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## Communications Broadcast Advisory

### Reaffirmed Principles and New “Clarifications” of the FCC’s Obscenity, Indecency and Profanity Regulations and Policies

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In an effort to reduce the risk of reversal by the United States Court of Appeals for the Second Circuit, the FCC successfully persuaded the Court to allow it to pull back and review four indecency decisions. Earlier this week, the FCC announced the outcome of that review. The “F-word” is still very problematic. A five-second delay mechanism may not be enough to establish a legal defense. There is a tip-of-the-hat toward the First Amendment in the context of news programs but only that. And the procedural hurdle that the FCC has thrown up against blanket indecency complaints is probably only a temporary setback for national organizations intent upon “cleaning up the airwaves.”

#### “The 2002 Billboard Music Awards” Program—Reaffirming the General Prohibition Against Broadcast of the “F-word” Outside the Safe Harbor Time Period

At the 2002 Billboard Music Awards, Cher used the phrase “fuck ‘em” to refer to her critics. Fox argued that this expletive was not indecent because it was used as an insult rather than to describe sexual activity. In reviewing its previous ruling in *The 2002 Billboard Music Awards*, the Commission reaffirmed that “non-literal uses of the ‘F-word’ come within the subject matter scope of [its] indecency definition.” The Commission further found that “Cher’s use of the ‘F-Word’ to reference a sexual act as a metaphor to express hostility to her critics is inextricably linked to the sexual meaning of the term.” This ruling serves to reaffirm the Commission’s ruling in *Golden Globe*, where the FCC strongly suggested that the use of the word “fuck” in virtually any context would be indecent.

In order to avoid substantial fines of up to \$325,000 per violation, stations should avoid material that contains the “seven dirty words” – shit, piss, fuck, cunt, cocksucker, motherfucker, and tits – and variations of these words. These words were determined to be indecent by the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). While the FCC has ruled that these words may be permissible in certain historic and social contexts, the recent rulings make it unclear whether this is truly the case.

### **“The 2003 Billboard Music Awards” Program—A Five-Second Delay May Not Be an Adequate Legal Defense Against the Broadcast of Indecent Program Material**

In reviewing its previous ruling in *The 2003 Billboard Music Awards*, the FCC found that implementing a five-second delay for live performances is not an adequate defense under all circumstances. In so ruling, the Commission reaffirmed its long-standing principle of licensee accountability, namely that because stations always have the ability to control what is aired over their facilities through the use of adequate delay mechanisms, they are always accountable for what is aired. During the 2003 awards show, presenter Nicole Richie said “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.” The Commission found this statement to be indecent despite the fleeting nature of the violation. The Commission noted that, taken in context, there is no indication that “any of the language was a spontaneous slip of the tongue.” Fox argued that its use of a five-second delay was sufficient, and specifically noted that the five-second delay had been used to block an earlier “cow shit” uttered by Ms. Richie. The Commission noted that the five-second delay was inadequate because indecent material had failed to be edited out using the same technology on another occasion, the 2002 Billboard Music Awards. Further, the Commission stated that Fox knew that Ms. Richie frequently used profane language and should have taken greater precautions before giving her a script that “called for her to make excretory references.” In short, the Commission employed what appears to be a “totality of the circumstances” standard to evaluate whether the availability and use of five-second delay is legally adequate. While providing little guidance as to the minimum length of delay that will provide an assured legal defense for broadcasters, this ruling does put broadcasters on notice that the Commission will consider the performer involved and the script the performer was provided in assessing whether the delay technology employed was up to the task. Clearly, whether a station can expect to be fined will turn on the presumptive adequacy of the delay mechanism and the level of human diligence used in effectively using the mechanism under the circumstances.

### **“The Early Show” Program—Being Classified as News Programming Is a Factor Weighing Against the Finding of an Indecency Violation**

The Commission has stated that there is no exception for indecent material aired during a news program. Furthermore, the FCC has also stated that even though particular material may be “social commentary” or political speech, this does not provide an absolute defense to a claim of an indecency violation. However, the FCC will weigh the value of the material as one factor in its indecency analysis. In its new *The Early Show* decision, the FCC reversed its previous ruling, now finding that use of the word “bullshitter” in that news show by one *Survivor* contestant to describe another was not indecent. In making this finding, the FCC determined that its previous ruling had not properly accounted for the “news value” of *The Early Show*. In so finding, the FCC “reaffirmed [its] commitment to proceeding with caution in [its] evaluation of complaints involving news programming...in light of the important First Amendment interests at stake.” While this recent ruling can be read as evidencing a positive development, it should not be read as creating a de facto exception for indecent material broadcast during a news show.

### **The “NYPD Blue” Program—Limiting Indecency Complaints Considered by the FCC to Those Where a Complaining Party Viewed the Programming**

The FCC has stated that it will only investigate material about which it has received complaints. In the *NYPD Blue* decision on remand, the FCC narrowed the range of complaints which it would consider as the basis for proposed forfeitures. In *NYPD Blue*, a single viewer from Virginia filed numerous complaints against various ABC affiliates nationwide. The FCC dismissed these complaints because “there is nothing in the record either to tie the complaints to [the station’s] local viewing area...or to suggest that the broadcast programming at issue was the subject of complaints from anyone who viewed the programming on any station that

aired the material outside of the safe harbor.” This decision may have the short-term effect of reducing the number of indecency complaints filed against stations, but in time it is likely that the national organizations which have filed these complaints in the past will look to their local chapters to file “localized,” but coordinated, complaints nationwide.

### Conclusion

Law, regulation and policy in this area are extremely complex, and the fines for violations can be financially devastating. Have an adequate and reliable system in place to prevent violations in this area, and do not hesitate to check with communications counsel before airing any questionably obscene, indecent or profane material. For more information, please contact a member of the firm’s Communications Practice Section.

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