



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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DA 01-1169

May 8, 2001

MASS MEDIA BUREAU ACTION

COMMENT SOUGHT ON THE ADVERTISING COUNCIL REQUEST FOR DECLARATORY RULING OR WAIVER CONCERNING SPONSORSHIP IDENTIFICATION RULES

On March 27, 2001, the Advertising Council, Inc. (“Ad Council”) filed a “Request for an Expedited Declaratory Ruling or Waiver of Section 317 of the Communications Act.” Section 317 of the Communications Act (“Act”) states that all matter broadcast by a station in exchange for consideration from any person shall, at the time the matter is broadcast, be announced as paid for or furnished by that person. 47 U.S.C. § 317. Section 317 also states that the requirement of an announcement may be waived if the Commission “determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.” 47 U.S.C. § 317(d).

The Ad Council requests a declaratory ruling that neither Section 317 of the Act nor the corresponding Commission Rule (Section 73.1212) requires that the White House Office of National Drug Control Policy (ONDCP) be identified as the sponsor of certain public service announcements (“PSAs”). The subject PSAs are aired by a station as part of its statutorily required matching contribution for broadcast time purchased by ONDCP in connection with the National Youth Anti-Drug Media Campaign.¹ The Ad Council argues that Section 317 does not apply to these matching PSAs because consideration is not paid to the station for airing them. Even if Section 317 applies, the Ad Council argues that, by identifying the organizations that produce, edit and otherwise control the PSAs as the sponsors of the PSAs, they already comply with Section 73.1212 and conform to Commission precedent.

As an alternative to a declaratory ruling, the Ad Council requests that the FCC waive the requirement that the ONDCP be identified as sponsor of the PSAs pursuant to Section 317(d). It argues that such a waiver would: prevent economic hardship to the actual sponsors of the PSAs, prevent public confusion, promote the goals of Section 317 by accurately telling listeners who is persuading them, and conform to Commission precedent.

The Advertising Council’s filing will be available for public inspection and copying during regular business hours in the Federal Communications Reference Information Center:

¹ Drug-Free National Media Campaign Act of 1998, 21 U.S.C. § 1801 *et seq.*

FCC Reference Information Center
Room CY-A257
445 12th Street, SW
Washington, DC 20554.

The filing is also available at the FCC Mass Media Bureau website, http://www.fcc.gov/Bureaus/Mass_Media/Public_Notices.

Copies of the filing are available for purchase from:

International Transcription Service, Inc. (ITS)
Room CY-B402
445 12th Street, SW
Washington, DC 20554
www.itsdocs.com
(202) 314-3070
(202) 314-3076 (fax)
(202) 484-8831 (TTY)

The public may submit comments on the Advertising Council's filing on or before May 29, 2001, and replies to those comments on or before June 8, 2001. Comments and replies should specifically reference this Public Notice (DA 01-1169). Commenters must file an original and four copies of all comments and reply comments to the Commission's Secretary:

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th St., SW
Room TW-A325
Washington, D.C. 20554

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. See 47 C.F.R. §§ 1.1200, 1.1206. *Ex parte* presentations, as defined in the Commission's rules, are any presentations that, if written, are not served on the parties to the proceeding, or, if oral, are made without advance notice to the parties and without opportunity for them to be present. In "permit-but-disclose" proceedings, persons may make *ex parte* presentations but must then disclose them to the parties. Rules pertaining to oral and written *ex parte* presentations in "permit-but-disclose" proceedings are set forth in Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

Mass Media Bureau Contact: Hope Cooper, (202) 418-1440.

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March 27, 2001

VIA FEDERAL EXPRESS

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Request For an Expedited Declaratory Ruling or Waiver of Section 317 of the Communications Act

Dear Ms. Salas:

This letter is submitted on behalf of the Advertising Council, Inc. (the "Ad Council" or "Petitioner")¹ to seek a declaratory ruling that neither Section 317 of the Communications Act (the "Act") nor the Commission's rules (Section 73.1212) established to implement Section 317 of the Act require that the public service announcements which are placed on broadcast media by the Ad Council and which qualify for matching credit (hereinafter "match-PSAs") under the Drug-Free Media Campaign Act of 1998, 21 U.S.C. § 1801 et seq. (the "Media Campaign Act"), need to be

¹ The Ad Council is a private, not-for-profit organization. Its major activities include the production, distribution, promotion and evaluation of public service communications programs. Each year, the Ad Council conducts approximately 40 public service advertising campaigns on behalf of national non-profit organizations and government agencies on issues such as improving the quality of life for children, preventive health, education, community well-being, environmental preservation and strengthening families. The Ad Council's messages are designed to make lasting and positive contributions to social change. The power of such messages have been captured in a number of well-known phrases, such as "Only You Can Prevent Forest Fires," "Friends Don't Let Friends Drive Drunk," "Take a Bite Out of Crime," and "A Mind is a Terrible Thing to Waste." The nation's top advertising agencies and leading corporate marketing executives provide their services free of charge to create public awareness campaigns using public service announcements. The nation's media, both through the national networks and local media, donate considerable amounts of advertising time and space free of charge to support the campaigns.

DSN:115123.8D

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identified as "Paid for by ONDCP" or a similar tag.² Should the Commission determine that such sponsorship identification is called for by the literal language of the statute and rules, then the Petitioner, pursuant to Section 317(d) of the Act and Section 1.3 of the Commission's rules, respectfully requests that the Commission grant a waiver of the sponsorship identification rules in the public interest so as to avoid public confusion that would otherwise result and to promote the laudatory and important goals of the Media Campaign Act which would be seriously compromised, if not undermined, through such a strict construction of the Commission's rules. Because of the national importance of promoting the purposes of the Media Campaign Act it is respectfully requested that the Commission rule expeditiously on this request and thereby erase any question in the mind of the nation's media as to whether the current airing of match-PSAs complies with the Act and the Commission's rules. (A Table of Contents is set forth at page 14, infra.)

SUMMARY OF ISSUES

In December, 2000, a staff action decision was issued by the Enforcement Bureau in Thomas W. Dean, Esq. Litigation Director, NORML Foundation, EB-00-IH-0078, Action Letter, DA 00-2873 (rel. Dec. 22, 2000), reprinted in 2000 FCC LEXIS 6808 ("NORML"). That ruling held that the networks must identify the ONDCP as the sponsor of commercial programs where the networks had received matching credit for such programs prior to the broadcast or rebroadcast of such programs as part of the ONDCP's National Youth Anti-Drug Media Campaign. Although the NORML decision dealt exclusively with commercial programming, the language of the ruling has caused several broadcast networks to raise questions with the Ad Council as to whether Section 317 requires that match-PSAs be similarly tagged under the ONDCP name. Through this letter request, the Ad Council requests a declaratory determination that neither Section 317 of the Act nor the rules promulgated thereunder require that an ONDCP tag be affixed to match-PSAs. In the alternative, should a literal interpretation of the Act or the rules be deemed to require such sponsorship identification tags, then a waiver is respectfully requested in order to avoid an anomalous result that would be contrary to the public interest.

BACKGROUND

The National Youth Anti-Drug Media Campaign

Prior to the enactment of the Media Campaign Act, the Partnership for a Drug Free America ("PDFA") developed and administered a nationwide pro bono anti-drug media campaign. The PDFA is a non-profit organization dedicated to reducing drug use in the United States. It has

² The ONDCP was created in 1988 under then President Bush as an office within the White House to focus on the nation's counter drug policies. Its principal purpose is to establish policies and objectives for, and to coordinate, the nation's drug control programs.

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developed such strong and recognizable messages as "This is your brain on drugs," which depicts cracked eggs frying in a pan. These announcements were aired free of charge as public service announcements ("PSAs") by the networks and broadcast on stations across the country. While the broadcasting industry continued to support the cause of reducing drug use during the 1990s, the number of anti-drug PSAs began to decline throughout this decade. In order to assure that these important messages received a broad reach, PDFFA and ONDCP approached Congress to obtain public funding for a paid national anti-drug media campaign.

In October 1998, in response to reports of increased drug use among America's youth, Congress, in the Media Campaign Act, authorized ONDCP to spend up to \$195 million each year for five years in public funds on a National Youth Anti-Drug Media Campaign. Congress directed ONDCP to use these funds, among other things, to purchase media time and space to bolster PDFFA's national campaign. 21 U.S.C. at § 1802(a)(1)(A). Recognizing that a paid media campaign potentially could compete with and ultimately decrease donated time that also aims at reducing drug use, Congress took pains to assure that the funds appropriated would not "supplant current pro bono public service time donated by national and local broadcasting networks." *Id.* at § 1802(b)(2).³ Congress therefore created the matching concept of requiring that for each dollar purchased the network or licensee make available an equivalent amount of time or space through either on air or in-kind contributions. Specifically, Congress directed that any funds utilized by ONDCP in the campaign "be matched by an equal amount of non-Federal funds for the national media campaign, or be matched with in-kind contributions to the campaign of the same value." *Id.* at § 1802(c). To fulfill statutory requirements, broadcasters receiving ONDCP funds were required to provide an equal amount of either pro bono advertising time or in-kind contributions. The pro bono advertising time can take the form of PSAs which are drawn off of an approved reel that is coordinated and placed through the Ad Council.

Following the enactment of the Media Campaign Act, the ONDCP issued its "Statement of Pro-Bono Match Program and Guidelines" (hereinafter the "Guidelines").⁴ The Guidelines provide that PSA advertising time and space must constitute at least 51% of the match under Section 1802(c) of the Media Campaign Act. Guidelines, at p. 5.⁵ In order to qualify as a

³ In addition, none of the public funds may supplant current anti-drug community-based coalitions, or fund partisan political purposes or media campaigns that feature elected officials, persons seeking elected office and other officials. *Id.* at § 1802(b)(1), (3)-(4).

⁴ The Guidelines may be found at <<http://www.ADCOUNCIL.ORG/ondcp>>.

⁵ The balance of the matching requirement can be fulfilled with "in-kind" public service efforts. In-kind contributions are activities that are not considered "advertising" or "PSAs", but which are deemed by media specialists to reach the

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media match, the PSAs must support one or more broad content objectives,⁶ and be non-commercial and non-denominational. Id. at 16. The logo of the organization producing the PSA must be clearly identifiable in the PSA. Id. Under the Guidelines, a National Media Match Task Force ("Task Force") led by the Ad Council (and comprised of representatives from the PDFA, the U.S. Department of Health and Human Services, the Department of Justice, the Department of Education, ONDCP and the Ad Council) meet on a quarterly basis to review completed PSA submissions from national not-for-profit organizations and government agencies for qualification under the match program. These PSAs are submitted to the Task Force as completed products by the not-for-profit organizations. The PSAs are produced independently by each not-for-profit organization or agency, are paid for entirely by such organization or agency and, at all times, are under the exclusive and full editorial control of such organization or agency. The PSAs underlying the instant request have been produced by some fifty-nine not-for-profit organizations or governmental agencies such as Save the Children, Big Brothers/Big Sisters, MADD, National Fatherhood Initiative, Boys Town USA, Kids Peace, Children's Aid Society, America's Promise, etc. All of these organizations are independent entities. None of the organizations producing these spots are controlled by, affiliated with or funded by ONDCP. Although the PSAs cleared by the Task Force may be run by broadcasters as match-PSAs, the same PSAs may be separately broadcast as public service announcements by the same broadcasters in other non-match time periods or by other broadcasters in the same or other markets.

⁵(...continued)

media campaign's audience with core messages. Id. at p. 1. Networks that accept public funds may provide a variety of other in-kind options as part of the media campaign, such as locally or nationally sponsored community events, Web-site development and maintenance, appropriate public affairs programming on radio, in-school programs, brochures, videos, feature stories in print and other activities or projects. Id. at 3.

⁶ The National Media Match Task Force has established broad criteria for qualifying messages. Those are that the messages must seek to educate and support the development of good parenting practices; to encourage greater parental and caregiver involvement in a child's upbringing and effective drug-prevention parenting strategies; to provide early childhood development programs that strengthen the parent-child relationship; to provide opportunities for youth through programs and services in school and after school such as mentoring; to foster high expectations and self esteem for youth; to prevent drug abuse including gateway behavior prevention, such as underage alcohol use; to emphasize the nexus between drugs and crime and violence; to emphasize the connection between substance use and AIDS; and to support other drug-related messages and campaigns. Id.

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Section 317 of the Act

Section 317(a)(1) provides:

All matter broadcast by any radio station for which any 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: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

47 U.S.C. § 317(a)(1) (italics in original). Section 73.1212 of the Commission's rules implements Section 317. That rule states, in pertinent part:

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such service or other valuable consideration is received Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section,⁷ could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent.

47 C.F.R. § 73.1212(e) (footnote added).

Section 317 reflects the basic principle that "listeners are entitled to know by whom they are being persuaded."⁸ Since 1927, "there has been an unvarying requirement that all matter broadcast by any station for a valuable consideration is to be announced as paid for or furnished, and

⁷ Paragraph (b) of Section 73.1212 directs "[t]he licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section." 47 C.F.R. § 73.1212(b).

⁸ Applicability of Sponsorship Identification Rules, 40 F.C.C. 141 (1963), modified, 40 Fed. Reg. 41936 (September 9, 1975).

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by whom." *Id.*⁹ The rule is particularly helpful in identifying the true sponsor of commercial matter and paid for issue advertising. This requirement, however, has been moderated in cases where a strict application of the sponsorship identification rules could result in too great a burden being placed upon a licensee or in circumstances where the very sound public policy purposes Section 317 was established to address would be undercut. *Loveday*, *supra* note 9, at 1458 (declining to impose a stringent obligation to investigate the true identity of the sponsor on broadcasters because such a rule "might . . . have the effect of choking off many political messages"). As a general matter, PSAs aired on behalf of not-for-profit organizations do not fall within the ambit of the Commission's rules requiring sponsorship identification because they are free and not paid for.

REQUEST FOR EXPEDITED DECLARATORY RULING

Section 317 Does Not Require a "Paid For" Tag Because No Consideration Has been Accepted by the Networks

The instant request for Expedited Declaratory Ruling springs from an action letter issued by the Enforcement Bureau in response to a complaint against various of the networks in *NORML*, 2000 FCC Lexis 6808 (released December 22, 2000). In that case the Enforcement Bureau addressed the circumstance of networks creating commercial programs, at times with the technical assistance of ONDCP, which contained anti-drug themes that ONDCP subsequently determined would qualify for media matching credit under the Media Campaign Act. The Enforcement Bureau found that consideration was present and determined that if such commercial programs were approved subsequent to their first airing, to receive matching credit, then future rebroadcasts should contain a tag that states that such program in part was "Paid for by ONDCP." The purpose of this letter request is neither to challenge nor untimely seek Commission review or reconsideration of that ruling. However, Petitioner does challenge any extension of the *NORML* ruling that would require tagging the free PSAs produced by unaffiliated not-for-profit organizations as "Paid for by ONDCP" if they are being aired as match-PSAs. Subsequent to the *NORML* decision several of the national networks expressed concern to the Ad Council that *NORML* might be construed so as to apply to the PSA component of the media match program and thus require a sponsorship identification tag for such spots as well. The purpose of this letter request is limited. It seeks a ruling that recognizes the factual distinctions between the commercial programming message at issue in *NORML* and the free PSAs at issue here. ONDCP plays a decidedly different role in each. It is submitted that such distinctions warrant a decidedly different treatment for the match-PSAs and do not require imposition of a sponsorship identification tag that such PSAs are "Paid for by ONDCP" when, in fact, such is not the case.

⁹ The sponsorship identification requirements were first imposed upon broadcasters by the Radio Act of 1927. A detailed discussion of the legislative history of these requirements is in *Loveday v. Federal Communications Commission*, 707 F.2d 1443 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983).

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At the outset, Petitioner maintains that the match-PSAs as presently aired fully comply with the Commission's sponsorship identification rules. The Section 317 identifications are required only where ". . . money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station." 47 U.S.C. § 317(a)(1). Generally, broadcasters do not receive any consideration for airing PSAs and consequently PSAs have traditionally been deemed to be exempt from the categories of programming that require sponsorship identification, even though PSAs, for their own purposes, frequently identify the originating producers or sponsors of the spot. See Commission Reminds Broadcast Licensees and Cable Operators of Sponsor Identification Requirements Applicable to Paid-For "Public Service" Messages, 6 FCC Rcd 5861 (1991) ("A 'public service announcement' (one for which no charge is made and which is regarded as serving community interests, as by promoting programs, activities, or services of governmental or other nonprofit organizations) exemplifies the type of material that would not require sponsor identification because it is broadcast or cablecast for free.").

Similarly, the match-PSAs constitute pro bono public service commitments undertaken by the networks and stations as well. The broadcasters air the match-PSAs at issue pursuant to a statutory requirement designed to preserve the existing levels of PSAs and to ensure that the PSAs are not displaced by the paid commercials. Because valuable consideration is not paid to the networks or stations for the airing of match-PSAs, the sponsorship identification requirements of Section 317 do not apply to the PSAs at issue in this request.

Section 73.1212 of the Commission's Rules
Mandates that the True Sponsor be Identified, Not the
Person Who Makes Arrangements on Behalf of the Sponsor

The match-PSAs are identified with the name of the organization (*i.e.*, the Ad Council, Big Brothers/Big Sisters of America, Boys Town, MADD, etc.) that produces the PSAs. Simply put, those organizations, not ONDCP, are the real-parties-in-interest behind the messages which are broadcast. Accordingly, if a tag is required at all, Petitioner submits that the tag of the producing organization is the only correct tag to properly identify the organization behind the match-PSAs.

Section 73.1212(e) states, in pertinent part:

Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, . . . the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent [or other person or entity] is acting instead of the name of such agent [or other person or entity].

47 C.F.R. § 73.1212(e) (emphasis added). The Ad Council is most properly viewed as the entity who facilitates and coordinates the match-PSA program on behalf of the myriad group of organizations who produce the spots. ONDCP has little to do with this process other than sitting on

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an eight person board with a non-controlling voice which determines which already-produced spots will be included in the match program and then monitoring through its advertising agency the number of spots aired for purposes of statutory compliance with the match program. The organizations that produced the spots are the real parties-in-interest here because they produce, edit and otherwise control the match-PSAs.

Of overriding significance, ONDCP exercises no such authority with respect to the match-PSAs. The viewers are directed by the spots themselves to contact the organizations' toll free phone number or website. They are purposely not directed to ONDCP. A tag identifying ONDCP as a sponsor would confuse this differentiation. The networks, after they receive a reel of qualifying match-PSAs, make their own determination as to which of the spots on the reel are to be aired, how often, and for what purpose. The Commission has noted that sponsorship identification may not be required of funding entities "where there is credible evidence that such entities do not have editorial control of the announcements."¹⁰ Here ONDCP is neither the funding entity nor the party controlling the spot editorially. Accordingly, should the Commission find that Section 317 applies to match-PSAs, Petitioner urges that the Commission then rule that the networks comply with Section 73.1212(e) and may continue to identify the Ad Council or the other independent organizations who produce the spots as the sole legitimate sponsors with respect to the match-PSAs.

NORML is Plainly Distinguishable on its Facts

The Staff's Action Letter in NORML does not logically extend to the match-PSA program. In the previous proceeding, NORML alleged that the networks entered into agreements with ONDCP whereby they received compensation in the form of matching credit from ONDCP in return for airing commercial programming that contained anti-drug themes. NORML further alleged that the networks did not disclose such compensation in violation of Section 317 and the Commission's rules. NORML at *1.

The facts were as follows. The ONDCP purchased advertising spots on the networks. The networks understood that matching credit could be obtained for the broadcast of programs containing story lines depicting the consequences of drug or alcohol abuse. Id. at *3. Certain programs with such story lines were broadcast by the networks. At times, the ONDCP provided technical assistance to the networks with respect to program content. Id. at *10, 13. The issue was whether sponsorship identification was required for subsequent airing of these programs. While the record in NORML showed that the networks might receive the matching credit for re-runs sometime in the future, id. at *14-15, in dictum, the Enforcement Bureau noted that sponsorship identification would be required with respect to repeat broadcasts to the extent that the networks

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See Trumper Communications of Portland, Ltd., 11 FCC Rcd 20415, 20418 (1996).

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have knowledge of future consideration because the networks would then be aware that they would be compensated for repeat broadcasts. Id. at *15.

NORML does not support a conclusion that match-PSAs must carry the ONDCP tag. First, in some instances, technical assistance was provided to the networks by ONDCP in NORML. Such assistance is not provided by ONDCP with respect to match-PSAs that do not carry an ONDCP tag. Moreover, the independent sponsoring organizations control and edit the match-PSAs. ONDCP does not produce, edit or pay for those spots. Second, the programming in NORML was commercial in nature. The match-PSAs here are non-commercial broadcasts. Third, as discussed below, the ONDCP program was constructed in a manner so as to preserve, not supplant, the PSAs in existence prior to Congress' enactment of a paid National Youth Anti-Drug Campaign. No such mandate applies to commercial programs and, thus, the issues presented herein were not addressed in NORML. Simply put, NORML did not address the salient facts underlying this letter request. These facts lead to a decidedly different conclusion and a finding that the match-PSAs produced by the independent not-for-profit organizations have been properly tagged and fully comply with the Commission's sponsorship identification rules.

REQUEST FOR WAIVER

There are overwhelming social, economic and public interest reasons why granting the relief requested in this letter matters. The nation's effort to combat the scourge of drug abuse has been a bipartisan centerpiece of national policy for decades as it aims to eradicate a cancer that infects our nation's society as a whole, particularly its youth. The match-PSAs have become an important weapon in the nation's campaign to end drug abuse. The application of the sponsorship identification rules should not be used to disarm that weapon and discourage organizations which expend funds to produce PSAs from doing so because of artificial restrictions imposed on their exposure. The respected organizations who have produced match-PSAs will resist a "Paid for by ONDCP" tag because ONDCP has not paid for the spots and is not responsible for their content. To say otherwise would be highly misleading. And, it will be confusing because, for the most part, the match-PSAs do not specifically relate to drug use, per se.

Section 317(d) of the Act provides that Section 317 may be waived if it is determined that the public interest, convenience, or necessity does not require that a tag should be affixed to a broadcast. In reviewing a request for waiver, considerations of hardship, equity or more effective implementation of overall policy may be taken into account.¹¹ Significantly, in placing a waiver provision in the statute itself and, thereby, not relying on the traditional waiver provision set forth in

¹¹ WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

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the Commission's rules,¹² Congress strongly suggested that rigid application of the sponsorship identification requirements may well be anomalous in certain cases. This is such a case.

Economic Hardship

Absent a waiver, Section 1802(b) of the Media Campaign Act and Section 317 of the Act will work at cross purposes. In Section 1802(b), Congress mandated that none of the public funds expended in furtherance of the National Youth Anti-Drug Media Campaign "may be obligated or expended . . . to supplant current pro bono public service time donated by national and local broadcasting networks." 21 U.S.C. § 1802(b)(2). The legislative intent behind this provision is clear on its face. The pre-existing pro bono program was to be preserved. Requiring that current PSAs be tagged as sponsored by an entity that did not produce the spot is a result simply not contemplated by Congress when it established this program. The spots already are tagged with the organization responsible for creating the PSA. To require a new tag to name ONDCP as a sponsor of spots not produced for ONDCP is illogical and will compromise the program and confuse the message being communicated. Moreover, the Media Campaign Act imposes a statutory requirement upon the broadcasters as opposed to a contractual requirement through ONDCP. The broadcasters comply with statutory requirements through airing the spots. They are not selling bonus spots at two for the price of one.

In this case of chicken and egg, it is clear that the airing of free PSAs came before the spot purchases by ONDCP. In reality, it is the presence of the match-PSAs that enables ONDCP to air its paid campaign, not the other way around. In the absence of there being these qualifying PSA spots, Congress probably would not have funded ONDCP to make the media buys under the Media Campaign Act since to do so would have frustrated the very sanguine purposes behind the entire national anti-drug media campaign established by Congress.

Furthermore, tagging the spots with "Paid for by ONDCP" would create an undue economic hardship in several ways for the independent organizations who created the spots as part of their public service initiative. First, production costs have not been budgeted to edit existing PSAs so that they include the ONDCP tag. Such additional production costs would likely be significant and represent a very real threat to the current PSA model. Second, most, if not all, sponsoring organizations use advertising agencies to create and produce the spots. They in turn employ individuals, many of whom are union members to assist in creating these pro bono announcements. Under existing union agreements there is an exemption from charging union scale for PSAs that constitute donated media. If match-PSAs were considered to be "paid ads" by virtue of the ONDCP sponsorship identification tag, the costs of producing the spots would escalate, imposing larger fees on production and requiring payment of larger residuals. These additional costs would substantially burden non-profit organizations and in all likelihood diminish the interest

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47 C.F.R. § 1.3 (stating that rules may be waived for good cause).

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of those organizations in continuing to produce spots that would qualify under the match. It would serve no salutary public purpose to have organizations which qualify for the match program expend their otherwise scarce assets to duplicate existing PSAs in order to add an indicia of ONDCP sponsorship on PSAs in which ONDCP had no production role or input whatsoever.

Waiver of Section 317 Will Prevent Public Confusion

A waiver is further warranted to prevent serious public confusion that would result if the sponsorship identification ruling were strictly enforced. An ONDCP tag gives the impression that ONDCP controls and edits the match-PSAs, pays for them and is somehow included in the message being communicated – an impression that could compromise such organization's independence and potentially could undermine its ability to raise funds from its members. Such an impression is plainly erroneous and would grossly and improperly mislead the public into believing otherwise. Since the sponsoring organizations pay for, control and edit the spots, the match-PSAs more appropriately should continue to bear only the tags of their sponsoring organizations.

In addition, most of the match-PSAs do not contain a direct message to avoid drugs. Under the Guidelines, a number of themes may qualify for matching credit. Supra note 6. For example, some PSAs are selected because they support issues that experts have determined create environments that help keep children from using drugs. Such issues include mentoring, excellence in education, parental communications skills and building self esteem. It would be an awkward and confusing result indeed if a PSA which encouraged children to volunteer was tagged with the ONDCP name. A waiver should be granted to avoid this result. Finally, these same PSAs are aired on other broadcast stations or by the networks at times that do not qualify for the match-PSA program but rather as part of a broadcaster's public service commitment to serve in the public interest. The same PSAs will not require an ONDCP tag when not aired as part of the match program. Having the identical message but with different sponsorship identification tags surely will confuse the public and undermine the beneficial purposes of Section 317, not to mention placing an unreasonable production burden on both the public service organizations and the broadcasters to reflect differing tags for the same spots when they are aired in different time periods or on different stations.

A Waiver Would Promote the Goals of Section 317

The waiver advocated here is not only contemplated under the Act (47 U.S.C. § 317(d)), but also would promote accomplishment of the goals of the statute and the public interest. The basic principle of Section 317 is that "listeners are entitled to know by whom they are being persuaded." This request is intended to help fulfill this vision.

The Commission has granted Section 317 waivers in the past so that programs would not have to be tagged with the name of the funding entity where it would be misleading to do so. In National Broadcasting Company, Inc. and Young & Rubicam International, Inc., 34 F.C.C.2d 600

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(1972), the petitioners requested a waiver of the requirements of Section 317(a) with respect to certain announcements which the Gulf Oil Corporation wished to present on the NBC network. The proposed announcements were devoted solely to promoting an independent organization supported jointly by the federal government and industry. This organization provided job training for disadvantaged persons. Gulf produced and paid for the ads. The petitioners therein asserted that the union members producing the spots would waive payment of their residual fees if the announcements made no mention of Gulf or its products therein. Id. The Commission granted the waiver request and stated:

We believe that the situation here presented is the kind to which the waiver provision of Section 317 may be appropriately applied and that the public interest, convenience and necessity does not require the broadcasting of a sponsorship identification requirement.

Id.

The situation here is very similar to the Young & Rubicam case. In both situations, the ads are devoted solely to promoting the objectives of an independent organization – whether it is job training for disadvantaged persons, volunteering or mentoring. Second, the Petitioner here, like the petitioners in Young & Rubicam, contends that persons engaged in the production of the PSAs will waive payment of residual fees for talent because the PSAs make no mention of the funding entity. Moreover, the putative funding entity here (ONDCP), unlike Gulf in Young & Rubicam, does not produce the ads in issue. Because the public interest justifications set forth in Young & Rubicam are equally applicable here and because ONDCP does not produce or otherwise control the match-PSAs, a waiver should be granted in the instant matter so that the networks may broadcast these PSAs without the misleading ONDCP tag.

Finally, a waiver would ensure that the current pro bono public service time donated by national and local broadcasting networks is not supplanted by the funds expended by the ONDCP. The requested waiver is limited in nature and narrowly tailored to the instant factual situation. Waiver of the sponsorship identification rules would only apply to non-commercial and independently produced match-PSAs, not other in-kind contributions where ONDCP provides technical assistance with respect to program content or otherwise controls the broadcast or becomes the actual producer of the match-PSA.

CONCLUSION

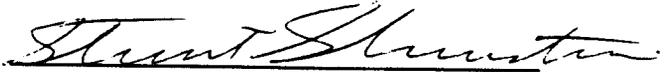
For the reasons set forth above, the Ad Council respectfully requests that the Commission declare that match-PSAs that are produced by independent organizations, and appropriately so identified, as currently aired comply with Section 317 of the Act and the Commission's rules since those match-PSAs carry the tag of the independent sponsoring organization. In the alternative, should a technical reading of Section 317 and the Commission's Rules be deemed to require that an ONDCP tag be affixed to the match-PSAs, then, for the reasons

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shown above, Section 317 should be waived in the public interest so as not to require the identification of ONDCP as the sponsor thereof.

Respectfully submitted,



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