Virginia Association of Broadcasters Legal Review

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Legal Memorandum

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DOJ Keeping Close Eye on Broadcast Transactions; Seeking to Understand the Advertising "Market"

The U.S. Department of Justice (DOJ) seems to be increasingly keeping an eye on the actions of broadcasters and transactions involving local media ownership, with a focus on potential anticompetitive practices and deals. In particular, the DOJ has focused its increased regulatory scrutiny on alleged harmful impacts to the spot advertising market purportedly caused by media company mergers and acquisitions.

Underscoring the fact that the DOJ is paying greater attention in these areas than it has in the past, earlier this month the agency held a two-day Public Workshop on Competition in Television and Digital Advertising in Washington, D.C. The Workshop was the fulfillment of a commitment by Assistant Attorney General for Antitrust Makan Delrahim to open a dialog with industry participants about how online advertising impacts competition in video advertising.

During four panels on May 2 and May 3, 2019, representatives of the television, cable, and digital industries, advertisers, and academics discussed how advertising is sold and the intensely competitive marketplace for "impressions" or views by consumers.

Of keen interest to broadcasters was discussion, prompted by questions from DOJ staff attorneys, related to how the video advertising market should be defined. A final determination of

the market definition will have far-reaching consequences for media transactions. If television spot advertising is a *unique* market—which multiple workshop panelists said is *not* the case—then one owner acquiring another station in a particular market with just one or two others stations would result in a highly concentrated market with allegedly negative competitive effects in the form of fewer choices and higher prices for advertisers; however, if cable spot advertising and digital video advertising are part of the *same* market as television spot advertising, then television station mergers would have a less significant impact because many others remain competitive in the local advertising market, which would raise fewer concerns about choice and higher prices.

Predetermined questions by DOJ staff attorney moderators suggested that the Workshop and a practical explanation of how the highly fragmented video advertising market operates was greatly needed. When asked about the DMA-wide "reach" of over-the-air television versus the smaller "reach" of cable, a subset of paid subscribers in the DMA, representatives of the cable and television industry both challenged DOJ's interpretation of "reach," pointing out that a television station may theoretically reach (as a technical matter) all homes in the DMA, but not all viewers within the homes actually view the station over-the-air. Cable can achieve a greater audience reach number by aggregating the distribution of an advertisement over multiple channels on their 250-plus channel systems. When asked how ratings impact the advertisers' willingness to substitute cable and digital advertising for television advertising, panelists said that advertisers do not buy advertising for *programming* anymore; rather, they buy for *impressions* or views.

Indeed, impressions and the pressure for advertisers to get a return on their advertising investment was a theme across all panels at the Workshop. Again and again, panelists reiterated that return on investment is the most important factor for advertisers—they are less concerned about the platform the advertising runs on than the effectiveness of their advertising dollars. Advertisers buy across media types and put packages together that include television, cable, and digital, laying bare the fact that the different media types are, in fact, substitutes in the market. While DOJ's traditional analysis suggests that broadcasters control the market, panelists explained that digital is quickly growing, in part due to the ease with which consumers can be targeted by use of data on consumer demographics and behavior. Broadcasters are playing "catch up" in the market with respect to targeting, although the implementation of ATSC 3.0 may allow television to compete more effectively by facilitating targeted television advertising.

It remains to be seen if DOJ will be swayed in its merger reviews by the robust discussion of the competitive video advertising market. We will continue to monitor the DOJ's actions and will provide updates on significant developments.

New HHS Rule Will Require Disclosure of Drug Prices in Some TV Ads

Last week, the U.S. Department of Health and Human Services adopted a final rule (the "Rule") that will mandate the inclusion of pricing information in many prescription drug advertisements aired on television. As explained below, the rule imposes obligations on *advertisers*—not on the TV broadcasters airing the spots. Still, as is the case with many products whose advertisements are regulated by agencies other than the FCC, broadcasters are generally better served if they are aware of pertinent rules. (Moreover, to the extent that TV stations produce

a spot for such an advertiser, stations will need to be familiar with the disclosure rules so that they can adequately serve their advertising client.)

The stated aim of the Rule is to improve the quality, accessibility, and affordability of Medicare and Medicaid, the idea being that providing transparency may ultimately lead to a reduction in the price of certain prescription drugs. To be clear: the new Rule is not yet effective; we expect it will take effect later this year, and we'll keep you posted.

Here's what TV broadcasters ought to know about the Rule, which adds several new sections to current regulations governing Medicare and Medicaid:

- Direct-to-consumer TV advertisements for prescription drugs covered by Medicare or Medicaid with a list price (i.e., a non-discounted price) of $35 or more must include text indicating the cost for a typical 30-day regimen (or for a typical course of treatment, whichever is most appropriate).

- Specifically, the following text is expressly required in the advertisement:

  > *The list price for a [30-day supply of] [typical course of treatment with] [name of prescription drug or biological product] is [insert list price]. If you have health insurance that covers drugs, your cost may be different.*

- The above text must (1) appear at the end of the advertisement, (2) be "placed appropriately," and (3) be presented against a contrasting background for sufficient duration and in a standard font size and style that does not complicate the ad and allows the text to be easily read. Obviously, some of these requirements are less-then-specific and may lead to further clarification through enforcement action.

- The requirement does ***not*** apply to advertisements for drugs with list prices of less than $35 per month for a 30-day supply or typical course of treatment.

- The new price-disclosure Rule applies to television advertisements wherever they appear; that is, the Rule applies whether the TV ad is broadcast over-the-air, on cable or satellite, or on a streaming service.

- The Rule does not apply to radio ads or to digital/online advertisements.

Again, the Rule does not directly apply to television broadcasters, and, generally speaking, broadcasters should not be subject to liability for an advertiser's failure to comply with the Rule's disclosure requirements. That said, you may wish to contact your communications counsel should you have questions regarding a particular spot.

We'll let you know when the Rule takes effect.

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

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