

Know When to Say No: Underwriting Controversies

The following remarks were delivered by Kenneth M. Scheibel, Jr., Senior Attorney Advisor in the Mass Media Bureau's Enforcement Division, to the 1999 National Public Radio Conference in Washington, D.C. on May 15, 1999. Mr. Scheibel is the Mass Media Bureau's expert on underwriting matters. The views expressed below are solely those of the author and do not necessarily reflect the views of the Commission.

1. **Pointers for stations...what topics to stay away from? Are there products, businesses or services that can't be mentioned?**

(a). **The "No Censorship" Provision of the Communications Act.** Section 326 of the Communications Act, with limited exceptions, prohibits the Commission from censoring broadcast material. Thus, it is left to the broadcaster's discretion to best determine its own community's program needs. Section 399 of the Act, however, prohibits noncommercial educational stations from engaging in editorializing or supporting any candidate for political office. The content of any programming of noncommercial educational stations must abide with this provision of the Act. Should a candidate for public office choose to support or underwrite programming, the sponsorship identification rule of Sec. 73.1212 would require the station to identify the underwriter -- in the case that a "committee to elect" was the true sponsor, the identification should reflect that fact. Licensees should take special care in this area -- in the case of a political candidate, any promotional underwriting announcement made on the candidate's behalf, if made in exchange for consideration, would violate Sec. 399B of the Act, the prohibition against supporting or opposing a political candidate, as well as the prohibition against advertising. Where no consideration is given, if the announcement promoted the candidate, the gratuitous broadcast might be alternatively deemed to constitute the noncommercial educational station's "support" for the candidate, in violation of Sec. 399 of the Act.

(b). **Alcohol and Tobacco.** We are often asked whether noncommercial educational stations should refuse underwriting support from alcohol makers or tobacco manufacturers. Initially, it should be noted that the FCC does not now prohibit the advertising of alcoholic beverages on commercial broadcast stations. While brewers and vintners have long advertised over the broadcast media, distillers have, until relatively recently, refrained under a self-imposed ban. FCC Chairman William Kenard has expressed personal concerns about the issue, but has also indicated his view that voluntary industry restraint by television networks and stations can be the most effective response.

It should also be noted, however, that any type of advertising is prohibited over noncommercial educational stations under Sec. 399B of the Act.

Can alcohol makers/vendors be acknowledged as underwriters? Nothing in our rules prohibits that at present. Noncommercial educational licensees should keep in mind, however, that if restrictions or prohibitions are enacted against the advertisement of alcohol, it may also affect their ability to accept program underwriting from these entities.

For many years, the advertising of cigarettes, little cigars, and smokeless tobacco products over broadcast stations has been statutorily prohibited. The Commission's role in this area is limited to determining whether the "advertising" alleged to have taken place actually occurred. In appropriate instances, such cases are referred to the Department of Justice, which agency is responsible for substantive interpretation of the statute's provisions. Our contact there is the Office of Consumer Litigation at (202) 307-0175. Consequently, the determination whether the mention of a tobacco underwriter constitutes prohibited "advertising" is a determination made at DOJ. Noncommercial licensees should take care to note that just because an announcement might not be deemed an "advertisement" for purposes of Section 399B, it might still be considered an "advertisement" by DOJ, possibly subjecting them to sanctions under 15 U.S.C. Secs. 1335/1338/4402.

(c). **Lotteries.** Section 73.1211(a) of the Commission's Rules provides:

No licensee of an AM, FM, or television station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes (18 U.S.C. 1304, 62 Stat. 763).

Under 18 U.S.C. Sections 1304 and 1307, as implemented by Section 73.1211 of the Commission's Rules, the broadcast of any advertisement or information concerning a lottery is, with certain exceptions, prohibited. A lottery contains the elements of prize, chance, and consideration. If one of these elements is missing, the scheme does not meet the lottery definition. *See Calnevar Broadcasting, Inc.*, 8 FCC Rcd 32 (MMB 1992); *WTMJ, Inc.*, 7 FCC Rcd 4957 (MMB 1992). Accordingly, we have determined that casino gaming activities, including certain card games and slot machines, are lotteries. *See, e.g., Hualapai Broadcasters, Inc.*, 8 FCC Rcd 4914 (MMB 1993); *Calnevar Broadcasting, Inc.*, 8 FCC Rcd 32 (MMB 1992). We have further ruled that the word "casino" may be broadcast only as part of the proper, or business, name of an establishment, and only to promote non-lottery activities at that establishment. *See Channel 33 Inc.*, 7 FCC Rcd 3224 (1992).

Noncommercial educational station contests will constitute a lottery where consideration in the form of an annual station membership fee is required to participate in the contest, if it also involves chance, and a prize. *See Letter of the Chief, Complaints & Political Programming Branch to William J. Dumas*, (Dec. 10, 1997) (a lottery exists where paid

subscribers vie on a first-come, first-served basis, for a limited number of promotional tickets). [Footnote 1](#). Where, for example, the "chance" element is missing, such as in the case of a station "giveaway," the restriction of participation to "station members" would be permissible, and a matter of station fundraising discretion.

Due to a recent February 25, 1997, decision of the United States Court of Appeals for the Ninth Circuit in *Valley Broadcasting Company v. United States*, 107 F.3d 1328 (9th Cir. 1997), and a December 16, 1997 decision of the U.S. District Court of New Jersey, in *Players International, Inc., et al. v. United States and FCC*, 988 F. Supp. 497 (D.N.J. 1997), the Commission has determined that it will not enforce the ban on the broadcast of lottery information against stations licensed to communities in the Ninth Circuit, or New Jersey, with the exception of the prohibition on the broadcast of information concerning certain state-run lotteries. This policy of non-enforcement applies to Ninth Circuit and New Jersey broadcasts which aired after the date of the courts' mandates, unless and until such time as the courts' decisions in *Valley Broadcasting* or *Players* are overturned or otherwise altered. The Supreme Court recently heard arguments on the constitutionality of the lottery prohibition.

2. How can you legally **turn away an underwriter**?

Under Section 3(10) of the Communications Act, broadcasters are not deemed "common carriers" required to afford the public with universal access. Thus, under the Communications Act, it is within the broadcaster's discretion to accept or decline specific programming.

3. Is there **specific language** that must be included in underwriting acknowledgements?

(a). The **sponsorship identification rule**, Section 73.1212, which implements Section 317 of the Act, requires that the station announce that a broadcast is paid for, and who paid for it. (In the case of noncommercial broadcasters, who cannot accept "paid for" programming, the sponsorship identification must indicate what person or entity provided underwriting support for the program broadcast.) The announcement must be made at the time the program is broadcast. In the case of noncommercial educational broadcasters, its purpose is to inform the public of the identity of the persons or entities providing program underwriting support: those "by whom the listener is being persuaded." [Footnote 2](#). Section 317(c) of the Act requires broadcasters to "exercise reasonable diligence" to obtain from "persons with whom it deals directly" the requisite information to assure that a proper identification is made." Section 73.1212(e) obligates a licensee to "fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or entity by whom or on whose behalf such payment is made."

The Commission and the courts have not interpreted these provisions as obligating broadcasters to act as private investigators to ascertain whether the persons with whom they deal are the true sponsors. Rather, unless furnished with credible, unrefuted evidence that a sponsor is acting at the direction of a third party, the broadcaster may rely on the plausible assurances of the person paying for the time that they are the true sponsor. [*In re Request for Declaratory Ruling of Paul Loveday and Californians for Smoking and No Smoking Sections*](#), 87 FCC 2d 492 (1981) (subsequent history omitted). The Bureau, in [*Trumper Communications of Portland, Ltd. et al.*](#) (DA 96-1788) (October 29, 1996), citing *Loveday, supra*, indicated that "[t]here may be cases where a challenger makes so strong a circumstantial case that someone other than the named sponsor is the real sponsor that licensees, in the exercise of reasonable diligence, would have to inform the named sponsor that they could not broadcast the message without naming another party." In *Trumper, supra*, the Bureau found that the unnamed Tobacco Institute was the true sponsor behind the reported sponsor "Fairness Matters to Oregonians Committee" (or "FMOC"). This was based on the fact that virtually all funding for FMOC and editorial control over FMOC's campaign rested with the Tobacco Institute and lobbyists for R.J. Reynolds. The Bureau ruled that future announcements for FMOC would be required to identify the true sponsor, the Tobacco Institute.

(b). Regarding **noncommercial underwriting sponsorship acknowledgements**, the Commission's rules do not prescribe a specific form that the identification must follow, except that it must take place at the time the program is broadcast. If the matter being broadcast is jointly sponsored or underwritten, [\(Footnote 3\)](#) then the announcement should identify all of the sponsors. [Footnote 4](#). General station support not associated with specific programming does not trigger the sponsorship identification rule. Acknowledgement of such donations is discretionary. *See Letter of Chief, Complaints and Investigations Branch to Station KUNV(FM)* (July 11, 1988). If something of value has been provided to the noncommercial educational station in connection with specific programming, on an other than arm's-length basis, the contributing entity would be deemed to have "provided support" to the noncommercial educational station, and must be acknowledged as a program sponsor.

4. **Should **non-profits and for-profits** be treated the same in terms of the wording of the announcements?**

Section 399B of the Act, as implemented by Section 73.503 of the Commission's Rules, prohibits public radio and television stations from broadcasting advertisements. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities. 47 U.S.C. § 399B. Although for-profit contributors of funds to a noncommercial station may receive on-air acknowledgements, the Commission has unequivocally stated that such acknowledgements may be made for identification purposes only and should not promote the contributor's products, services, or business. Specifically, such announcements may not contain comparative or qualitative

descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. See [Public Notice](#), "In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," 7 FCC Rcd 827 (1986).

Despite these restrictions, the Act does not prohibit noncommercial educational stations from airing announcements that promote its own activities, or those of other not-for-profit entities. See *Letter from the Chief, Complaints and Investigations Branch, Enforcement Division, to Kenneth A. Barnard*, (March 25, 1993) (noncommercial stations may choose to promote the services, facilities, or products of not-for-profit entities, so long as these messages do not substantially interrupt or suspend regularly scheduled programming or constitute "joint fundraising"). It should further be noted that the restrictions set forth under the Act and the pertinent Commission rules apply only to that material which is contained in a station's broadcasts, and not to its off-air advertisements or references.

5. (a). **How should a station respond when an underwriter wants to include the **name of its sponsor in its underwriting announcement as well**? Example: "Acme Theatre, presenting 'Romeo and Juliet'. Production underwritten by Star Computing." Is that the same as a department store listing the brands it carries? ("Acme Western Wear, offering Wrangler, Lee and Dakota jeans.")**

A station may mention a sponsor's product line in its underwriting announcements if the purpose is to merely identify the inventory or service that it offers. However, a station should not mention another entity or that entity's product or service for any other purpose, unless that entity also supports the program in question. In the example given, if Star Computing also provides support for a broadcast that Acme Theatre sponsors, then Star's identification as an additional program sponsor would be appropriate. On the other hand, if Star Computing supports Acme Theatre in some manner not associated with the broadcast, then it is not a program sponsor, and its mention in the underwriting acknowledgement should be avoided.

- (b). **What's the definitive answer on whether a financial institution can list **credit card or CD or mortgage loan interest rates****?

Prohibited price information may be deemed to include reference to specific price information, interest or loan rates, available sponsor discounts, or products or services offered by the sponsor at no cost or "free." See [Public Notice, supra](#). [Footnote 5](#).

- (c). **What about "**menu listing**" descriptions of product, service or personnel attributes that are factually verifiable? When included in a sponsor's logogram or slogan?**

Comparative, qualitative and descriptive language used in underwriting announcements is not rendered nonpromotional and permissible merely because the underlying message was "verifiable;" or because the comparative or qualitative language was contained in an established company logogram or slogan. While the Commission acknowledged in the [Public Notice](#) that licensees may exercise their "good faith" discretion to determine the text of their underwriting announcements, it specifically cautioned that logograms or slogans used by corporations and businesses are permitted only *"so long as they do not contain comparative or qualitative descriptions of the donor's products or services"* (emphasis added). Finally, the "menu listing" of the qualifications or attributes of a sponsor's personnel, service or product has been construed as promotional. This practice has been found to be inconsistent with the "identification only" purpose of underwriting announcements. *See, e.g., Evansville-Vanderburgh School Corporation, WPSR (FM)*, [[PDF](#)], (LOA) (March 23, 1999).

6. **Can public radio stations do **recruitment underwriting**? ("Programming sponsored by Acme Accounting, now accepting applications for accountants and file clerks.")**

The Commission has not directly addressed this point, and we continue to receive informal inquiries about it. While a case can be made that the inclusion of such messages may be deemed inconsistent with the "identification only" purpose of underwriting acknowledgements, because they appear to benefit a business aspect of the for-profit underwriter -- "recruiting," many noncommercial educational broadcasters believe that these announcements are a public service to listeners, and that their inclusion within underwriting announcements should be deemed discretionary and permissible.

Perhaps if an appropriate request for declaratory ruling is presented, supported by citations to law and policy, a more definitive answer could be formulated. The Bureau invites public broadcasters to pursue this matter.

7. **Where can the stations find **help** in this confusing process?**

Useful background publications, citations, and contact information may be found online at the Media Bureau's website: <https://www.fcc.gov/encyclopedia/noncommercial-nature-educational-broadcasting>, or by calling the **Enforcement Division's office at (202) 418-1430**.

Footnotes:

[Footnote 1](#): In this case, the station awarded promotional tickets to "concerts, movies, etc., to subscribers only," who donated \$25 annually in order to "receive a membership number" enabling them to "obtain giveaways."

[Footnote 2](#): See [Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations \[Memorandum Opinion and Order\]](#), 90 FCC 2d 895, 901, n.18 (1982) [scanned document].

[Footnote 3](#): Section 73.1212(e) provides that where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required, ensure that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee or association or other incorporated group, or other entity shall be made available for public inspection at the station's public file, or in the case of a network, the list may be retained at the network headquarters or at the location where the originating station maintains its public file.

[Footnote 4](#): See [Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations \[Memorandum Opinion and Order\]](#), 90 FCC 2d 895, 901, n.18 (1982). In that policy statement, the Commission resolved, among other things, a request from the producers of "Firing Line", who sought a waiver of the sponsorship identification rule, which required identification of forty-five underwriting contributors. The producers observed that program time constraints did not allow for an exhaustive identification, and proposed naming the major contributors (\$20,000 or greater), identifying the remaining contributors as "Friends of Firing Line," and announcing that the specific information about the identity of the unnamed contributors could be found in each station's public file and/or at PBS' offices. The Commission determined that the proposal was reasonable and did not violate the spirit of the rule, and noted that similarly situated noncommercial educational licensees would not violate the rule in following the same approach.

[Footnote 5](#): On page 4 of the [Public Notice](#), the Commission stated that "announcements containing an inducement to buy, sell, rent or lease are not permissible. Examples of such announcements are 'six months' free service.'"