

***SWM*MEMO**

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From the law offices of SCHWARTZ, WOODS & MILLER

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BASICS OF PUBLIC BROADCASTING UNDERWRITING REGULATION

In 1982 the FCC and Congress eliminated the identification-only rule for funding credits and launched the era of enhanced underwriting. The law prohibits public broadcast stations from broadcasting "advertising", which has a statutory definition unique to the industry. You are not permitted to air "any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit, (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office."

At the industry's request the FCC established general guidelines and left it to licensees initially to make reasonable good faith determinations with respect to credits based on the law and FCC interpretive rulings. You need to apply the line to sort out permissible identification and description from impermissible promotion. That line is sometimes clear and sometimes quite subjective.

Under this regulatory scheme underwriting trends have developed with relatively little active involvement by the FCC. The Commission last issued a policy statement on underwriting in 1986. It does not monitor stations for underwriting violations, but reviews credits when complaints are filed. Over the years complaints have been filed by audience members, commercial licensees, and in one instance an area cable company. Few underwriting complaints have been decided by the FCC Commissioners. Most are decided by the staff of the Enforcement Bureau.

SUMMARY:

A primer on the basics of underwriting regulation for public broadcasters

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The past year has seen an unusual number of underwriting decisions, with fines and “voluntary payments” ranging from \$2,000 to \$20,000. There was also a federal District Court decision in California upholding the Constitutionality of the basic law (that decision is under appeal by the licensee involved to a higher federal court).

This memo focuses on the application of FCC rules and policies to stations’ on-air underwriting acknowledgments and to paid messages by non-profit entities. It does not address the standards of national public broadcasting organizations, which are different in various ways from the FCC’s guidelines, or cover in depth tangential issues such as promotion of program-related materials and the sharing of proceeds from sales or events with for-profit entities. Note that most examples are from radio cases – there are few reported cases involving public television stations.

BASIC UNDERWRITING PRINCIPLES

A. Donor Identification is Okay Promotion of For-Profits is Prohibited

1. A noncommercial licensee may not air announcements promoting for-profit entities in exchange for consideration to the licensee or its principals or employees.

2. Licensees must identify every donor that has paid consideration to support the production or broadcast of a particular program. Where the donors are too numerous to mention on air, you may name the largest and inform viewers as to where the complete list may be obtained. It is not legal to afford anonymity to a program underwriter. On-air identification of donors whose contributions support general station operations, rather than specific programs, is at the licensee’s discretion.

3. Underwriting announcements by statute may only identify and describe underwriters and may not promote the products, services, or facilities of for-profit entities. The Commission

has extended the statutory language to bar promotion of a for-profit underwriter itself.

4. The Act states that announcements “may not interrupt regular programming” and the FCC rule tracks the language of the Act. However, in interpreting that language the Commission has been guided by the House Report that accompanied the legislation, which states that underwriting credits may not interrupt regular programming, but should be scheduled at: “the beginning and end of programs . . . between identifiable segments of a longer program” or, in the absence of identifiable segments in programming, during “station breaks,” such that the flow of programming is not “unduly disrupted.” The House did not define “longer” and the FCC did not discuss the meaning of the term when it adopted the House’s interpretation of the Act. Since the basic PTV building block is a half hour, it seems reasonable to consider a one-hour program to be a “longer” program that may be interrupted for credits. At the same time, there is an FCC decision holding that in some circumstances it is permissible to insert credits between segments of half-hour programs. Note, though, that the Commission has observed on several occasions over the years that licensees should avoid placing credits with such frequency so as to constitute “commercial clutter.”

B. Underwriting Content

1. Content Restrictions

(a) No comparative, qualitative, or otherwise overtly promotional descriptions of products or services, such as highlighting desirable features of the underwriter’s offerings or mentioning features such as a warranty included with the purchase price (although it is permissible to mention that an underwriter sells warranties separately);

(b) No mention of price information, such as sales or savings, interest rates, discounts, or claims of value;

(c) No calls to action, such as "stop by" or "call" or "try"; and

(d) No inducements to buy, sell, or lease; no bonuses or free gifts or services.

2. Permissible Content

(a) Corporate slogans may be used under the Commission's interpretation of the statutory language permitting "logos". The FCC has stated that an underwriter's slogan may contain otherwise impermissible language that is included in a credit for identification rather than promotional purposes (more on this below);

(b) Product and service listings and brand and trade names;

(c) Value neutral descriptions of the company and its products or services; and

(d) Telephone numbers and location information and, by industry practice, Web addresses that do not themselves constitute impermissible product claims or calls to action.

C. Promoting Non-Profits is Permissible

You may broadcast underwriting credits or paid messages that promote non-profit entities and their products, services, and facilities in exchange for payment. Promotional announcements on behalf of non-profit entities that are affiliated with commercial entities are permissible as long as they do not promote the affiliated commercial entity or its offerings. So, for example, while a metro car dealers association or a real estate association may be a nonprofit, they could not sponsor a message that promotes their for-profit members.

Nonprofits include, for example, credit unions, many health plans and some hospitals, which may compete directly with for-profit entities. Some licensees choose not to use the leeway to broadcast promotional spots for nonprofits for fear of adverse reaction by the audience or by current

or prospective for-profit underwriters. Others successfully capitalize on that leeway. A paid message for a nonprofit must be tagged "paid for by", "sponsored by" or "furnished by" [name of entity], unless the sponsor is obvious.

While the FCC permits you to promote nonprofits in exchange for consideration, your income from such spots would be considered unrelated business income, which may be subject to unrelated business income tax. You should consult your tax advisor if you run promotional messages for nonprofits.

D. Underwriting & Programming Secured by Others

Stations obtain programs that already include underwriting announcements. Also, a licensee may contract with others to solicit underwriting support on the licensee's behalf in order to facilitate a mutually desired production or in return for a commission. The licensee should always retain the discretion to air or to reject any announcement offered.

The FCC's Enforcement Bureau has for several years allowed licensees facing complaints of all types to negotiate "consent decrees" in some circumstances. Such decrees permit a licensee to resolve charges without admitting a rule violation that could present a problem in the event of further investigations or at renewal time. They typically involve a "voluntary" payment to the U.S. Treasury and commitments to take steps to avoid problems in the area at issue. In a 2008 case involving a nationally distributed program, a licensee of noncommercial radio stations agreed as part of a consent decree Compliance Plan "to make good faith efforts to obtain underwriting copy accompanying nationally distributed programming in advance for purposes of independently reviewing it for compliance with the rules." In later cases, this commitment has been extended to "independently produced" programs. While these decrees apply only to the stations that enter into them, the trend underscores licensees' responsibility for all credits that they air.

COMPARATIVE AND QUALITATIVE LANGUAGE PROHIBITED

A. Comparative or Qualitative Language and Slogans

Language focusing on positive or distinguishing attributes or desirable features, or suggesting the superiority of the underwriter's products or services or the underwriter itself, is prohibited as qualitative. Licensees should avoid most adverbs and adjectives. As you will see from the following lists of terms found permissible and impermissible in FCC decisions, the Commission staff has not been totally consistent over the years.

1. Illustrative Impermissible Terms and Phrases

- Targeted
- Refreshing
- Specialized
- Exclusive
- Luxurious
- One-Stop Shop
- Tastefully decorative
- Accommodating
- Delightfully honest
- Dependable
- Efficient
- Economical
- Excellent
- Fair Price
- Leading provider of ...
- Number One
- New
- Prompt
- Reliable
- Quality services
- We love selling real estate
- We're all about family
- Mention of membership in or certification by organizations or associations that act as sanctioning or certifying bodies for various professions

2. Illustrative Permissible Terms and Phrases

- Surgery never has to be unpleasant
- Pies Baked Daily
- Home Style Foods
- Intelligent four-wheel drive
- "Creative" to describe advertising
- "Fresh and Original" to describe health food
- Longevity/length of time in business
- "Timeless traditional truths" to describe an art gallery's works
- AT&T -- the right choice (slogan)
- Dupont -- makers of better things for better living (slogan)
- Movado Museum Watch, another famous Swiss-made product
- The department store specializing in golf; ... providing everything
- New York Gom Tang House specializing in Oxtail Soup. Through long experience and skill, we have made instant Oxtail soup in a can (slogan).
- Comfortable like your own home. Korean Airlines will try its best. Our wings, Korean Air (slogan).

3. Slogans

The use of corporate slogans is permissible when the licensee allows them in good faith for identification value rather than promotion. There appears to be significant latitude when it comes to the use of slogans, as evidenced by the Commission's acceptance, although many years ago, of the Korean Air slogan. For further example, the FCC accepted as non-promotional the use of the slogan "exceptional service, trusted advice" in an A.G. Edwards credit. Informal staff advice even indicated, years ago, that some calls to action may be permitted if within slogans, as in "Get Met, It Pays." We would hesitate to include in a credit price references or calls to action even if included in a slogan. But there is no clear line of demarcation as to what, if anything, is beyond defense if in a *bona fide* corporate slogan. However, the protection for otherwise promotional

language included in slogans would be lost if the slogan is altered or used in context so as to be promotional. The Commission's latitude for slogans envisions use of the underwriter's corporate slogan, not just an advertising slogan, of which a company may have many. Over the past several years corporate slogans in some industries have moved from long-term identifiers to catchphrases that may morph every few years. For example, McDonald's has reportedly used 23 corporate slogans to date. The Commission has in past cases been satisfied when a licensee states that the underwriter represented that a tag line is its corporate slogan.

B. Long Credits and Verbosity

While there are no set limits on the length of underwriting credits, the Commission in a 2009 decision involving credits exceeding 30 seconds stated "the longer the announcements, the more likely they are to contain material ... that is inconsistent with the 'identification only' purpose of such announcements." Also, the unnecessary and excessive repetition of otherwise permissible identifying information can violate the rules. Fifteen repetitions of "Nissan of Temecula", for example, was found to constitute impermissible non-identifying verbosity. Likewise, announcements that dwell at length on product attributes that suggest usefulness, convenience, or advantages of an underwriter's products or services are impermissible.

C. "Look and Feel"; Special Effects & Music

The Commission staff had developed a policy barring the use of "conventional commercial advertising techniques". However the 2003 decision that Station WTTW was within its discretion in broadcasting a highly produced Amoco credit that had aired extensively on commercial TV appears to have signaled an end to that policy, at least where the similarity to commercial ads is merely in terms of high production values and humor. The use of special effects and music is a matter of licensee discre-

tion. Nonpromotional sound effects or audio enhancements are permissible, as is background music that is not overtly promotional. Music that is strongly connected to a donor's commercial advertising, such as jingles (e.g., the McDonald's, Coke, or United Airlines jingles), should be scrutinized carefully, especially if lyrics are involved.

D. Historical Information, Donor Background

Nonpromotional background information, such as the length of time the underwriter has been in business, is permissible. Thus, "in recognition of 125 years in business" would be okay. Expressions such as "world's second largest computer company" (which was once approved by PBS) are borderline qualitative and comparative, and their permissibility remains in doubt.

E. Donor Homilies & Unrelated Messages

Donor homilies, or information, sayings, or proverbs that are unrelated to the donor, are permissible as long as they do not promote the donor. For example, an insurance company many years ago used: "We should all be concerned about the future, because we will have to spend the rest of our lives there." The full Commission's approval in 2003 of the statement in a credit for a surgery center that "surgery never has to be unpleasant" was based on a finding that the statement was informative and did not distinguish the skills of the underwriting surgeons from their competitors. You may also identify underwriters with a non-controversial public service message (e.g., General Motors and "Buckle up for safety," or American Express encouraging computer literacy) or let them encourage support of public broadcasting. Messages promoting non-profit entities that are paid for by for-profit entities (e.g., Chevron announcements promoting the American Ballet Theater) are permissible if the commercial entity receives only nonpromotional acknowledgment for its contribution. On the other hand, a message presented for a nonprofit entity may not promote a for-profit company, although it arguably may mention a sponsoring for-profit company.

PRICE INFORMATION PROHIBITED

Underwriting credits may not include price information or references to manner of payment, affordability, availability of financing, discounts, or other price incentives. The Commission is particularly sensitive in this area. So, for example, the following announcements are impermissible:

- Flexible Financing
- ... offering a discount on air conditioner recharge with a Pennzoil oil change and 14-point lube check
- ... if his client does not recover damages, he does not collect a fee.
- ... every Thursday night is ladies' night... (suggests drink specials or discounts)
- No down payment on approved credit...up to \$3,000 in cash rebates
- All-you-can-eat catfish on Sundays
- First time buyer's plan and preferred financing
- On sale for a limited time only
- Providing an opportunity to save on brokerage commission
- Mention KNON and receive a 10% discount
- Home of the Wednesday lunch special

In marked contrast to the last example, a decision found "daily lunch specials" permissible on the ground that the phrase appears to refer to the variety of a restaurant's meal offerings and so does not constitute a prohibited price reference.

CALLS TO ACTION & INDUCEMENTS TO BUY PROHIBITED

Calls to action and inducements to buy are prohibited. For example, the following phrases are impermissible:

- Planning a special occasion
- So do yourself a favor and come out
- Stop in

- Give them a call
- Treat yourself to a night of total entertainment
- Get more information by calling
- You can tell Roger that I sent you
- Get your tickets now
- You can't afford to pass this party up (where part of proceeds was to go to licensee)
- Big O Tires Express Lane Service guarantees that four tires will be installed in 20 minutes or less
- With every test drive you'll receive a pair of tickets

OTHER ISSUES

A. Licensee Special Events

You are permitted to promote your own and other nonprofits' fund-raising events, including selling a block of tickets for a commercial concert, but not events where you get a share of a commercial entity's proceeds

B. Promotional Remotes

Licensees must be careful in conducting live remote broadcasts to avoid unduly promoting the for-profit participant. The broadcasts should be based on public interest judgments rather than an exchange of consideration. Announcements identifying the origination of a broadcast are permissible, but promotional announcements often raise factual questions concerning whether the entity hosting the remote has provided the station with consideration. Making a location available in exchange for on-air promotion beyond that reasonably related to the production of the program would constitute consideration and would be prohibited. When doing remote broadcasts, licensees should not urge listeners to visit the business or promote the entity's goods or services.

C. Employment information

The Commission has not had occasion to rule on the permissibility of underwriting credits that mention that the underwriter is hiring and provide application information. While such announcements could be viewed as advancing an underwriter's commercial activities, they could also reasonably be viewed as providing information of interest to the community and not violating the statute.

D. Issues underwriting

The statute does not permit underwriting or any paid messages for nonprofits that support or oppose any candidate for political office or express the views of any person with respect to any matter of public importance or interest. The phrase "any person" as used here is defined to include nongovernmental entities as well as individuals. There is no case law interpreting the latter prohibition other than a decision that a paid message taking a position on one side of a referendum is impermissible. Considering that almost any statement could be considered to refer to a matter of public interest, licensees need to make good faith judgments as to the scope of the provision. For example, an underwriter urging viewers to vote seems to us not to address an unmentionable "matter". The Constitutionality of this prohibition is being litigated currently in the California case mentioned above, so far with the government on the winning side.

CONCLUSION

Underwriting credits can involve varying degrees of risk, particularly when proposed announcements approach the promotional border or when for-profit entities are involved in ventures with the licensee. The themes at the heart of the

underwriting rules and policies are preservation of the noncommercial nature of the service, prevention of undue program interruption, and the good faith exercise of licensee discretion to provide programming to meet the community's needs.

FCC underwriting enforcement is a complaint-driven process, so you never know when a credit may be questioned. It takes only one complaint to trigger a full investigation. Each licensee should adopt a system for internal review of credits before they run and remain mindful of the expectations and likely reactions of both audience and regulators. The risk of a complaint by an audience member or by one of your commercial counterparts increases as copy approaches the line between identification and promotion.

While the specific guidelines of national organizations are not addressed here, voluntary compliance with industry-wide standards can support the reasonableness of individual judgments. In any event, credits employing conventional commercial advertising techniques such as visuals highlighting the features of products or services or "slice-of-life" depictions of consumers should be handled with care. There are endless variations of underwriting credits; underwriters and their agencies (and your agencies and underwriting reps) can present countless dilemmas. With spotty enforcement, relatively low forfeitures and "voluntary" consent decree payments on the one hand and an ever increasing need for revenue on the other hand, some licensees are tempted to run credits that are not defensible. We counsel our clients to restrict credits to those that are defensible under the statute and FCC rules. We recommend that you consult with your attorney concerning novel or questionable underwriting announcements and arrangements.