November 21, 2022

Legal Memorandum

*In this issue, please find information about*

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| *Headlines:* | [EAS Updates: FCC Sets Compliance Deadline for CAP Priority and New Text; Seeks Comment on Rule Changes to Improve EAS Operational Readiness and Cybersecurity](#_EAS_Updates:_FCC)[FCC Seeks Comment on Repurposing 12.7 GHz Band; Extends Freeze on Most 12.7 GHz License Applications](#_FCC_Seeks_Comment)[NAB and Xperi Ask FCC to Permit Increased FM Digital Power Output](#_NAB_and_Xperi_1)[DOJ Adopts Regulations Aimed at Protecting Journalists from DOJ-Initiated Compulsory Process](#_DOJ_Adopts_Regulations)[FCC Works Toward Streamlining Technical TV Rules](#_FCC_Works_Toward) |

# EAS Updates: FCC Sets Compliance Deadline for CAP Priority and New Text; Seeks Comment on Rule Changes to Improve EAS Operational Readiness and Cybersecurity

 The Commission continues to adopt and propose new rules regarding the Emergency Alert System (“EAS”), generally focused on improving the existing system and ensuring its operational readiness. The latest FCC actions directly affecting broadcasters are: (1) the announcement of December 12, 202**3**, as the compliance deadline for implementation of the recently adopted “CAP priority mandate” and new EAS text requirements; and (2) a [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-22-82A1.pdf) (the “Notice” or “NPRM”) proposing various rule changes designed to improve EAS operational readiness and cybersecurity.

Compliance Deadline for CAP Priority Mandate and New Alert Text. As we have previously written, in September 2022 the FCC adopted various new EAS rules, including a general requirement for broadcasters’ EAS equipment to prioritize alerts formatted in the Common Alerting Protocol (“CAP”). At the same time, the FCC also adopted slight changes to the text that accompanies certain EAS alert header codes.

 The FCC has now set a **December 12, 2023**, deadline by which broadcasters must comply with those rules. Although the compliance deadline may currently seem relatively far away, broadcasters will need to monitor outreach from their EAS equipment manufacturers over the course of the next year in order to ensure compliance by the deadline. In particular, compliance with the new requirements will generally require broadcasters to install manufacturer-supplied updates to their EAS equipment. Accordingly, over the next year it will be especially important for broadcasters to watch for and promptly install any such updates.

NPRM on EAS Operational Readiness and Cybersecurity. The FCC recently adopted an NPRM proposing various rules designed to improve the operational readiness of the EAS, including cybersecurity. At a high level, the Notice proposes two types of rule changes: (1) those requiring notice when EAS equipment is rendered nonoperational or compromised; and (2) those relating to broadcasters’ cybersecurity practices.

Background. The EAS has long been one of the nation’s most important emergency alerting tools, and is regularly used by national, state, and local authorities to notify communities of impending emergencies. The current system incorporates multiple mechanisms for distributing emergency information, both via EAS participants’ monitoring of upstream audio transmissions and via internet-issued alerts. However, given that false or unauthorized alerts—once entered into the EAS architecture—may be easily used to spread incorrect or misinformation beyond a single station, securing the EAS against unauthorized access is a safety priority.

 Unfortunately, over the last decade the EAS has been used to transmit various “false” and otherwise unauthorized alerts, including incidents with hacking in 2013 and 2020, and a false alert in 2018. Additionally, in 2020 and 2022 the FCC and FEMA publicly expressed concerns regarding reported cybersecurity issues with existing EAS equipment, including equipment vulnerabilities caused by out-of-date software, firmware, and password protection. Finally, according to the Notice the results of the 2021 nationwide EAS test revealed both that approximately 5% of EAS participants (including broadcasters) were unable to fully participate due to equipment failures and that more than 5,000 EAS participants (including broadcasters) were using outdated software or equipment that no longer supported regular software updates.

The NPRM’s Proposals. In light of the foregoing concerns regarding the operational readiness and security of the EAS, the FCC issued the Notice in order to “remain vigilant and proactive.” As noted above, although the Notice seeks comment on many varied proposals, the items most relevant to broadcasters are those related to new potential (1) notice requirements and (2) cybersecurity plans.

 Regarding the new potential notice requirements, the Notice first seeks comment on whether to require broadcasters to: notify the FCC within 24 hours of discovering a defect in their EAS equipment; repair the defective equipment “promptly and with reasonable diligence;” and submit another notification once the equipment is repaired. Such a notice and repair requirement would change the existing rule’s more-permissive stance toward EAS equipment repairs, which currently allow broadcasters 60 days in which to repair their EAS equipment without further FCC authority (subject, of course, to the requirement to enter in the station log certain defined information regarding the defective equipment). The Notice also seeks comment on an additional proposed notice requirement—to report certain details of any incident of “unauthorized access” within 72 hours of when the station “knew” or “should have known” of the incident. Notably, this second proposed notice requirement would apply not just to “unauthorized access” of a station’s EAS equipment, but more broadly to any aspect of the “communications systems and services that potentially could affect [the station’s] provision of EAS.” (Additionally, “unauthorized access” would be defined as “either remote or local access to EAS equipment, communications systems, or services by an individual or other entity that either does not have permission to access the equipment or exceeds their authorized access.”)

 Regarding the cybersecurity proposals, the Notice broadly seeks comment on a proposal to require all broadcast stations to adopt, implement, and annually certify to having a cybersecurity plan in place with certain required characteristics. The Notice proposes that the annual certification be required as part of each station’s Form One filing (which is typically filed prior to the nationwide EAS test (i.e., the NPT)); however, the Notice expressly notes that the FCC would be entitled to request and review broadcasters’ entire cybersecurity plans. Put differently, although the annual certification itself would likely not be tremendously burdensome for broadcasters, the certification would have to be “backed up” by a comprehensively prepared—and actively implemented—cybersecurity plan. On that score, the Notice further proposes substantial required content for each plan, including, among other things, “securing equipment behind properly configured firewalls or using other segmentation practices” and “requiring multifactor authentication where applicable.” And although the Notice does not expressly address the interplay between the various proposed rules, it appears possible that the adequacy of a station’s cybersecurity plan could directly affect when a station “should know” of instances of unauthorized access—i.e., a station without a comprehensive cybersecurity plan might simultaneously run the risk of being unable to comply with an aspect of the NPRM’s proposed “unauthorized access” notice requirement.

Next Steps. The Notice’s proposals are varied and complex and address many additional items not discussed above (for example, the appropriate level of confidentiality to afford to any proposed broadcaster notice submissions). Perhaps most importantly, at this stage the Notice’s multiple proposals are just that—proposals that the Commission may or may not ultimately adopt. The FCC is seeking broad comment on the Notice such that broadcasters will have a meaningful opportunity to weigh in on the proposed burdens and benefits of each of the proposals.

 Comment deadlines have not yet been set.

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# FCC Seeks Comment on Repurposing 12.7 GHz Band,

# Extends Freeze on Most 12.7 GHz License Applications

 As FCC Chairwoman Rosenworcel previously forecast in comments earlier this year, the Commission has now formally adopted a [Notice of Inquiry](https://docs.fcc.gov/public/attachments/FCC-22-80A1.pdf) (the “NOI”) to explore “expanding” the use of the 12.7-13.25 GHz spectrum band (the “12.7 GHz Band”), particularly for new and developing mobile broadband use. At the same time, the FCC extended a filing freeze (the “Freeze”) on most applications for new or modified licenses in the 12.7 GHz Band. The NOI and Freeze come against the backdrop of the FCC’s continued search for mid-band spectrum to repurpose for 5G and future wireless services, and at a time when the C-band relocation—which was the last FCC target for 5G repurposing—is approximately one year away from the final accelerated clearing deadline.

The NOI. Like the C-band relocation (and others) that preceded it, the NOI’s proposals have the potential to directly affect—including by potentially entirely displacing—current broadcast operations in the relevant spectrum band. Broadcasters currently make use of the 12.7 GHz Band in multiple different ways, most notably for Television Broadcast Auxiliary Services (“BAS”), both fixed and mobile, which are essential for live coverage of local events and news. The 13.15-13.2125 GHz portion of the band is also used for television pickup stations and cable television relay service (“CARS”) pickup stations. Indeed, according to the NOI there are approximately 1,697 call signs for approximately 1,172 fixed BAS paths in the 12.7 GHz band, including approximately 485 licenses for approximately 491 TV studio-transmitter links, 1,179 licenses for 1,188 TV intercity relay stations, 32 licenses for TV translator relay stations, and one license for an aural intercity relay station. For mobile uses, according to the NOI, there are 403 BAS call signs that authorize land mobile television pickup stations, typically for electronic news gathering and special event coverage.

 Although the NOI recognizes broadcaster (and other) incumbent uses of the 12.7 GHz band, the NOI seeks comment on how to repurpose the band to accommodate new mobile broadband use, either via band sharing or by requiring broadcasters (and other incumbents) to sunset current operations and “relocate to other spectrum or technologies.” In seeking comment on potential sharing options, the NOI turns to frameworks the FCC has previously deployed (for example, in the 6 GHz band and TV white spaces), including static and dynamic sharing and use of automated frequency coordination or databases. In seeking comment on potential sunset and relocation for incumbent uses, the NOI also turns to frameworks the FCC has previously deployed (for example, in the ongoing C-band relocation), and requests further comment on appropriate transition deadlines for incumbent services.

Current, Ongoing Freeze on 12.7 GHz Applications. At the same time the Commission issued the NOI it issued an accompanying Order extending the current freeze on new and (most) modified applications for licenses in the 12.7 GHz band “pending the outcome of” the proceeding. The purpose of the freeze is to “preserve the current landscape of authorized operations in the 12.7 GHz band.” The freeze does not apply to renewals, cancellations, or certain specified modifications of existing BAS and earth station authorizations.

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 Although the NOI does not expressly set forth any proposed action or rules, it is nonetheless a strong signal by the FCC that existing broadcast use in the 12.7 GHz band may soon be required to change. The NOI’s comment period will give broadcasters and other stakeholders an opportunity to inform the FCC’s ultimate decisional process regarding what steps, if any, to take regarding the 12.7 GHz band. Comments on the NOI are due November 28, 2022, with reply comments due December 27, 2022. We will continue to monitor this proceeding and will let you know of any important developments.

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# NAB and Xperi Ask FCC to Permit

# Increased FM Digital Power Output

 At the end of October, NAB and Xperi Inc. jointly filed a [Petition for Rulemaking](https://www.fcc.gov/ecfs/document/10261669202264/1) (the “Petition”) advocating for the FCC to initiate a rulemaking to amend its current rules governing in-band/on-channel (“IBOC”) digital radio broadcasting. Fundamentally, the Petition seeks to (1) make more generous the formula currently used to determine the FM power levels of certain digital stations and (2) provide blanket authorization for digital FM radio stations to use asymmetrical sidebands. The Petition argues that if the FCC were to take those two actions it would simultaneously improve digital FM signal coverage and building penetration and likely help encourage additional digital radio deployments, given that currently “many stations . . . are unable to fully replicate their analog coverage using the power levels permitted under the existing rules.”

 Background. The FCC has authorized hybrid digital audio broadcasts since 2002, allowing stations the option to implement digital broadcasts—transmitted in addition to a station’s existing analog signal—via IBOC. Although there are many technical nuances to digital broadcasting, simply put IBOC is a method of transmitting a digital audio signal simultaneously with an AM or FM station’s existing analog signal, by transmitting the digital signal via the sidebands of the center, analog frequency. Older receivers continue to receive the analog signal. On the other hand, newer receivers are able to receive both the analog and digital signals, allowing for the receiver to use the digital signal if available, or to make use of the analog signal if the digital signal is unable to be decoded.

 Despite the many technological advancements made in digital radio since 2002, the number of receivers on the market that are capable of receiving and transmitting a digital audio signal has quickly outpaced the proportion of broadcast stations that have converted to digital operation. According to the FCC, IBOC digital radio provides increased audio quality for stations that operate in the FM band and allow AM stations to reach a level of quality close to that of analog FM stations.

 Digital FM Power Level Restrictions. Although digital audio broadcasts provide an improved experience over their analog counterparts, digital broadcasters must still avoid causing harmful interference to other stations. As a result—and just as with analog broadcast stations—the FCC has imposed power limits on digital radio audio signals. However, it’s been approximately twelve years since the FCC adopted the current formula for determining, when necessary, permissible FM digital power levels above the current baseline (-14 dBc). The Petition argues that “concerns” with the formula have developed over that twelve-year period, including that it assumes symmetric digital sidebands, thus effectively eliminating the ability for stations to increase power on one sideband to improve digital coverage, and overstates the level of protection necessary for analog stations.

 The Petition’s Proposal. In their Petition, NAB and Xperi urge the FCC to update the formula used to determine the FM power levels of many stations that wish to exceed the current limit of -14 dBc for digital operations. The Petition also includes a request to be consolidated with a 2018 petition filed by NAB, Xperi, and NPR, which—like the current Petition—requested permanent authorization of asymmetrical sidebands.

 According to the Petition, the current formula operates under the assumption that a station will utilize symmetrical sidebands to achieve digital coverage—that is, the assumption that a station must increase power both above and below its main frequency in equal amounts. However, the Petition points out that greater digital coverage can be accomplished by increasing power on only one sideband. Consequently, the Petition requests blanket authorization for digital FM radio stations to use asymmetrical sidebands without having to first acquire separate or experimental FCC authorization. As a corollary, the Petition also proposes two alternative formulas for calculating FM power levels: one for symmetrical sidebands and one for asymmetrical sideband usage. According to the Petition, both proposed formulas are meant to be applied in the same way as the original, but should “better reflect the real-world interference environment in the FM band and the appropriate level of protection that 1st-adjacent stations need from harmful interference.”

Digital Radio Outlook. Although the FCC has not yet solicited comments on or opened a new docket relating to the Petition, NAB and Xperi argue that if the FCC were to adopt the Petition’s proposals it would make it easier for FM broadcast stations to convert to digital. Facilitating digital conversions would, in turn, “encourage transmission equipment manufacturers to continue to invest in the development of [digital radio] equipment,” lead to lower equipment costs, and thus encourage even more stations to convert to digital.

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# DOJ Adopts Regulations Aimed at Protecting Journalists from

# DOJ-Initiated Compulsory Process

The Department of Justice (“DOJ”) recently [announced](https://www.justice.gov/opa/pr/attorney-general-garland-announces-revised-justice-department-news-media-policy) new [regulations](https://www.justice.gov/ag/page/file/1547046/download) (the “Regulations”) aimed at prohibiting, with limited exceptions, DOJ use of compulsory legal process against members of the news media, particularly when acting within the scope of newsgathering. Based on the recognition that a “free and independent press is vital to the functioning of our democracy,” the new Regulations formalize the DOJ’s existing policy to protect members of the news media acting within the scope of newsgathering from, among other things, DOJ-initiated subpoenas, search warrants, and certain court orders. The Regulations also amend existing DOJ policy regarding questioning, arresting, and charging members of the news media. The Regulations are now in effect.

The Regulations have many internal cross-references and cover a great number of potential situations. The following provides a high-level summary of the Regulations likely to be most relevant to broadcasters.

*Background.* In summer 2021, Attorney General Merrick Garland revised existing DOJ policy to provide greater protection to members of the news media and better protect journalists from compelled disclosure of information revealing their sources. The Attorney General also initiated a DOJ review to further explain, develop, and formalize regulations protecting the news media. That further review included input from both federal prosecutors and the news media, and ultimately resulted in the newly expanded and codified Regulations.

*The Regulations.* The new Regulations set forth rules for DOJ use of compulsory legal process against members of the news media—including, among other things, subpoenas, search warrants, and court orders seeking testimony, documents, communications records, metadata, or digital content—for information obtained within the scope of newsgathering, and information obtained for other purposes. Jettisoning the prior rules’ reliance on an open-ended “balancing test” to determine when compulsory process was appropriate, the new Regulations generally provide bright-line determinations as to when the DOJ may and may not use compulsory process.

For members of the news media, the new Regulations specify a separate set of rules that apply when information is obtained within the scope of “newsgathering.” The new Regulations define “newsgathering” as “the process by which a member of the news media collects, pursues, or obtains information or records for purposes of producing content intended for public dissemination.” Such newsgathering includes a member of the news media’s receipt, possession, or publication of government information (including classified information) and the establishment of ways to receive such information, including from anonymous or confidential sources. It is important to note, however, that criminal acts related to the receipt or use of information (e.g., theft, unlawful surveillance or wiretapping, unlawfully accessing a computer, or aiding and abetting such criminal acts) are not within the scope of newsgathering as defined in the Regulations.

Under the new Regulations, when information is received by a member of the news media within the scope of newsgathering (as defined above) the DOJ may only use compulsory legal process to obtain such information in the following, limited circumstances:

* To authenticate evidence that was previously published;
* When a member of the news media has already agreed to provide the requested information in response to proposed DOJ compulsory process;
* When the information is necessary to prevent an imminent or concrete risk of death or serious bodily injury; or
* When the information is necessary to prevent critical infrastructure from being destroyed or incapacitated.

The Regulations also revise existing rules as to when the DOJ may use compulsory process to obtain information from members of the news media when the information was obtained outside the scope of newsgathering. The DOJ can use compulsory legal process to obtain such information only under the following circumstances:

* When a member of the news media is the subject or target of an investigation and is suspected of having committed a crime;
* To obtain information about a non-member of the news media who is the subject or target of an investigation, so long as that information is in a space (physical or electronic, including devices and accounts) shared by a member of the news media;
* To obtain information that is not related to newsgathering;
* To obtain information relating to personnel not involved in newsgathering;
* To obtain information relating to a member of the news media who may be a victim of or witness to a crime, or whose premises may be a crime scene, so long as the reason they were a victim or witness (or present on the crime scene) was not based on or within the scope of newsgathering;
* To obtain information related to public comments, messages, or postings, so long as a member of the news media does not exercise editorial control before publication; or
* To obtain certain subscriber or customer information.

*Additional Considerations.* Whether within or outside of the scope of newsgathering, in each of the foregoing scenarios, the new Regulations require the DOJ to obtain authorization from either the Deputy Assistant Attorney General or the Attorney General (depending on the type of information at issue) **prior** to using compulsory legal process. To successfully obtain authorization will generally require the Deputy Assistant Attorney General or the Attorney General to determine that the DOJ has already tried—but was unable—to get the information from non-news-media sources and that the DOJ first attempted to get a member of the news media’s consent to provide the information. Further, information requests must be narrow, cover a reasonably limited period of time, and should not interfere with “unrelated newsgathering” or require the production of a “large volume of materials.” The DOJ also must believe that the information is essential to investigation, litigation, or prosecution.

Notably, the Regulations do not define “news media,” so it is not entirely clear what factors determine whether someone qualifies as a “member of the news media” for purposes of the Regulations. If there is uncertainty regarding a person or entity’s status as a member of the news media, the Assistant Attorney General for the Criminal Division must approve any status determination (or refer determinations involving “genuine uncertainty” to the Attorney General). Additionally, authorization must come from the Attorney General if there is a question over whether a member of the news media was acting within the scope of newsgathering.

Finally, although the DOJ is generally prohibited from using compulsory legal process both within and outside of the scope of newsgathering, those rules will not apply if the news media member is reasonably suspected of being an agent of a foreign power or involved in terrorist activities or groups. Separate rule provisions also apply in the event a member of the news media consents to providing the information requested by any DOJ-proposed compulsory process.

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# FCC Works Toward Streamlining TV Technical Rules

Over the last several months the FCC has been taking steps in an “ongoing effort to ensure that its rules are current,” particularly as applied to TV broadcasters. First, in late summer the Commission released an [Order and Sixth Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-22-58A1.pdf) to make various—and propose other—changes in Part 74 of the FCC’s rules for low power television (“LPTV”) and TV translator stations (the “July Order” and the “July Notice”); the FCC then released a similar [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-22-73A1.pdf) in September concerning changes to Part 73 of the rules governing full power and Class A stations (the “September Notice”) (collectively with the July Notice, the “Notices”).

The effect of the proposed changes across both Notices would be to simplify relevant rules by deleting rules that are obsolete, duplicative, or no longer have any practical effect due to the passage of time and/or changes in Commission policy. Many of the proposed changes are also aimed at reflecting the steady shift toward electronic, rather than paper, filings.

Perhaps the most prominent example of “need” for the proposed rule cleanup pertains to the many rules still currently on the books concerning analog television operations. Of course, as television broadcasters are well aware, all television stations (i.e., full power, Class A, LPTV, and TV translator stations)—except for a select few TV translator stations previously granted a waiver—should have ceased analog operations some time ago.

Although the digital transition date varied as between TV station classes, because the transition process was one that, in all cases, spanned several years, according to the FCC it has not yet been practical to modify the relevant rules to reflect the completion of the digital transition. Now that the latest of the digital transition deadlines (July 2021 for LPTV and TV translator stations) has passed, the FCC has declared analog television a “legacy” service and, thus, the FCC considers its associated rules “obsolete” or “irrelevant.”

*The July Order.* Regarding the LPTV/translator rules, the July Order eliminated those provisions of Part 74 of the rules that governed analog television operations. As a specific example, rules covering analog-to-analog and analog-to-digital interference protection requirements, as well as those covering the pre-transition digital construction period processing procedures, have now been eliminated in their entirety. References to analog interference rules and various analog services met a similar fate. Finally, the July Order also amended rule titles and other language to remove references to digital and analog television service—as analog has been almost totally phased out, the need for this distinction is no longer necessary.

In alignment with the July Order’s elimination of analog rules and references, the September Notice proposes doing the same within the full power and Class A television sections of the FCC’s rules. It also proposes the deletion of obsolete rules governing the post-incentive auction transition period, as the completion of the incentive auction process renders many of those rules obsolete. The Notice does propose, however, retaining those portions of the rules that are of relevance to the small number of stations that are still in the process of constructing their facilities on their post-auction channel assignments.

*The July and September Notices.* The July and September Notices touch on many of the same areas, albeit with some variances, in an attempt to bring the rules into alignment with the current operating environment—i.e., post digital transition and post spectrum repack. A number of the proposed revisions are very technical in nature, such as removal of the technical engineering guidelines for analog television operations. A meaningful number are targeted toward making practical improvements—for instance, the September Notice proposes to make the necessary updates to reference the most recent official U.S. Census population data rather than the year 2000 data that is currently referenced. In addition, both Notices contemplate updates to the rules to reference the current designation for form numbers (and remove references to forms that are no longer in use) and to require electronic filing in the Licensing and Management System (“LMS”).

The Notices are not only concerned with trimming regulatory fat, however. The September Notice, for example, proposes a reorganization of subpart E of Part 73 of the rules to account for the proposed deletion of obsolete portions of the subpart. This reorganization, if adopted, would include creating a new section to house technical rules that are currently buried within the Table of TV Allotments. The September Notice also proposes a similar reorganization across Part 73 of the rules as a whole, to “collect provisions on related matters that are currently spread over various rules and group them together.”

As noted above, the proposals are numerous and therefore this memo does not attempt to discuss all aspects of the Notices. However, a few final items are worth noting in the September Notice. First is a proposed revision that would codify a mandatory minimum of 480i video resolution for Class A stations. Second is a proposal to include a new paragraph intended to codify the long-standing Commission practice to place a condition on all television broadcast station authorizations that result in a change in coverage area, as well as all authorizations for new stations—a condition that requires broadcasters to identify and notify healthcare facilities within their coverage areas to avoid interference with the facility’s medical telemetry devices. Finally, with the proposed deletions, revisions, and reorganization of so many portions of the Part 73 and Part 74 rules, the September Notice recognizes that things can very quickly become confusing and disjointed. In the hopes of mitigating that, the September Notice therefore also proposes updates to cross-references across the affected portions of the rules, including by providing cross-references in historic rule sections to indicate the new locations to which the rules that have been relocated.

*Conclusion.* The updates for both Part 73 and Part 74 of the Commission’s rules are numerous and span a wide range of substantive areas affecting full-power, Class A, LPTV, and TV translator station operations. We will continue to monitor both proceeding and let you know of any significant future updates.

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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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