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

February 15, 2019

Legal Memorandum

In this issue, link to information about

Developments:

Federal Election Commission Seeks Comment on Changing Size of TV Political Disclaimers

Recent news out of the Federal Election Commission ("FEC") ought to get broadcasters' attention, as possible revisions that the FEC may make to its political advertising disclaimer rules *could* set up a conflict with the FCC's political broadcasting rules, potentially leading to confusion. We learned this week that the FEC is seeking comment on whether to launch a proceeding that would consider changing the required size (or, really, the required vertical picture height) of disclaimers on television political advertisements. Ads concerning candidates for federal office are subject to FEC requirements, in addition to FCC rules. Although federal candidates, committees, and third-party advertisers—not broadcast stations—are primarily responsible for compliance with these FEC requirements (broadcasters, of course, are separately responsible for compliance with the FCC's sponsorship identification rules relating to political—and other—advertising), being familiar with these rules can help stations assist political advertisers in assessing the adequacy of sponsorship identification tags. Likewise, broadcasters ought to take note when changes to those rules are discussed; in fact, they may wish to comment in FEC proceedings, including this one, to remind the FEC of how its rules interplay with the FCC's rules.

At issue here is the FEC rule that requires that any TV ad paid for or furnished by a "political committee" (whether or not authorized or paid for by a candidate) must carry a written

disclaimer in letters equal to or greater than four percent (4%) of the communication's vertical picture height. Extreme Reach, a software company that has a platform for video ad campaign workflow—many broadcasters are familiar with Extreme Reach because it provides an avenue for delivery of infomercials and other content—has filed a Petition for Rulemaking ("Petition"), asking the FEC to launch a proceeding to change the "four percent" rule, arguing that the law has not kept up with technology. The Petition asserts that the FEC's current, "four percent" rule for TV political ads, which was established back when "standard definition" was the television broadcast standard, fails to account for the industry's subsequent adoption of the "high definition" standard.

The Petition asks the FEC to harmonize the vertical picture height requirement with the broadcast industry's current disclaimer guidelines for high-definition broadcasts, which set the size of such disclaimers at approximately two percent of the vertical picture height. Accordingly, the Petition seeks to break the FEC's current rule into two provisions: one retaining the four-percent requirement for standard-definition broadcasts and one adopting the approximately two-percent requirement for high-definition broadcasts.

Now, the FEC is seeking comment on the Petition; that is, the FEC wants to know whether other stakeholders believe the Petition has merit. Comments on the Petition are due April 15th. It's possible the FEC will launch a rulemaking proceeding on the issue; it's also possible that the FEC will decide to take no action at all.

Notably, even if the FEC ultimately altered the disclaimer sizing requirement, broadcasters would still need to comply with the FCC's rules (as well as applicable state law) regarding sponsorship identification, which *also* require disclaimers to be equal to or greater than four percent of the vertical picture height. Clearly, the outcome of all of this could have a significant impact on broadcasters. We'll be monitoring developments closely.

FCC Eliminates Mid-Term EEO Report

Broadcasters will soon have one less regulatory requirement to worry about. That's because the Commission at its February open meeting adopted an Order eliminating the Mid-Term EEO (Equal Employment Opportunity) report, known as the FCC Form 397 report. According to the Order, the Mid-Term EEO Report is almost entirely redundant in this era when all broadcasters are required to use the Online Public Inspection File ("OPIF"); in fact, with one exception (discussed below), all of the information that broadcasters are asked to provide on the Form 397 is already otherwise available in the OPIF.

Note: even though the Order was adopted on February 14th, the Mid-Term EEO Report will not officially be eliminated until May 1, 2019. Thus, stations with an April 1 Form 397 filing deadline will still be required to file the Mid-Term EEO Report by April 1, 2019.

The FCC has long required broadcast television stations in station employment units with five or more full-time employees, and radio stations in employment units with eleven or more full-time employees, to file Form 397 as such stations near the mid-point of their eight-year license terms. The goal behind the Form 397 requirement is to facilitate EEO compliance and to provide

the FCC with information necessary for it to conduct mid-term EEO reviews (which are mandated by law).

The only nugget of information that a broadcaster provides on its Form 397 that is not currently made available in its OPIF is a certification regarding the threshold issue as to whether the broadcaster has the requisite number of employees to, in fact, be subject to a mid-term EEO review.

To handle this, the Order states that the FCC will add a simple mechanism to the OPIF so that radio stations uploading their annual EEO public file report will have to identify whether their full-time staff size is sufficient to trigger a mid-term review. (All television stations that have to upload an annual EEO public file report to the OPIF necessarily have the requisite five employees needed to trigger a mid-term review, so the very act of filing an annual EEO public file report will serve to notify the FCC that such station's staff is large enough to trigger a mid-term review).

We'll send a reminder about the EEO Mid-Term Report's elimination closer to May 1, 2019.

Federal Trade Commission Consent Orders Provide Useful Reminder Regarding Native Advertising

Two consent orders approved recently by the Federal Trade Commission ("FTC") serve as a salient reminder for broadcasters about the nature of native advertisements—and to be wary of where the line is drawn between creative advertising and consumer deception. That's especially true for broadcasters who assist advertisers with the generation of content for non-broadcast platforms such as websites, apps, and social media.

The FTC enforces the FTC Act, which prohibits unfair and deceptive advertising, and which may be enforced against advertisers for dubious or unsubstantiated claims that are made in broadcast and/or digital advertising campaigns. "Native advertising" is nothing new to broadcasters—in the broadcast realm it includes product placement and other paid campaigns that are intended to look like non-advertising program material; in the digital realm (including station websites), "native advertising" refers to a promotional tool used by advertisers to organically draw attention to its product while blending into the scenery of the immediate content to which the consumer has chosen to listen or view. It involves formatting an ad so it matches the style and layout of the content into which it is integrated.

Although studies have shown that native advertisements often generate high consumer click-through rates due to the advertisements' ability to seamlessly integrate into the form and function of the user experience into which the advertisement is placed, such ads inherently run the risk of being deceptive and/or misleading—and, therefore, unlawful—if adequate disclosures aren't made (on the broadcast platform, the FCC's sponsorship ID requirement is the disclosure technique to avoid running afoul of FCC payola/plugola concerns and FTC Act concerns). Critically, native advertisements must contain disclaimers of appropriate size, content, and placement to comply with the FTC Act.

And that's a lesson broadcasters can take away from the two final consent orders (the "Orders") in which the FTC settled allegations that two companies—Creaxion Corporation ("Creaxion") and Inside Publications, LLC ("Inside Publications")—had deceived consumers by failing to disclose the commercial nature of several native advertisements. The FTC's complaints alleged that the companies had disseminated digital ads that (1) made false or misleading endorsement claims, (2) deceptively failed to disclose material connections with endorsers, and (3) had been deceptively formatted. The ads were tied to the launch and promotion of "FIT Organic Mosquito Repellant" whereby Creaxion partnered with Inside Publications to run advertorials and endorsements from athletes in two magazines and across those athletes' and publications' social media channels. According to the complaints, the advertising campaign sought to capitalize on the worldwide outbreak of the Zika Virus and the then-prevalent concerns regarding mosquitos carrying the virus at the 2016 Summer Olympics in Brazil.

The advertorials and endorsements ran in (1) social media promotions; (2) print and online promotional articles; and (3) online consumer reviews. From a pure advertising-efficacy perspective, the ads were successful in seamlessly integrating with the various media platforms' forms and functions.

But the FTC took issue with the fact that *none* of the social media posts or reposts, print or online articles, or paid-for consumer reviews were identified as commercial advertising. That is, the endorsements and consumer reviews appeared to reflect the independent experiences or opinions of impartial users, despite the fact that there was no such impartiality or independence, and thus ran afoul of the FTC Act's bar on unfair, false, deceptive, or misleading acts or practices.

Fortunately for the companies at issue, the FTC's Orders did not levy any fines. But they serve as important reminders to media entities that native advertisements must contain disclaimers of appropriate size, content, and placement to avoid running afoul of the FTC Act. And, again, this is especially important for broadcasters who assist advertisers with the generation of content for websites, apps, social media, and other non-broadcast platforms.

Drone Developments: FAA Requires External Marking on Drones; Comment Deadline Set for Drone Flights over People

Recent Federal Aviation Administration ("FAA") activity is likely to impact broadcasters who utilize drones in the course of newsgathering, video production, and tower inspections—both in the short term, and potentially, in the long term as well. Below, we discuss a new rule regarding external identification/marking of drones that takes effect on February 25, 2019, and then we discuss the FAA's potential relaxation of restrictions on various drone operations (including flights over people).

FAA REQUIRES EXTERNAL MARKINGS ON DRONES

The FAA recently issued an Interim Final Rule (the "Rule") that will require drone (a/k/a small unmanned aircraft or "sUAS") owners to display on the external surface of any sUAS its assigned FAA registration number. The new Rule **takes effect on February 25, 2019**.

Since late 2015, the FAA has permitted sUAS registration numbers to be located in non-external locations (such as inside a battery compartment) as long as the numbers were accessible without the use of tools (i.e., "readily accessible"). But in comments to the FAA following issuance of that prior rule, various law enforcement and security stakeholders informed the FAA that first responders, when called to deal with a drone-related issue, generally must locate a sUAS's registration number; and when those responders must open a compartment to do so, they face a significant risk of encountering a concealed explosive device.

The FAA recognized that there would be an inherent risk to first responders if it notified the general public about those responders' concerns without putting in place any FAA mechanism to mitigate the risk. So, the FAA ultimately determined that there was good cause to issue the new Rule without giving prior notice and opportunity for comment—and to have the Rule take effect quickly, just 10 days after publication of the Rule in the Federal Register.

Again, the new external identification/marking Rule will take effect on February 25, 2019. Accordingly, as of that date, the FAA registration number of station drones must be externally and legibly marked such that the number "can be seen upon visual inspection of the aircraft's exterior." If your station uses drones for newsgathering, video production, or any other purpose, be sure to communicate this revised requirement to the personnel who are in a position to confirm compliance. Even though the Rule is taking effect soon, the FAA is seeking furtherer comment regarding the Rule. Any party wishing to comment must do so by March 15, 2019.

COMMENT DATE SET ON FAA PROPOSALS TO RELAX DRONE REGULATIONS

In other drone news, broadcasters have until April 15th to comment on the FAA's Notice of Proposed Rulemaking ("Notice"), that, among other things, would permit small unmanned aircraft systems ("sUAS"), i.e., drones that weigh 55 pounds or less, to fly at night and over people when certain conditions are met. You'll recall that we reported extensively on a draft of the Notice last month. (Please let us know if you'd like us to resend that detailed memo.) That Notice has now been published in the Federal Register, triggering the April 15 comment deadline.

In addition, also earlier this week, the FAA released a second relevant document—an Advance Notice of Proposed Rulemaking ("Advance Notice") regarding the Safe and Secure Operations of Small Unmanned Aircraft Systems. The Advance Notice addresses topics that are related and similar to issues addressed in the Notice. Comments on the Advance Notice are also due April 15th.

Overview of Notice. At a high level, the FAA in the Notice seeks comment on potentially relaxing some of its existing rules, which impose operational restrictions including prohibitions on drone operations at night and flights over persons who are not (1) either directly participating in the drone's operation or (2) reasonably protected from a falling drone (i.e., by being under a covered structure or inside a stationary vehicle). These current restrictions necessarily limit broadcaster use of drones for video production in many newsgathering circumstances, and the broadcast industry has been waiting for new rules that would allow for drone operations over people and at night.

The Notice draws on the experience the FAA has gained since the current rules took effect in 2016. It proposes to incrementally expand permitted drone uses to help meet the "demands for increased operational flexibility."

- Night Operations. The FAA has received thousands of requests for waivers to operate drones at nighttime, making such waiver requests by far the most common type of waiver request the FAA receives. In processing these night operations waivers, the FAA considered the two most critical factors in ensuring safety during night operations to be drone anti-collision lighting and operator knowledge. Accordingly, the Notice proposes to standardize and codify these factors as two separate requirements: (1) a requirement that each drone operator seeking to conduct night operations must complete knowledge testing or training specific to such operations, and (2) a requirement that each drone operating at night must have anti-collision lighting illuminated and visible for at least 5,280 feet (i.e., one mile). Together, the requirements address FAA concerns with operators' ability to maintain visual line of sight with a drone during night operations. The Notice also seeks comment on whether drones conducting night operations should be required to have additional, position lighting. And, the FAA seeks comment on several issues pertaining to anti-collision lights.

- Operations over People. Unlike the FAA's proposed rules for night operations, the agency's proposed rules for conducting operations over people are quite nuanced and complex. At a high level, the FAA proposes three categories of permissible operations over people, which escalate in restrictiveness based on the level of risk of injury each category of operations presents. Across all three categories of permissible drone operations, operators would be responsible for following any manufacturer's instructions accompanying the drone, as well as ensuring that the drone meets the applicable category's requirements prior to each flight. (We provided a detailed summary of these proposals last month.)

Overview of Advance Notice. The Advance Notice supplements the Notice and seeks more generalized comments regarding drone operations. Among the topics on which the Advance Notice seeks comment are whether the FAA should engage in rulemaking regarding: prescriptive drone horizontal and vertical stand-off distances from people and structures; altitude, airspeed, and other drone performance limitations; restrictions regarding the type and weight of drone payloads (including cameras); and redundancy and fail-safe requirements for critical drone systems.

There is likely to be overlap between the drone issues raised in these parallel proceedings stemming from the Notice and Advance Notice, respectively. Accordingly, interested parties may wish to monitor both proceedings, as the filings in one proceeding may help inform understanding of the other.

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

Tim Nelson, Editor

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

Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles F. Marshall
Stephen Hartzell
Julia C. Ambrose
Elizabeth E. Spainhour
J. Benjamin Davis
Timothy G. Nelson
Amanda M. Whorton
Patrick Cross
