the outset, the ONDCP purchased advertising spots on each of the Networks with the understanding that the Networks would “donate a matching amount of media time and space.” “Statement of Pro-Bono Match Program and Guidelines,” Executive Summary, Exhibit B to Fox response. The ONDCP allowed the Networks to obtain matching credit for the broadcast of public service announcements (“PSAs”) provided by the ONDCP; the broadcast of programs containing story lines depicting the consequences of drug or alcohol abuse; and for undertaking other non-broadcast community initiatives designed to educate young people about the negative consequences of drug and alcohol use. The Networks were required to satisfy at least 51% of their matching obligations by the broadcast of PSAs, but were free to determine how to satisfy the remaining matching obligations, within the parameters outlined in the Guidelines. All five of the Networks chose to satisfy part of their matching obligations by broadcasting programming with anti-drug or anti-alcohol themes.

## DISCUSSION

Section 317(a)(1) of the Act provides, in pertinent part, that:

All matter broadcast by any radio station for which money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

47 U.S.C. § 317(a)(1).

Similarly, Section 73.1212(a) of the Commission’s rules provides:

When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce:

- (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and
- (2) By whom or on whose behalf such consideration was supplied ...

47 C.F.R. § 73.1212.

Section 507 of the Act requires both producers and suppliers of programs to report the receipt of any such consideration to the licensee or licensees over whose facilities the program is to be broadcast. 47 U.S.C. § 508(b). Moreover, in cases where such disclosure is made, appropriate sponsorship identification is required. 47 U.S.C. § 317(b).

Sponsorship identification requirements were first imposed upon broadcasters by the Radio Act of 1927 and the basic purpose of such requirements has not changed since that time: “listeners [and viewers] are entitled to know by whom they are being persuaded.” *Applicability of Sponsorship Identification Rules*, 40 FCC 141 (1963), *as modified*, 40 Fed Reg. 41936 (September 9, 1975).<sup>3</sup> Thus, the audience must “be clearly informed that it is hearing or viewing matter which has been paid for, when such is the case, . . . and the person paying for the broadcast of matter [must] be clearly identified.” *Midwest Radio-Television, Inc.*, 49 FCC 2d 512, 515 (1974), *citing National Broadcasting Company* 27 FCC 2d 75 (1970). The language of the statute is very broad, requiring sponsorship identification if any type of valuable consideration is directly or indirectly paid or promised, charged or accepted. The Commission has consistently upheld these strict identification requirements. *Universal Broadcasting Co. of Minneapolis-St. Paul, Inc.*, 51 FCC 2d 597, 602 (1975), *forfeiture reduced*, 58 FCC 2d 1367 (1976), *citing Sponsorship Identification Rules*, 34 FCC 829, 894 (1963) (The Commission’s “strict identification requirements” should not be relaxed because “[p]aramount to an informed opinion and wisdom of choice . . . is the public’s need to know the identity of those persons or groups who elicit the public’s support.”).

NORML asserts that the ONDCP “used financial incentives to get television networks to work anti-drug messages into the scripts of some popular TV shows.” NORML complaint at 2. NORML contends that the public has a right to know that the Networks’ programming is being influenced by the ONDCP and that the failure to disclose such information violates the Commission’s sponsorship identification requirements.

The Networks claim that the broadcast of programming with anti-drug/anti-alcohol themes did not require sponsorship identification. WB argues that this case is similar to other situations where the Commission found that sponsorship identification was not required. Specifically, WB states that the Commission “has made clear that no [sponsorship identification] announcement is required where a government or private entity provides a press release to a broadcaster, which uses editorial comment therefrom on a program; when a university makes a professor available to give lectures on a broadcast program; or when a bus company produces a scenic travel film which it provides for free, even if one of its busses is fleetingly shown.” WB response at 6, *citing Applicability of Sponsorship Identification Rules*, 40 FCC 141 (1963), *as modified*, 40 Fed Reg. 41936 (September 9, 1975), referring to examples 11, 19, and 26.

The Networks also argue that no sponsorship identification is required because at the time the programs were broadcast they did not know whether or not matching credit would be obtained, citing to *Metroplex Communications, Inc. (WHYI-FM)*, 5 FCC Rcd 5610 (1990), *review denied sub nom. Southeast Florida Broadcasting Limited Partnership v. FCC*, 947 F.2d 505 (D.C. Cir. 1991). In some cases the programs were submitted for approval prior to broadcast, but in all cases, approval was not obtained until after the original broadcast. Even those Networks that sought ONDCP’s “technical” advice with respect to the handling of certain themes,<sup>4</sup> claim that such discussions were completely separate from the process by

<sup>3</sup> See also *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983), for a detailed discussion of the legislative history of sponsorship identification requirements.

<sup>4</sup> In two episodes, WB added a tag line to the program acknowledging that it received technical assistance from the ONDCP. Specifically, the tag line stated: “Technical Guidance Provided by the Office of National Drug Control Policy Education Branch.” WB response at 5. Such a disclosure would not, however, satisfy any sponsorship (continued....)

which matching credit was obtained.<sup>5</sup> Additionally, the Networks assert that they would have broadcast programs with such themes even without their understanding with the ONDCP and, in fact, that prior to reaching their understanding, they had aired such shows. Finally, ABC, CBS, Fox, and WB argue that in some cases programs were not awarded matching credit and that had they aired sponsorship identification, it would have been misleading to the public.

NORML acknowledges the Networks' concern about airing sponsorship identification prior to actually receiving the ONDCP's approval of programs for credit. However, despite this issue, NORML, in paraphrasing the statute, argues that sponsorship identification is required because "certain matters were broadcast (anti-drug messages imbedded in program content) for which valuable consideration (match credit) was indirectly paid (by freeing up ad time to sell), promised (through the Guidelines), charged (by submission by the networks of materials for credit) or accepted (on numerous occasions), by the station so broadcasting (all of the television networks in question), from a person (ONDCP) without any announcement that such payment was made." NORML reply at 6. Moreover, NORML contends that where the Networks submitted a script to the ONDCP prior to the broadcast of a program, or where the Networks consulted ONDCP as to the program content, the Networks had a "reasonable expectation" that they would be given matching credit for the program. Finally, NORML asserts that the Networks should have at least included sponsorship identification messages when they rebroadcast programming for which the ONDCP had already approved credit, especially if additional credit was obtained for the rebroadcast.

There are two fundamental issues in this case. First, did the credit that the Networks received toward satisfaction of matching obligations constitute consideration for broadcasting programming with anti-drug and anti-alcohol themes? Second, if so, was such consideration paid or promised, charged or accepted, prior to the broadcast of the programming at issue?

The Networks were obligated to donate a matching amount of media time for every advertising spot purchased by the ONDCP. Thus, we find that any credit toward that obligation that the Networks received for the broadcast of programming with anti-drug and anti-alcohol themes constitutes consideration. This case is clearly distinguishable from the examples cited by WB, where the Commission found no consideration was received. In all of the cited examples, the broadcast station received material from an outside source, but aside from the provision of material, did not receive any consideration for its broadcast. In this case, the Networks actually received consideration for the broadcast of the material at issue. Moreover, in all of the cited examples, the Commission made clear that if consideration in addition to the provision of service or property were provided, sponsorship identification would be required. 40 Fed Reg. at 41938 at subheading D and n. 3.

We similarly reject the Networks' arguments that sponsorship identification is not required because the Networks were broadcasting anti-drug and anti-alcohol material prior to the establishment of the ONDCP's National Anti-Drug Media Campaign in 1998. The Commission has found that sponsorship identification is required even when the licensee had previously broadcast similar programming without receiving

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identification requirement as it does not reveal that consideration was received for the broadcast of the program. See *Midwest Radio-Television, Inc.*, 49 FCC 2d 512 (1974).

<sup>5</sup> Exhibit D to the "Statement of Pro-Bono Match Program and Guidelines," April 21, 2000, states that the ONDCP's technical assistance and consultation services are "entirely separate from the Pro-Bono Match process and in no instance will people associated with the Strategic Message Review process be involved with providing technical assistance or consultation." See Exhibit B to Fox's response.

compensation.<sup>6</sup> See *Waiver of Requirements of Section 317 of the Communications Act Granted to State Broadcasters' Association in Connection with NCSA Plans*, 45 FCC 2d 655, 656 (1974) (subsequent history omitted) (sponsorship identification necessary despite the fact that “contributing organizations had for many years received time, announcements and similar cooperation from radio stations without regard to any contribution made to the Association.”). If compensation was paid or promised, charged or accepted at the time of the broadcast, sponsorship identification is required even if the station has previously aired such programming without receiving compensation.

A more difficult issue presented in this case is whether or not at the time of the original broadcast of a program, the consideration had been paid or promised, charged or accepted. While there is no doubt that there was an understanding between the Networks and the ONDCP, it is difficult to find that such an understanding rose to the level of a promise to compensate the Networks for the broadcast of specific program material. Instead, at most, ONDCP promised that it might compensate the Networks for programming that contained anti-drug or anti-alcohol themes. The record indicates that compensation was never provided prior to the original broadcast of a program. Moreover, while the Guidelines provide insight as to what types of programming might be eligible for compensation, the Guidelines are very subjective, providing only general ideas as to the themes the ONDCP would consider appropriate for matching credit. There is no certain guarantee of compensation. In fact, the information before us reveals that in a significant number of cases, the ONDCP rejected the Networks' submission of programming for matching credit. Even where the Networks or program producers sought the ONDCP's “technical advice,” there does not appear to have been a promise of compensation, notwithstanding the fact that the Networks' anticipation of compensation may have been greater in such cases. In such circumstances, we cannot find that the Networks violated our sponsorship identification rule. Indeed, had the Networks indicated that they had received consideration or a promise of consideration from the ONDCP in connection with all the programs, the result for a not insignificant number of the programs would have been to mislead the public into believing the ONDCP was a sponsor when it was not. This would run counter to the purpose of the rule. While the interest of providing full information to the public might have been served by disclosure that consideration from the ONDCP might be received in the future, we find nothing in the statute or the rules requiring disclosure of such possible future consideration.

Finally, we look to whether or not sponsorship identification was required for the repeat broadcast of a program for which the Networks already received matching credit. The facts before us reveal that the Networks did broadcast repeat programs and did receive matching credit for having done so, although usually at a lower percentage than the original broadcast. The record is, however, unclear as to whether or not the Networks had already received matching credit for the original broadcasts at the time the repeat broadcasts were aired. To the extent that credit had already been obtained for the original broadcasts and the Networks were aware that they would be compensated for repeat broadcasts, there was more than just a mere anticipation of possible compensation. Thus, in those cases, sponsorship identification is required and we caution the Networks to do so in the future. Given the complexity of this situation, however, we do not believe that a sanction is warranted for any repeat broadcast of programs that did not contain appropriate sponsorship identification. The need to include sponsorship identification in the repeat broadcasts was perhaps not clear to the Networks, and certainly not clear to stations that broadcast network programming (particularly those that are not owned by the Networks).

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<sup>6</sup> ABC states that some of the programs for which it received matching credit were actually aired prior to the time it reached an understanding with ONDCP. Where the programs were broadcast prior to any understanding between ABC and the ONDCP regarding the National Anti-Drug Media Campaign, there is no question that sponsorship identification would not be required.

Accordingly, for the reasons set forth above, we will not take any further enforcement action in response to NORML's complaint and we consider this matter closed.

This action is taken under delegated authority pursuant to Sections 0.111 and 0.311 of the Commission's Rules, 47 C.F.R. §§ 0.111, 0.311.

Sincerely,

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Chief, Enforcement Bureau

cc: Mr. Franco Garcia, Executive Counsel, Corporate Legal Affairs, ABC, Inc.  
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