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Broadcast Newsletter

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NEW FCC CHAIRMAN CONTINUES RAPID FIRE APPROACH

New FCC Chairman Brendan Carr has continued to venture into new territory on several fronts, and all broadcasters should be paying close attention.

After ending the FCC's DEI practices on his first full day as FCC Chairman, Carr recently sent a letter and announced on social media that the DEI practices of NBC Universal and Comcast would be investigated as inconsistent with FCC policy.

One week after a complaint from Senator Marsha Blackburn, the FCC Enforcement Bureau issued an Enforcement Advisory on the subject of Payola dealing with musical artists that perform at station events. Two weeks later, Chairman Carr sent a letter to iHeart Media noting the payola advisory and asking for information related to the artists IHeart invites to perform at their music festival and actions taken by iHeart after the Advisory.

These actions follow earlier announced investigations of NPR/PBS for allegedly including commercials in content aired by their affiliates.

Carr's approach is novel for a sitting FCC Chair, exerting the authority of the Chairman's office to enforce regulations via investigation.

FCC ENFORCEMENT BUREAU ISSUES PAYOLA ADVISORY

One week after Senator Marsha Blackburn raised a payola concern in a letter to the FCC, the Enforcement Bureau issued a February 6 advisory to all broadcasters warning about compliance with its payola rules and a related criminal federal statute. The Advisory suggested that stations might be engaging in "covert manipulation of airplay" based on musical artist participation in station promotions or events. Just over two weeks later, FCC Chairman Brendan Carr fired off a letter to iHeart Media expressing concerns over their actions since the advisory and compliance actions for their upcoming country festival station event in Austin.

Senator Blackburn's letter reported musicians being invited to broadcast station events for reduced or no compensation as a condition to airplay of their music. The advisory raised concerns that if stations are determining airplay based on artist participation in station promotions or events for reduced or no pay, and not disclosing those arrangements on air, a payola violation might result.

Payola is the unreported payment to—or acceptance by—employees of broadcast stations, program producers, or program suppliers of any money, service, or valuable consideration to achieve airplay for any programming. Section 507 of the Communications Act requires those persons who have paid, accepted, or agreed to pay or accept such payments to report that fact to the station licensee *before* the involved matter is broadcast. In turn, Section 317 of the Act requires the licensee to announce that the matter contained in the program is paid for, and to disclose the identity of the person furnishing the money or other valuable consideration.

These restrictions are part of the FCC's Sponsorship Identification rule 73.1212. In addition, the FCC rule requires broadcasters to exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals information to enable the licensee to comply with the sponsorship identification requirements. Varying degrees of diligence are expected depending on station formats.

The Chairman's letter requires iHeart to provide information by March 6th on its dealings with artists, their compensation for the festival versus other venues, whether airplay is being promised, what protocols iHeart has in place to police payola matters, and what actions iHeart took after the advisory was issued. At the time of our newsletter publication, the 10-day period had not run so iHeart's response or lack thereof was unknown.

These developments should prompt all broadcast stations to examine their payola policies and review how they exercise diligence to prevent payola violations. To be clear, if payment for airplay is disclosed on air at the time an artist's music is played, then there is no payola violation. It is certainly permissible to have music artists perform for free at station events if there is no promise of increased airplay of their music. But if there is such a promise, it must be disclosed on air.

EEO Form 395-B Fate Still Uncertain

A recent hearing on the US Fifth Circuit Court of Appeals on the legitimacy of the FCC decision reinstating EEO Form 395-B to collect employee ethnicity, race and gender shed very little light on whether the form itself will survive judicial scrutiny. The FCC conceded during the hearing that the addition of a "non-binary" gender category on the form would be removed under President Trump's new executive order that the U.S. government will recognize only male and female genders.

Because there are also petitions pending at the FCC seeking reconsideration of the decision reinstating Form 395-B, the Court asked whether the FCC might be reconsidering and reversing the reinstatement of the form. The FCC notified the court after the hearing that it is deadlocked 2-2 on the issue given that a third Republican Commissioner has not yet been appointed. Whether the Court rules before the FCC might internally take up the issue remains to be seen. A ruling upholding the form, even without the new "non-binary" gender category, might complicate the Commission's ability to change course.

For the moment, the status quo remains – the legal challenges prevent the FCC from ordering completion and submission of the form by broadcasters. A revamped Office of Management and Budget, which would have to approve any revised form, could spell another obstacle to the form being approved. While the rule sets a September 30 annual deadline for the form to be filed, the Media Bureau must issue a notice first, an unlikely step at this point.

Rules on Loud TV Commercials to Get a New Look

Yesterday, the FCC voted to open a new proceeding to re-look at its current rules on preventing the airing of commercials on TV stations, cable, and satellite that are excessively loud compared to normal programming.

The FCC first adopted loud commercial prevention rules in 2012 after Congress adopted the CALM Act. While complaints about loud commercials initially dropped, they have been increasing and last year jumped appreciably according to the FCC's news release.

Defining "Public Interest"

Less than thirty days into the new administration, a common phrase keeps surfacing – the public interest. FCC licenses come with a built-in legal requirement to conduct broadcast operations in the "public interest, convenience, and necessity." But Congress, the FCC and the courts have never adopted a precise definition of the public interest standard. Basically, they've nibbled around the edges when necessary, interpreting certain actions within the standard (i.e., serving the needs of the community) and some outside the standard (i.e., obscene content or false EAS tones). The lack of a clear definition gives the FCC very broad discretion to put a station's actions under a "public interest" microscope.

That microscope is being wielded freely in the first days of the new administration, in various contexts – reinstating and examining news distortion complaints as public interest matters, and zooming in on whether stations are acting "based on their financial interests at the expense of community responsiveness" in obtaining free or discounted performances from musical artists that may be resulting in favorable air play.

Carr is concerned with an erosion of public trust in the media and has previously called for a rulemaking proceeding to newly consider and further define what the public interest standard means. We may see that proceeding soon after there is a 3rd Republican Commissioner at the FCC.

Dates to Remember

March 9, 2025
Daylight savings time begins; AM daytime-only radio stations or those operating with pre-sunrise and post-sunset authority should check their licenses or PSRA-PSSA authorizations to be sure they are operating during authorized hours

April 1, 2025
Radio and TV Stations located in Indiana, Kentucky, Tennessee, Texas, Delaware, and Pennsylvania: if five (5) full time employee threshold is met, prepare EEO public file report covering the period from April 1, 2024 to March 31, 2025, upload it to the station online public inspection file and post it on the station website

Mid-Term EEO Review for Radio stations located in Texas: if station employment unit has **eleven (11) or more full-time employees**, an independent **mid-term EEO review** of your last two EEO public file reports by the FCC will occur in connection with the 2024-25 EEO public file report due April 1, and when uploading the report, each station in the SEU must indicate that the SEU has 11 or more full-timers using the "Mid-Term Review" tab is the OPIF settings section. If the SEU has **between five and ten full-time employees**, when uploading the 2024-25 report, each station in the SEU should indicate that the SEU has fewer than 11 full-time employees using the "Mid-Term Review" tab in the OPIF settings section (by doing so, no mid-term review of the SEU will take place)

Mid-Term EEO Review for Television stations located in Indiana, Kentucky and Tennessee: if station employment unit has **five (5) or more full-time employees**, an independent **mid-term EEO review** of your last two EEO public file reports by the FCC will occur in connection with your upload of the 2024-25 EEO public file report due April 1. By uploading an EEO public file report, the FCC automatically knows that your television station meets the 5 or more full-time employee threshold for a mid-term review. So unlike for radio, there is no OPIF mechanism available or needed for TV stations to specify the number of SEU employees

April 10, 2025
TV, Class A, AM & FM Stations (commercial & noncommercial): deadline to complete and upload to online public file the 1st Quarter 2025 issues/program lists and any foreign sponsorship identification reports

Class A TV Stations Only: deadline to complete and post to your online public file the 1st Quarter 2025 certification of ongoing Class A eligibility

Noncommercial Broadcast Stations: deadline to complete and post to your online public file the 1st Quarter 2025 report for any 3rd Party Fundraising conducted during the quarter

For more info, contact Joe Chautin or Mark Balkin.

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Actual resolution of legal issues depends upon many factors, including variations of facts and applicable Federal laws. This publication is not intended to provide legal advice on specific subjects, rather, it seeks to provide insight into legal developments and issues that we feel could be useful to our clients and friends.

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