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Legal Memorandum

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Enforcement Bureau Issues Enforcement Advisory Targeting Sponsorship Identification Requirements

The FCC recently released an “[Enforcement Advisory](https://docs.fcc.gov/public/attachments/DA-21-266A1.pdf)” (complete with the colorful graphic you see immediately above) reminding broadcasters of their obligations to comply with the Commission’s sponsorship identification requirements. The Advisory comes several months after the FCC [imposed](https://docs.fcc.gov/public/attachments/FCC-21-19A1.pdf) a $233,000 penalty for a broadcast ownership group’s multiple violations of the sponsorship ID rules (as well as a preexisting consent decree), and close to a year after the FCC [imposed](https://docs.fcc.gov/public/attachments/FCC-20-59A1.pdf) a $48 million penalty—the largest ever imposed on a broadcaster at the time of its issuance—for a broadcast ownership group’s violations of, among other things, the sponsorship identification requirements.

The rules governing broadcasters’ sponsorship identification obligations are currently set forth in both the Communications Act (as amended) and the FCC’s regulations and interpretive decisions. The sponsorship ID rules require—and we suspect this will all sound familiar to broadcasters—that when a broadcast licensee has received or been promised payment or other consideration for the airing of program material, the station must disclose that fact at the time of airing and identify who paid for or promised to pay for the material. Stations also have the responsibility to exercise “reasonable diligence” in determining whether sponsorship identification is needed in any given circumstance, and, if it is, in identifying the true sponsor of the broadcast material. The policy underlying the requirements is that listeners and viewers are entitled to know who seeks to persuade them.

The Enforcement Advisory notes the public harms that can occur when broadcasters fail to comply with the sponsorship identification requirements, stating: “Broadcasters who air paid-for programming without disclosing the program’s sponsor can mislead the public and promote unfair competition. Such non-disclosures foster the perception by the public that a paid announcement is the station’s editorial content, while concealing that the station is being paid by a third party to promote a particular message. That impression can also give undisclosed sponsors an unfair advantage over competitors whose paid programming is properly disclosed as paid-for material.”

What’s the cost of broadcaster violations, you ask? The FCC sets a base forfeiture of $4,000 for each violation of the sponsorship ID rules, but the Commission has discretion to increase the amount (as it recently did in the case of the first penalty noted above, where the FCC doubled the $4,000 base forfeiture amount to $8,000 per violation).

Broadcasters may wish to carefully review the Enforcement Advisory and their sponsorship identification practices. Among other things, stations may wish to confirm that, when sponsorship ID is required, they are utilizing the FCC’s mandated language of either “paid for by,” “sponsored by,” or “furnished by” (the latter only when material is provided for free to the station), as applicable. In addition, broadcasters may wish to ensure that station personnel fully understand the sponsorship identification length and placement requirements. Broadcasters should also be particularly mindful when airing paid-for programming that doesn’t appear in a traditional spot advertising format. For example, paid-for spots that have a “newsy” or public affairs feel, mimic a news segment, or feature “experts” at a roundtable may present a heightened risk for broadcasters, given that a reasonable consumer may not realize the program material is actually sponsored.

We encourage you to consult your communications counsel or the Association’s Hotline with any compliance questions.

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Media Bureau “Reminds” Commercial Broadcasters of OPIF Rules Pertaining to TBAs/LMAs, JSAs, and SSAs

The Media Bureau recently issued a [Public Notice](https://docs.fcc.gov/public/attachments/DA-21-305A1.pdf) (the “Notice”) kindly “reminding” commercial broadcast station licensees that “every ‘sharing’ agreement pertaining to the operation of the station, whether involving the lease of airtime, the joint sale of advertising, or the sharing of operational services,” must be “retained in their Online Public Inspection Files (OPIF).” Such types of agreements include time brokerage agreements (“TBAs,” also known as local marketing agreements, or “LMAs”); joint sales agreements (“JSAs”); and shared service agreements (“SSAs”). Whether a station complies with this upload/retention requirement is certainly something the FCC looks at when it’s license renewal time; indeed, the Notice begins by suggesting that the Media Bureau is issuing the reminder given that the broadcast license renewal cycle continues to “move forward.”

The Notice reminds commercial broadcasters that, within 30 days of executing any agreement or contract involving the lease of airtime (a TBA/LMA) or the joint sale of advertising time involving the station (a JSA), the station must place in its OPIF a public copy of the agreement. Each commercial television broadcaster also must place in its station’s OPIF any agreements under which the station provides or collaborates to provide station-related services to any stations with which it is not under “common control,” as that term is defined by the FCC’s rules (a SSA). Broadcasters may redact confidential or proprietary information before uploading such agreements to the OPIF, but the agreements must stay in the OPIF as long as they remain in force.

The Notice emphasizes that the substance of a given agreement, rather than its form, governs whether a station must upload the agreement to its OPIF: “Regardless of how an agreement is styled or labeled, if it covers the provision of programming time, sale of advertising, or provision of services among commercial broadcast stations, it must be retained in the station’s OPIF even if it is not specifically identified as a ‘Time Brokerage Agreement,’ ‘Local Marketing Agreement,’ ‘Joint Sales Agreement,’ or ‘Shared Services Agreement.’ ” The Notice further suggests that licensees should “err on the side of inclusion” when determining whether a particular agreement must be uploaded to the OPIF, particularly given that broadcasters are permitted to redact confidential and proprietary information prior to upload.

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*Tim Nelson, Editor*

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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