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FCC Issues Fines for Airing Video News Releases Without Sponsorship Identification

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On March 24, 2011, the Federal Communications Commission's (FCC or Commission) Enforcement Bureau issued Notices of Apparent Liability for Forfeiture (NAL) against two television broadcast licensees for airing material from video news releases (VNRs) in violation of the Commission's sponsorship identification rule. The licensees, Fox Television Stations, Inc. and Access.1 New Jersey License Company, LLC, each face forfeitures of $4,000. The fines stem from complaints filed with the FCC against numerous television stations by Free Press and the Center for Media and Democracy in 2006.

Under Section 317 of the Communications Act, broadcasters are required to disclose to their listeners or viewers if they have aired matter in exchange for money, services or other valuable consideration. Notably, the Act exempts from the disclosure requirements material "furnished without charge or at a nominal charge." This safe harbor seemingly would cover situations where a broadcaster receives no payment and makes its own independent judgment about what to air, such as when a broadcaster derives story material from a VNR.

In the Fox case, however, station KMSP-TV aired material in one of its newscasts from a VNR that the station obtained from the Fox News Edge service. The segment, which addressed consumer demand for convertibles during the summer, featured 12 different shots of three General Motors cars, each of which was named in the segment. Even though Fox stated that neither the station nor its employees received any consideration in exchange for broadcasting the VNR, and that no third party had reported to the station a consideration exchange, the Bureau concluded that the VNR material itself constituted "valuable

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consideration." Analogizing to an example the Commission first offered in 1963, where a bus company furnishes a travel film free to broadcast stations and the bus is "shown to an extent disproportionate to the subject matter of the film," the Bureau concluded that, because KMSP-TV's story focused on the GM convertibles in both the script and video footage rather than "merely quoting editorial comment from a press release," sponsorship identification was required. By its use of the VNR, the Bureau reasoned, the station had "impliedly agreed to broadcast an identification beyond that reasonably related to the subject matter of the film."

Similarly, in the Access.1 case, station WMGM-TV included material from a Matrixx Initiatives Zicam VNR during a sponsored "Lifeline" health segment. The broadcast included four different shots of Zicam and the cover of the Zicam Travel Well Survey as well as a sound bite with a medical doctor recommending Zicam by name. Here, the station included a sponsorship announcement-not for Zicam, but for the hospital that paid for the segment. Nevertheless, the Bureau determined that because the VNR focused "almost exclusively" on Matrixx's Zicam product, the station was required to identify Matrixx as the sponsor of the VNR material.

Notably, the Bureau expressly rejected Fox's arguments that the investigation unconstitutionally intruded into the station's journalistic and editorial discretion in the presentation of news and public information, and would ultimately result in broadcasters self-censoring and eschewing legitimate speech under the threat of government sanction. In dismissing these assertions, the Bureau stated that: (1) Section 403 of the Communications Act gives the Commission broad authority to investigate any matter relating to enforcement of the Act; (2) the Bureau's decision leaves broadcasters free to exercise newsgathering and editorial functions; and (3) the Commission's rules are simply disclosure requirements, not direct speech restrictions.

The Notices mark the second and third enforcement actions since the FCC sent letters of inquiry to 77 stations in 2006 seeking information about the airing of VNR material. In order to enforce a civil forfeiture, the Commission must bring a lawsuit within five years of the date when the claim "accrued"-generally the date of the incident. With this deadline approaching, it would not be surprising for the Commission to address many of these dormant inquiries in the coming months.

We will keep our clients apprised about developments concerning FCC enforcement with respect to sponsorship ID. In the interim, it may be advisable to review your sponsorship identification and payola policies as well as your newsroom practices with respect to disclosures.

For further information, please contact the individuals listed below or the Wiley Rein attorney who regularly handles your FCC matters.

*Not admitted to the District of Columbia Bar, supervised by principals of the firm.