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GUEST COMMENTARY

How to Stay Out of FCC Trouble

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As the communications marketplace has become increasingly competitive and deregulated, the FCC has placed a high priority on strong enforcement of its rules. With fewer rules to enforce, the agency has become more serious about punishing companies that run afoul of the remaining requirements.

The FCC has initiated more than \$100 million in new enforcement action over the past six years. Commissioners and members of Congress of both political parties have supported this tough enforcement regime.

The broadcast industry has an admirable tradition of regulatory compliance, and much of the commission's enforcement action has focused on other industries. Nevertheless, broadcasters have found themselves in the FCC's enforcement cross hairs.

That's not likely to change any time soon. This article provides some practical advice to radio broadcasters about how to avoid the FCC's wrath and, if you become the subject of an enforcement action, how to minimize its impact on your stations.

Comply

The best way to avoid FCC enforcement action is to comply in the first instance. All the persuasive arguments you and your lawyer can develop against enforcement after the fact are unnecessary if there isn't an underlying problem that needs to be addressed.

Fixing a problem once the agency brings it to your attention is not enough to keep you out of trouble. Broadcasters should have FCC compliance programs in place and make sure that they are implemented proactively. This should include training new employees and periodically requiring all employees to refresh their compliance education.

Management should take an active role in overseeing compliance and compliance education efforts. When problems occur, they should be fixed promptly.

Maintaining a serious compliance and training program will yield a two-fold benefit. First, it should ensure compliance or at least reduce the number of potential violations. Second, having such a program should enable broadcasters to establish their good faith with the FCC, which can reduce the penalty if a violation does occur.

Licensees should certainly try to comply with all applicable requirements. Nevertheless, some violations are more likely to be the subject of enforcement action or involve higher penalties than others, so focusing on those areas is particularly important.

What are some of the major high-risk areas for radio broadcasters?

Indecent Programming. Indecency, of course, has been the commission's No. 1 one broadcast enforcement area in recent years. The agency took about \$8 million in new indecency enforcement action last year, *roughly four times the amount of indecency enforcement during the prior 76 years that the FCC and its predecessor the Federal Radio Commission have been in business.*

Then-Commissioner (now-Chairman) Kevin Martin, along with Commissioner



Photo by Leslie Stimson

David Solomon

Michael Copps, was at the forefront of the agency's stepped-up indecency enforcement so, if anything, the FCC will probably get even more aggressive in this area. To make things worse, Congress is seriously considering increasing the statutory indecency penalties and taking other legislative steps that could result in even stronger indecency enforcement.

It is no longer unthinkable that the commission could seek to revoke licenses for serious and/or repeated indecency infractions.

While lots of attention has been paid to high-profile television indecency cases such as the Janet Jackson Super Bowl incident, FCC statistics indicate that more radio programs were the subjects of indecency complaints than television programs in 2004. Radio programs accounted for three times the number of newly issued Notices of Apparent Liability for Forfeiture than

television stations.

Radio stations with shock jocks and those that run lots of other live programming or “edgy” songs are particularly at risk for indecency enforcement. With respect to live programming, the commission has indicated that an effective time delay is the best way for stations to protect themselves.

If your stations don’t employ a time delay system, compliance training and education are even more critical. Of course, there’s always the risk of the unexpected statements of a guest or even a bystander on a live program

Payola/Sponsorship Identification. Another likely “hot” enforcement area in the next year or two is likely to be payola and related sponsorship identification rules. Early in Chairman Martin’s tenure, the commission issued a strong public notice about the importance of these rules and indicated a clear willingness to take strong enforcement action where warranted.

While the public notice focused specifically on the issue of video news releases and thus did not directly apply to radio, there’s little doubt that the agency will respond seriously to payola or sponsorship identification violations in the radio area as well. Indeed, earlier this year, the FCC publicly announced an investigation into a potential radio payola/sponsorship identification violation.

More recently, in response to New York Attorney General Eliot Spitzer’s \$10 million payola settlement with Sony BMG Entertainment, Chairman Martin directed the Enforcement Bureau to conduct a follow-up investigation and indicated that the commission would take “swift” enforcement action if it uncovered violations. Commissioner Jonathan Adelstein expressed his view that the facts underlying the New York settlement “may represent the most widespread and flagrant violation of any FCC rules in the history of American broadcasting.”

The number of payola complaints made to the FCC may increase in the wake of Commissioner Adelstein’s recent call for the public to come forward with payola complaints — what he termed a “Neighborhood Watch” approach to payola. Stations need to guard not only against the traditional “pay for play” scenario but also against undisclosed product placement situations, or even situations

where a guest comes onto a talk show and touts the benefits of a product she was given for free by the manufacturer.

Remember, a broadcaster is not simply required to disclose consideration when it knows about it, but also must act with “reasonable diligence” to find out whether there has been a payment or other consideration (even during another stage of the production chain) in connection with material being broadcast on the station. This can get pretty tricky.

Public Safety. Even before 9/11, the FCC gave high priority to enforcement in the public safety area. Chairman Martin was a strong supporter of public safety as a commissioner so it can be expected that the agency will continue active enforcement on such matters as the Emergency Alert System, tower lighting and painting, RF radiation limits and AM tower fencing.

Such “localism” requirements as the main studio rule, the public file rule and the quarterly issues/programs list will also likely continue to be important enforcement areas.

Tell the truth

Once a complaint is filed against you, or the FCC does begin investigating you, the single most important thing you can do to help yourself is to be forthcoming and tell the truth. Companies under investigation for relatively minor offenses can get themselves in much worse trouble by trying to hide the facts or lie.

Leaving morality aside, there’s a reasonably good chance you are going to get caught. When you do get caught, you are going to be in deep trouble, with your licenses potentially at risk. So be responsive and be honest.

In addition to providing a truthful and complete response to the FCC’s inquiries, you should also use the investigation as an opportunity to put forth your best legal and policy arguments against enforcement action. While it’s never a good thing to be investigated by the FCC, if it happens, you should take every opportunity to present your best case and not simply respond to the questions directed to you by the commission.

The Enforcement Bureau staff will read carefully what you provide. If you have a good case and present it well,

you will prevail.

Think ‘Consent Decree’

If it looks like the FCC may be heading toward a proposed forfeiture (or, even worse, a revocation hearing), you may want to propose entering into a Consent Decree with the commission. A typical Consent Decree will not include a finding of a violation or an admission of liability.

The company will make a voluntary contribution to the Treasury in lieu of a monetary forfeiture and commit to certain compliance measures that often go beyond the requirements of the rule itself. The key to getting a consent decree is making clear in discussions with the commission that you recognize you had some problems and you are committed to ensuring that they don’t happen again.

Don’t be stupid

There is a lot of commission case law in the enforcement context that gives guidance regarding what arguments work and what arguments don’t work. Many broadcasters seem to be unaware of this case law or decide to ignore it. This is not a good idea.

During my tenure as chief of the FCC Enforcement Bureau, I saw many of the same old unsuccessful arguments over and over again. Some of my favorite bad arguments include those along the following lines: “We think the rule is stupid,” or “We think the FCC is stupid,” and “We think Congress is stupid,” and also “We think the courts are stupid.”

Of course, as bad as these arguments are, they aren’t as nearly bad as saying to an individual decision-maker that, “We think you personally are stupid.” I heard that one too.

It may feel good to say it; but trust me, it won’t help you.

You are also not likely to avoid enforcement action by arguing that your company is too big to ensure compliance at all its many stations, that you have a unique format that provides special public interest benefits or that you fixed the problem as soon as the commission told you about it.

As to arguments that can help you, the best I can tell you here is that you should focus on the facts, the law and any important underlying policy considerations in a clear, dispassionate and persuasive manner. And, to return to where I started, the more you can say about your compliance efforts the better.

RW welcomes other points of view. 