



# Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey & Leonard, LLP  
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100  
Charlottesville, VA 22902 • (434) 977-3716

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## Legal Memorandum

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*In this issue, link to information about*

*Developments:* [April Fools' Day Warning – No Joke  
Comment Period Established for EAS Proposals](#)

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### No Fooling: Hoax Rule, EAS, and On-Air Phone Call Prohibitions

April Fools' Day is just a few days away, which means that station personnel may be considering April Fools' Day related programming. Stations should remain mindful of the FCC's "Hoax Rule"—which prohibits the broadcast of hoaxes and other false and deceptive programming related to a crime or catastrophe—and of the FCC's Emergency Alert System ("EAS") rules, which prohibit the broadcast of EAS and Wireless EAS tones (or a simulation of the EAS and Wireless EAS tones) for any purpose other than an actual test, an actual alert, or an educational Federal Emergency Management Agency ("FEMA") Public Service Announcement ("PSA"). Stations should also be careful not to engage in "prank" phone calls that would violate the FCC's rule governing the broadcast of telephone conversations.

*The Hoax Rule.* The Hoax Rule is fairly straightforward: No station should broadcast or participate in the broadcast of any false information regarding a crime or catastrophe if (1) the station knows the information is false, and (2) it is foreseeable that broadcast of the information will cause substantial public harm. Perhaps the most efficient (and probably the most responsible) way to avoid a violation would be to ensure that any April Fools' Day broadcast material avoids referring to a crime, catastrophe, or other emergency condition. For your convenience and reference, a copy of the FCC's Hoax Rule is attached. Programming that violates the FCC's Hoax Rule may be amusing, but it may also come at a cost, even when the station's intent is benign. The "base" fine for a violation of the Hoax Rule is \$7,000.

*False or Simulated EAS Tones.* The EAS rules are also relatively straightforward. In a nutshell, the FCC's EAS rules:

- (i) require stations to air Presidential EAS alerts and to air required monthly and weekly tests,
- (ii) permit stations to air other, non-presidential EAS alerts such as AMBER alerts and severe weather alerts,
- (iii) specifically prohibit the airing of EAS tones for any reason other than a test or an actual alert, and
- (iv) specifically prohibit the airing of false or simulated EAS tones or alerts.

In recent years, broadcasters and other media companies have been fined up to \$1,000,000 for airing false or simulated EAS tones. Even if an April Fools' Day broadcast doesn't violate the Hoax Rule, if it contains EAS tones or simulated EAS tones (or Wireless EAS tones), it could run afoul of the EAS rules.

The only permissible transmission of EAS tones for non-alert/non-test purposes is in the context of a FEMA PSA for the WEA (Wireless Emergency Alert) program. Remember: even news reports cannot contain real or simulated EAS or Wireless EAS tones. More specifically, the FCC has extended its waiver (through May 2017) to allow for the transmission of FEMA PSAs that make "clear that the WEA Attention Signals are being used in the context of the PSA and for the purpose of educating the viewing or listening public about the functions of their WEA-capable mobile devices and the WEA program."

*Broadcast of Telephone Conversations.* The FCC's rule governing the broadcasting of a telephone conversation requires a station to inform any party to a telephone conversation of the station's intention to broadcast the conversation. The station must provide notice *before* the telephone conversation is broadcast or before it is recorded for broadcast. The only exceptions to this rule are (i) where the other party is aware that the conversation will be broadcast, or (ii) the other party may be presumed to be aware from the circumstances of the call. The presumption of awareness exists only when the caller is associated with the station (e.g., an employee or part-time reporter calling in to the station) or when the listener/viewer (or other party) initiates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations (for example, a radio call-in show where the host solicits listeners to call in and "sound off" or severe weather coverage by a television station in which viewers are encouraged to call in and report the conditions outside their windows). This rule makes it pretty difficult for stations to make prank calls as a part of April Fools' Day programming.

The FCC routinely issues \$4,000 fines for violations of this rule, and the FCC often investigates these situations when the person or business who is the object of a station's "prank" files a complaint with the Commission. In short, stations should be careful to follow the rule and obtain consent before broadcasting telephone conversations (or recording telephone conversations

for later broadcast)—while compliance with the FCC’s rule is fairly straightforward, noncompliance can be costly.

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With all that in mind, stations may safely go forth and entertain their listeners and viewers with April Fools’ Day program material!

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## Comment Dates Set for FCC Proposals to Improve EAS System

As we reported to you previously, the FCC adopted a [Notice of Proposed Rulemaking](#) which proposes methods to improve the Emergency Alert System (“EAS”) through which broadcasters and other participants disseminate emergency information. Responding to the advancement of technology, the FCC is exploring new ways to utilize infrastructure and communications improvements to make EAS more efficient and effective. Comment is sought by the Commission on its proposed changes to the EAS rules in four main areas:

- improving alerting organization at the state and local levels;
- building effective community-based public safety exercises;
- ensuring that alerting mechanisms are able to leverage advancements in technology, including IP-based technologies; and
- securing EAS against accidental misuse and malicious intrusion.

The Commission is seeking comment on the following key issues:

*Governmental EAS Integration.* The Commission has the stated goal of better coordinating federal, state and local government in the EAS process. The proposals are designed to encourage state and local innovation to meet the needs of their communities, and the FCC seeks to facilitate state and local alert originator participation in the use of wireless emergency alerts (“WEA”), and to enhance the utility of EAS and WEA as alerting tools. To that end, comments are sought regarding policy and jurisdictional issues which must be addressed in the proposed integration of state, local and federal systems. Additionally, the FCC seeks comment regarding the types of voluntary community exercises that can be implemented to achieve this integration.

*The EAS and Social Media.* With a significant number of people obtaining their information from social media platforms, the FCC is now considering how to use those social media platforms to improve EAS. The FCC stated that it recognized that use of these platforms may allow for assessment of the scope of the emergency, the efficient triage of victim needs, and the ability to organize optimal deployment of emergency resources. Comment is sought on how to assess and meet public expectations for receiving alerts as content is viewed across different platforms.

*Meeting the Emergency Alert Needs of All Community Members.* The FCC also seeks comment on how to implement community-based alerting exercises which can best meet the needs of individuals with limited or no English proficiency and individuals with disabilities.

*New Online Filing System.* State and local governments have long been required to file their emergency preparedness plans with the FCC. Currently, such filings are made on paper. The Commission seeks comment on its proposal to utilize an online filing system for the filing of emergency plans and to adjust existing administrative rules to streamline the process by which the FCC gauges the effectiveness of such plans.

*EAS Security.* The FCC is concerned with the security of EAS, and the Notice proposes to improve EAS security by requiring EAS participants to certify annually that they are following certain best practices for EAS security. To be sure, this proposal represents a new burden on EAS participants. Broadcasters may wish to consider whether their facilities—and especially their EAS gear—is configured and designed with security in mind and whether an annual certification is warranted.

*“Live” EAS Testing.* The FCC seeks comment on whether state and local alert originators and/or EAS participants should be allowed to conduct periodic “live” EAS tests and alerts using the EAS tones. Comment is also sought on what steps can be taken to prevent public confusion when such “live” tests are conducted.

*Use of EAS Tones in PSAs.* The FCC also seeks comment on whether broadcast stations should be permitted to broadcast Public Service Announcements (“PSAs”) to help educate the public about EAS. Currently, the use of EAS tones (or sounds that mimic EAS tones) for any purpose other than a test or actual alert is prohibited, and the FCC in recent years has imposed significant fines (some in the million dollar range!) on a number of EAS participants for the alleged violation of the prohibition. Under the FCC’s proposal, PSAs would be able to use the EAS tones only if they would not mislead the public or cause technical harm. While the proposal speaks only in terms of PSAs, stations may wish to consider providing comments to support the educational use of EAS tones in news stories as well.

*Comment Deadlines.* Comments are due **May 9, 2016**, and reply comments are due **June 7, 2016**. Stations that are interested in filing comments may wish to discuss the nuances of the proposals with legal counsel, EAS equipment vendors, and state and local government officials who play a role in state and local alerting protocols.

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If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

*Stephen Hartzell, Editor*

BROOKS, PIERCE, McLENDON,  
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove  
Mark J. Prak  
Marcus W. Trathen  
David Kushner  
Coe W. Ramsey  
Charles E. Coble  
Charles F. Marshall  
Stephen Hartzell  
J. Benjamin Davis  
Julia C. Ambrose  
Elizabeth E. Spainhour  
Eric M. David  
Timothy G. Nelson

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**47 C.F.R. § 73.1217 Broadcast hoaxes.**

No licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if:

- (a) The licensee knows this information is false;
- (b) It is foreseeable that broadcast of the information will cause substantial public harm, and
- (c) Broadcast of the information does in fact directly cause substantial public harm.

Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances.

Note: For purposes of this rule, “**public harm**” must begin immediately, and cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties. The public harm will be deemed **foreseeable** if the licensee could expect with a significant degree of certainty that public harm would occur. A “**crime**” is any act or omission that makes the offender subject to criminal punishment by law. A “**catastrophe**” is a disaster or imminent disaster involving violent or sudden event affecting the public.

[57 FR 28640, June 26, 1992]