December 14, 2022

Legal Memorandum

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# CISA Identifies Security Vulnerabilities in DASDEC EAS Devices; PSHSB Recommends Broadcaster Precautions

Last week, the FCC’s Public Safety and Homeland Security Bureau (“PSHSB”) notified many EAS participants (including many broadcasters) of two security vulnerabilities in DASDEC EAS encoder/decoder devices. The vulnerabilities were disclosed in a recent [advisory](https://www.cisa.gov/uscert/ics/advisories/icsa-22-326-02) (the “Advisory”) issued by the Cybersecurity and Infrastructure Security Agency (“CISA”), which explains that if the identified vulnerabilities were to be exploited by malicious actors, it could “result in false alerts being issued to broadcast or cable sites that are immediately connected to the compromised system.”

*What DASDEC Software Versions Are Affected?* The Advisory identifies the following software versions of DASDEC equipment as subject to the vulnerabilities:

1. Versions prior to 4.1 (CVE-2019-18265 only); and
2. All versions (CVE-2022-40204 only).

*What Precautions Should Affected Broadcasters Take?* First, **all broadcasters should ensure that their DASDEC equipment is patched to the latest software version**. This first step is especially important because, according to the Advisory, broadcasters should be able to remove the first identified vulnerability by upgrading their DASDEC to the latest software version. Broadcasters should also continue to be vigilant in monitoring for future software updates—indeed, the Advisory states that the second vulnerability “will be fixed in a future [software] patch.”

In addition, both CISA and PSHSB recommend that affected broadcasters take the following actions:

* Minimize network exposure for all control system devices and/or systems, and ensure they are not accessible from the internet.
* Locate control system networks and remote devices behind firewalls and isolate them from business networks.
* When remote access is required, use secure methods, such as Virtual Private Networks (“VPNs”), while recognizing VPNs may have vulnerabilities and should be updated to the most current version available. Also recognize that each VPN is only as secure as its connected devices.

*Tie-in to Current FCC Focus on EAS Cybersecurity.* PSHSB’s message to broadcasters further links to its August 2022 [Public Notice](https://protect-us.mimecast.com/s/WY4nC4xwJgHJoLpDtxrba3?domain=docs.fcc.gov) describing steps broadcasters can take “to improve their cyber hygiene.” And, as we have previously written, the FCC is currently in the midst of a [proceeding](https://docs.fcc.gov/public/attachments/FCC-22-82A1.pdf) considering whether and how to improve the operational readiness of EAS equipment, including through the possible adoption of cybersecurity plan content and certification requirements. Comments on those FCC’s proposals are due by December 23, 2022, with reply comments due by January 23, 2023.

Finally, it’s worthwhile to note that PSHSB’s message to broadcasters closes with an express reference to the FCC’s ability to take enforcement action for violations of the FCC’s EAS rules: “Under the FCC’s rules, EAS Participants are responsible for ensuring that EAS equipment is installed so that the monitoring and transmitting functions are available during the times the stations and systems are in operation. Failure to receive or transmit EAS messages during national tests or actual emergencies because of an equipment failure may subject the EAS Participant to enforcement.”

Given the FCC’s current, ongoing focus on EAS operational readiness, security, and effectiveness, stations would do well to heed PSHSB’s enforcement warnings.

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# New FEC Digital Political Ad Disclosure

# Requirements Will Affect 2024 Election Cycle

*Introduction.* With the 2022 election cycle behind us, it is already time to start looking ahead to the 2024 election cycle (which will get underway in 2023). Of course, broadcasters in various jurisdictions must also prepare for some state and local election activity during 2023, and special elections for federal offices (due to death or resignation) can arise at any time. Consequently, even in an “off” year like 2023, broadcasters cannot let down their guard with respect to the myriad legal requirements applicable to political programming and advertising. And although stations should already be well-versed in the FCC’s rules regarding political file recordkeeping and on-air political advertising disclosures, a recent Federal Election Commission (“FEC”) decision warrants attention for digital political ads.

Recent election cycles have seen a steady increase in the number of broadcast stations capitalizing on digital political advertising—indeed, industry estimates suggest that spending on digital political advertising more than doubled just in the two years between 2020 and 2022. Following the 2022 general election, the FEC finally concluded a proceeding that it had begun several years ago: to take another look at its stance on digital political disclosures (which hadn’t been revised since 2006) and provide guidance that better fits the ways in which political advertising has changed on the internet. In doing so, on December 1, 2022, the FEC adopted a new final rule governing [Internet Communication Disclaimers](https://www.fec.gov/resources/cms-content/documents/mtgdoc-22-52-B.pdf) (the “Final Rule”) to provide entities that pay to place digital political advertisements—including on digital platforms operated by broadcasters—with a more suitable FEC regulatory framework. Previously, only political advertisements in broadcast or print media were held to strict disclosure requirements identifying who paid for any given ad. The Final Rule (if not rejected by Congress) will cause similar requirements to apply certain digital or internet-based political advertisements as well.

*Background.* Much of the guidance up until now concerning digital political disclaimers has been based on the Bipartisan Campaign Reform Act of 2002 (“BCRA” or the “Act”). Though Congress neglected to reference the internet in the language of the Act, the FEC adopted a modified version of the Act’s term, “public communication,” that explicitly *excluded* some political advertising communications over the internet as “public communications.” A 2004 D.C. Circuit case scrutinized Congress’s decision to exclude internet communications from the definition of “public communications” and ultimately prompted the FEC to require sponsorship disclosures on “internet communications placed on another person’s Web site for a fee.” Under that iteration of the disclosure requirements, banner ads, streaming video, popup ads, and directed search results have for some time been required to disclose the name of candidates, committees, or agents that authorized or paid for digital political advertisements.

The current rulemaking proceeding has been in the works for more than a decade; in 2011 the FEC sought comment on whether to modify the political advertisement sponsorship disclosure requirements for certain internet communications. The FEC has solicited additional comment on the subject multiple times since then, culminating in a 2018 hearing on the regulatory changes proposed in a Notice of Proposed Rulemaking (the “2018 NPRM”) in that same year. The 2018 NPRM and the hearing discussions centered around making changes to the disclaimer rules “to reflect post-2006 changes in internet technology—such as the development of mobile applications on smartphones and tablets, smart TVs and devices, interactive gaming dashboards, e-book readers, and wearable network-enabled devices, such as smartwatches and headsets.” The Final Rule adopted December 1 purports to represent a synthesis of the viewpoints and discussions had on this matter over the past decade.

*Changes to the Current FEC Disclosure Rules.* In recognition of the explosion in internet usage and activity since 2006, Section 100.26 of the FEC’s rules will now define the term “public communication” to include “communications placed for a fee on another person’s website, digital device, application, service, or advertising platform.” This definition encompasses not only paid political advertisements on station-owned / -operated websites, but also paid political advertisements on broadcaster streaming platforms and mobile applications, as well as ads bought for placement on station social media pages. Despite this expansion of the internet communications that are subject to the political disclosure rules, the FEC was careful to limit the applicability of the rules to the methods of communication outlined within it—in other words, there is no open-ended language leaving the door open for application to “all future technology.”

The FEC’s action will also modify Section 110 of its rules (which also governs radio, TV, and print political ads) to add language specific to text, graphic, and audio requirements for various types of digital political advertisements. Overall, under the new FEC rules, a much larger number of political advertisements placed on the internet will need to include a specific sponsorship disclosure message. This requirement will apply to the person or entity (i.e., the candidate, the candidate’s authorized committee, or an agent of either) that pays to place the ad, regardless of whether they are responsible for the original creation, production, or distribution of the ad.

*What the FEC’s New Political Sponsorship Disclosure Rules Require.* In general, there are three main categories into which a political advertisement may fall for the purposes of this rule, and each is identified by who authorized and paid for the advertisement. First, political advertisements paid for by a candidate, authorized committee of a candidate, or an agent of either must disclose that the communication was financed by “the authorized political committee.” Second, if the advertisement is paid for by a third party and has been authorized by the candidate, an authorized committee of the candidate, or an agent of either, the sponsorship disclosure must identify who paid for the ad and state which individual or entity authorized the ad. Finally, if the ad is neither paid for nor authorized by the candidate, an authorized committee of the candidate, or an agent of either, the sponsorship disclosure must provide the full name and permanent street address, phone number, or website address of the entity that paid for the ad, as well as state that it was not authorized by any candidate or candidate’s committee. In every instance, the required sponsorship disclosure “must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity” of the person or entity that paid for the political message. Digital political ads that contain text and/or graphic components ***must*** include a written sponsorship disclosure, regardless of whether there are audio components as well.

The specific requirements for digital political advertisements will vary based on the format of the ad; an overview of the criteria is below:

* If a political advertisement contains text or graphic components, the required written disclaimer must be included in a way that allows it to be viewed without the viewer having to take any action (such as clicking a link or hovering over a digital component).
* The text must be of a size large enough that it is easily readable, taking into consideration the color contrast between the background and the text. A good rule of thumb is that the letters should be at least as large as the majority of other text in the communication and the color contrast should be equal to or greater than that between the background and the largest text in the ad to satisfy this requirement. (These requirements obviously differ from the FCC’s four-percent-of-screen-height political sponsorship ID requirement for television ads.)
* For ads that are wholly contained in a video, the sponsorship disclosure must be visible for at least four (4) seconds and it must appear within the video without requiring action from the viewer to prompt its display. (These requirements are similar to the FCC’s four-second on-screen requirement for political sponsorship identification.)
* If the ad has only an audio component and no video, the sponsorship disclosure must be included within the audio of the ad itself.

*Impact on Broadcasters.* As with other FEC requirements, the new digital disclosure requirements for online political ads are unlikely to have much practical impact on broadcasters. Generally, the FEC’s jurisdiction extends only to federal political candidates and other entities engaged in federal electoral activities; compliance with the FEC’s rules is generally not the responsibility of broadcast stations that run political ads (whether on the broadcast platform or on a digital platform). That said, broadcasters may nonetheless wish to familiarize themselves with the new requirements because they may become the subject of all-too-familiar “cease and desist” letters from lawyers seeking to convince stations to stop airing certain political ads favoring or opposing candidates for public office.

*Effective Date and Supplemental Rulemaking Proceeding.* Notably, the FEC is ***not*** inviting additional public comment on the rule changes discussed above. Barring an unlikely rejection of the new rule by Congress, the new requirements will become effective within 30 days of the FEC’s transmittal of the new rules to Congress. As of December 9, 2022, the rules have not yet been transmitted to Congress but are expected to be in the normal course—in other words, we would expect the new digital disclosure requirements to be in effect once political advertising begins in earnest for 2023 elections and for the early onset of 2024 political campaigning.

In addition, the FEC has issued a [Supplemental Notice of Proposed Rulemaking](https://www.fec.gov/resources/cms-content/documents/mtgdoc-22-55-A.pdf) to seek comment on whether “public communications ‘promoted for a fee’ on another person’s website, digital device, application, or advertising platform” should also be subject to the political sponsorship disclosure requirements. The Supplemental Notice has not yet been published in the Federal Register, which means that we do not yet know when comments will be due. As always, we will be keeping an eye on further relevant FEC political sponsorship disclosure developments.

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# January 6, 2023, Effective Date Announced for FCC

# Transition to Nielsen Local TV Station Information Report for DMA Carriage Determinations

The Commission has [announced](https://www.federalregister.gov/documents/2022/12/07/2022-26482/update-to-publication-for-television-broadcast-station-dma-determinations-for-cable-and-satellite) a January 6, 2023, effective date for the rules adopted in a recent [Report and Order](https://docs.fcc.gov/public/attachments/FCC-22-89A1.pdf) (the “Order”) updating FCC references to a new Nielsen publication—the Local TV Station Information Report—in place of two now-retired ones. Broadcasters, including the Big Four Network Affiliates Associations, unanimously endorsed the FCC’s proposed ministerial updates.

The handful of comments filed in the docket also addressed various other Nielsen-related issues, including the accessibility of essential Nielsen data to non-Nielsen subscribers. On that issue, and perhaps just as (if not more) important for broadcasters than the new rules’ recalibration to reliance on Nielsen’s Local TV Station Information Report, were Nielsen’s concessions during the proceeding. In particular, Nielsen filed an [ex parte letter](https://www.fcc.gov/ecfs/document/101347765631/1) that admitted that Nielsen has not, to date, provided DMA maps to non-clients but now agrees that it will provide DMA maps to stations that do not subscribe to the service “at a reasonable charge.” Nielsen also told the Commission that it does, and will continue to, offer “ratings information to non-clients at special prices for the limited use of preparing for assignments and transfers of control.”

Finally, even with the new rules now set to take effect and Nielsen’s concessions “on the record,” the Commission appears willing to keep an eye on Nielsen-related issues going forward. In particular, the Order acknowledged concerns about Nielsen’s loss of accreditation and expressly referenced Nielsen’s ex parte letter, including by stating that the FCC “will continue to monitor” Nielsen’s current lack of accreditation and the development of any viable market substitutes for Nielsen’s Local TV Station Information Report. Indeed, the Order expressly “encourages stakeholders to keep [the FCC] appraised of changes in the broadcast audience measurement market.”

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# Large Radio Group Faces Likely $400,000 Settlement in Response to FTC and State Complaints of

# Deceptive On-Air Endorsements

According to a recent FTC [press release](https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-states-sue-google-iheartmedia-deceptive-ads-promoting-pixel-4-smartphone), a large media ownership group (the “Radio Group”) and large technology company (the “Advertiser,” and together with the Radio Group, the “Parties”) are facing significant penalties—totaling $9.4 million—in response to an investigation and complaints filed by the Federal Trade Commission (“FTC”) and several state attorneys general relating to deceptive on-air endorsements. Various publicly available FTC documents, including a [complaint](https://www.ftc.gov/system/files/ftc_gov/pdf/2022-07-20%20Complaint.pdf) and [proposed agreement and consent order](https://www.ftc.gov/system/files/ftc_gov/pdf/2022-07-14%20iHeart%20Consent.pdf) regarding the Radio Group, allege that the Parties worked together to air nearly 29,000 deceptive endorsements by on-air radio personalities promoting their use of and experience with a particular model of the Advertiser’s smartphones despite never having actually owned or used the phone. The FTC is seeking to settle the violations by prohibiting the Parties from making similar misrepresentations and imposing certain compliance, recordkeeping, and monitoring obligations on the Parties. The proposed $9.4 million monetary penalty comes from the actions of the state attorneys general, and although the majority of the proposed penalty is likely to be levied against the Advertiser, state court [documents](https://www.mass.gov/doc/iheartmedia-consent-judgment/download) suggest that the Radio Group is likely to be responsible for $400,000 of the penalty.

*Background*. Although broadcasters’ compliance efforts are typically primarily focused on FCC rules and regulations, broadcasters are also subject to FTC oversight, including the FTC Act’s prohibition on unfair, deceptive, and misleading advertising. Similar to the FCC’s sponsorship identification rules—which generally require stations to broadcast an announcement disclosing the sponsored nature of any matter that is broadcast in exchange for valuable consideration directly or indirectly paid or promised to the station—the FTC’s rules and policies regarding endorsements require disclosure when there is a connection between an endorser and an advertiser that consumers would not expect and that would affect how consumers evaluate the endorsement. The FTC’s rules and policies also require that endorsements “reflect the honest opinions, findings, beliefs, or experiences of the endorser.” Further, “[w]hen the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given.” Both advertisers and endorsers are liable for violations of the FTC’s endorsement rules.

Broadcasters may also be familiar with the FTC’s [Endorsement Guides](https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf), which represent the FTC’s administrative interpretation of many common situations endorsers, including broadcasters, might encounter. Last updated in 2009, over the past year the FTC has proposed updating the Endorsement Guides to, among other things, better reflect modern endorsement situations (including those involving the internet) and to explain the potential liabilities of intermediaries for their role in disseminating deceptive endorsements.

*The Apparent Violations*. According to the FTC’s complaint, the Advertiser hired the Radio Group to have the Radio Group’s on-air radio personalities record advertisements endorsing the Advertiser’s new smartphone. The Advertiser provided the Radio Group and radio personalities with scripts for the advertisements, which scripts used first-person language and allowed each radio personality to customize the creative to reflect their personal lives. Certain members of the Radio Group raised concerns about the radio personalities reading the scripts without having actually used the phones and requested that the Advertiser provide the radio personalities with phones before recording the advertisements. However, the Advertiser refused to provide phones to the radio personalities, and the advertisements were recorded as originally planned.

As a result, the radio personalities’ on-air endorsements represented that they owned and/or regularly used the endorsed phone when, in fact, they did not own and had not used the phone. For example, the typical script included statements by radio personalities that the phone had “my favorite phone camera out there, especially in low light;” that the phone was “great at helping me get stuff done;” and that “I’ve been taking studio-like photos of everything . . . my son’s football game . . . a meteor shower . . . a rare spotted owl that landed in my backyard.”

*The Proposed Orders.* To resolve its investigation, the FTC has issued proposed orders and consent decrees with the [Advertiser](https://www.ftc.gov/system/files/ftc_gov/pdf/2022-06-28%20Google%20Consent.pdf) and [Radio Group](https://www.ftc.gov/system/files/ftc_gov/pdf/2022-07-14%20iHeart%20Consent.pdf) (the “Proposed Orders”). The Proposed Orders are far-reaching, with many obligations imposed on the Parties—including certain compliance, recordkeeping, and monitoring obligations—extending for 10 years. For instance, the Proposed Orders would require the Parties to submit, under penalty of perjury, annual compliance reports to the FTC and notifications of changes in corporate structure that might affect compliance obligations. Additionally, and as noted above, although the Proposed Orders do not impose any monetary penalties, the Advertiser and Radio Group are likely to be subject to $9.4 million in penalties to seven states which brought claims based on the same allegedly deceptive endorsements.

The FTC is soliciting public comment on the Proposed Orders until January 5, 2023, after which it will review the comments and decide whether it should withdraw the Proposed Orders or make them final.

*The Takeaway.* Broadcasters should be mindful any time a station’s on-air personality endorses a good, service, or brand and there is a connection that consumers would not expect and which would affect how consumers evaluate the endorsement. Such endorsements may implicate not only the typical FCC rules governing sponsorship identification (including prohibitions on payola and plugola), but also the FTC’s rules and policies regarding endorsements and testimonials in advertising. As a result, broadcasters must disclose connections falling within the scope of the FCC’s sponsorship identification rule and the FTC’s unfair and deceptive advertising rules, and ensure that endorsements reflect the actual opinion and experience of the endorser.

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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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