Communications

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Paying the Piper: Avoiding Payola/Plugola Violations and Minimizing Liability

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The volatile combination of broadcast employees concerned about their income and job security, and cash-strapped businesses looking for cheap and effective ways to promote themselves in difficult economic times, creates an unusually fertile ground for payola and plugola violations. Complicating matters are state efforts to prohibit "payola" activities that are legal under federal payola law. Even being accused of payola can be devastating to a broadcaster, and stations must be extremely diligent in uncovering and preventing payola and plugola violations.

Payola is the undisclosed acceptance of, or agreement to accept, anything of value in return for on-air promotion of a product or service. It is forbidden by Sections 317 and 507 of the Communications Act of 1934, and by Sections 73.1212 (broadcast) and 76.1615 (cable) of the FCC's Rules. Its sibling, Plugola, occurs when someone responsible for program selection promotes on-air a venture in which he or she has a financial interest without disclosing that interest to the station licensee and to the public. A payola or plugola violation by an employee usually results in the employer violating the FCC's sponsorship identification rule as well.

The penalties for violations can be high—a $10,000 fine and up to one year's imprisonment for each offense. The importance of complying with the restrictions on payola was underscored by the FCC in 2007 when it released orders adopting Consent Decrees in which four major radio station owners agreed to pay a combined $12.5 million to close investigations into possible payola violations. In addition to agreeing to pay between $2 million and $4 million each to the United States Treasury, each broadcaster also agreed, without admitting fault, to implement specific business reforms and a compliance plan within 60 days and to keep those reforms and compliance measures in effect for at least three years.

In addition to financial liability, violations of the payola rule and plugola policy can call into question whether the station licensee is exercising adequate control over the station, thereby affecting its qualifications to remain a Commission licensee. The FCC has stated that "a broadcaster's failure to comply with section

317 of the Act and 47 C.F.R. section 73.1212(b) may result in the imposition of administrative sanctions, including monetary forfeiture or initiation of revocation proceedings."

Adding further fuel to the fire, payola is no longer a purely federal matter. States have begun stepping in on the theory that variations of payola may violate state unfair business practices statutes. In New York, investigations were commenced by then-New York Attorney General Eliot Spitzer. Those investigations concluded that the four major record companies—EMI Music North America, Warner Music Group, UMG Recording Inc., and Sony BMG Music Entertainment—had provided illegal financial benefits to radio stations to obtain airplay and boost the chart position of their artists. Rather than risk litigation, each of these record companies entered into separate settlement agreements pursuant to which they not only agreed to institute company-wide reforms, but also to make payments to fund music education and appreciation programs in New York State. Specifically, EMI agreed to pay $3.75 million, Warner agreed to pay $5 million, Universal agreed to pay $12 million, and Sony BMG agreed to pay $10 million.

The New York investigations also asserted that major radio group owners CBS Radio, Inc. and Entercom Communications had traded airtime in return for gifts, promotional items, and other forms of payment. New York filed suits against CBS and Entercom in state court, claiming that these "payola" activities violated the New York deceptive trade practices laws (since New York has no jurisdiction to enforce federal payola laws). Both companies ultimately settled with New York, with CBS paying $2 million, Entercom paying $4.25 million, and both companies agreeing to cease the offending practices, to put internal systems in place to detect violations, and to appoint a compliance officer to monitor compliance.

The New York settlements are notable for two reasons. First, by bringing state enforcement to an area where only federal enforcement existed before, the potential sources of a payola suit or criminal action against record companies and broadcasters increases by a factor of 50. Second, the potential for numerous suits from multiple states increases the total potential liability for payola/plugola activity. This is not only because of the risk of fines from multiple jurisdictions, but because states may allege that activity that is legal under federal law may be pursued by states as an unfair or deceptive trade practice under state law.

For example, one of the charges brought in New York was that radio stations sold "spin programs" to record companies. These programs, aired overnight, were effectively "paid programs" featuring artists and songs that the sponsoring record company wished to promote. Because the record company was publicly identified as the sponsor on-air, federal payola rules were not violated. However, New York alleged that the purpose of such programs is to increase the amount of airplay for a song, artificially pumping up the song's chart position. New York asserted that the arrangement was meant to deceive the public as to the popularity of a song and artificially increase sales of the record as a result. While publicly labeling the activity "payola", New York prosecuted it under state law as a deceptive trade practice.

Introducing states into the process therefore increases not only the likelihood of a legal action, but subjects broadcasters to potentially 50 different definitions of "payola." Also, allegations of payola typically generate increased enforcement activity looking for more payola. For example, the New York investigations spurred the FCC to announce increased enforcement of federal payola and plugola restrictions. Then-Chairman Martin stated that "[t]he Commission will not tolerate non-compliance," and directed the Enforcement Bureau to review the conduct underlying the New York settlement agreements for possible FCC enforcement action against any broadcast licensees that may have been involved.

As discussed briefly above, the FCC's enforcement efforts ultimately led to consent decrees with a number of broadcasters, some of whom had already made payments to New York to settle the Spitzer probe. In short, the financial costs of even alleged non-compliance continue to multiply.

Beyond the direct financial costs, however, is the risk of imprisonment for those involved, and the regulatory threat to a station's FCC license. Few allegations provide evidence as explosive to those interested in attacking a station's license renewal application as a claim that the station has engaged in payola.

It is therefore vital to broadcasters that their managers and employees thoroughly understand how to comply with the laws regulating these matters. It is equally important that they be trained to spot potential violations before a problem gets out of hand.

Planning to Comply and Complying to the Plan

In creating an effective payola/plugola compliance plan, licensees must recognize that merely distributing a statement that your station prohibits payola is grossly inadequate. An active approach is needed. The FCC has stressed that each licensee has an obligation to "exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals, information to enable the licensee to comply with the sponsorship identification requirements of Section 317 of the Act."

It is helpful at the outset to draw a distinction that even government officials often confuse. A station generally cannot be guilty of payola; its employees and program suppliers are the ones that are guilty of payola. When an employee accepts money for playing a song without disclosure of the payment, the employee has engaged in illegal payola. When the station then airs the song without disclosing that it was paid for, the station is guilty of violating the sponsorship identification rule. As the consent decrees at the FCC and the settlements in New York demonstrate, however, the stakes for station owners are still quite high, as licensees are legally required to uncover and prevent payola before it results in sponsorship identification violations. Where they fail to do so, they face liability under both the payola laws and the FCC's sponsorship identification rule.

The universal premise underlying the payola rule, the plugola policy, and the sponsorship identification rule is that the public has a right to know when someone has a financial incentive to influence what the public hears or sees in the broadcast media. If a broadcast station or a station employee receives any money, product, or service, directly or indirectly, in exchange for causing material to be broadcast, that fact, as well as the identity of the sponsor, must be broadcast. By addressing payments made to station employees and program producers, the payola and plugola restrictions expand the range of material that is considered "sponsored" and which must be aired with adequate sponsorship disclosure even if the station itself receives nothing.

As a practical matter, payola and plugola are a form of employee theft, with employees selling or using for their own benefit the station's most valuable asset—its airtime. Not only is the result unfair for advertisers who pay the station's normal ad rates, but for the station's other employees, whose salary and/or bonuses are based on the station's success in selling ad time "above the table."

However, the biggest victim of all may be the station owner, since payola is one of the few crimes where both the perpetrator (the employee taking payola money) and the victim (the station owner whose ad time is being stolen) are subject to prosecution for permitting it to happen. Indeed, the station owner's biggest asset, the station itself, is put at risk in a payola investigation. Because the government views the public as being the actual victim of payola, however, there is little sympathy for the station licensee when payola occurs.

Defining Payola

In its 1988 *Public Notice* on the subject, the FCC defined payola as "the unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to achieve airplay for any programming." Payola is always illegal. However, because the lack of disclosure is an essential element of payola, it does not exist when full disclosure is made. It is not the payment of money to influence a broadcast but the lack of disclosure and sponsorship identification that makes the transaction illegal.

Payola usually occurs when someone makes a gift or payment to a person involved in station programming in exchange for favorable exposure. Both the person making the gift or payment and the recipient are required to disclose the arrangement to the licensee, and both can face criminal sanctions if they do not. When told of such an arrangement, the licensee must exercise its judgment as to whether to allow the program to be aired under such circumstances and, if so, to provide complete sponsorship identification on-air.

Thus, there are two required levels of disclosure. The station employee and any other parties giving/receiving a benefit for the use of airtime must disclose the existence of the "payment" to station management, and station management must then disclose the "sponsorship" on the air if it elects to proceed with airing the material.

When a payment of any kind is made for the purpose of influencing what is broadcast, it does not matter who makes and who receives the payment. The material broadcast is considered "sponsored," and the public must be informed. In this regard, there is little difference between a standard paid commercial unit and a song that gets extra play only because somebody took the program director on a junket.

Defining Plugola

Plugola exists when someone responsible for program selection promotes (or "plugs") on the air goods or services in which he or she has a financial interest. Plugola is similar to payola, except that it need not involve an outside party or payment of any kind. It can be accomplished by a single station employee. For instance, if a local night club pays a radio announcer to spin records, and the announcer mentions these appearances on the air to bolster club attendance, plugola has occurred. Station management must be informed and the "sponsorship" must be disclosed on the air.

Although it is less likely, even people who are neither station managers nor on-air personalities can engage in plugola. For instance, the person who prepares program logs could schedule extra announcements for a company in which he has a financial interest. Like payola, plugola can take many forms and its prevention requires continuous vigilance.

Plugola is legal only when (1) station management is made aware of the nature and extent of the employee's interest that is being promoted and (2) required over-the-air sponsorship identification is given. Any employees who are in any way connected with station programming and have any outside interests that could create a conflict of interest with station programming should be required to disclose these interests to management so that appropriate safeguards can be implemented.

Implementing a Compliance Plan

A proper compliance plan will:

- have a written policy prohibiting all forms of payola and plugola;
- ensure distribution of the written policy to all employees, not just those directly connected with programming;
- address the treatment of employees' outside business interests;
- require regular collection of affidavits of compliance from employees;
- have a mechanism for actively spotting and investigating suspicious activities; and
- ensure that appropriate sponsorship identification is placed on all material aired.

Broadcasters often ask whether there is such a thing as a standardized payola compliance plan, but unfortunately, there is no "one size fits all" answer for all stations. Over 20 years ago, the FCC stated that:

> The "reasonable diligence" standard can require a higher duty of care by stations whose formats or other circumstances make them more susceptible to payola. Thus, for example, we would expect stations that report to record charting services to demonstrate greater diligence to prevent improper conduct by its principals and employees than would a station with an all news format. It may fall short of "reasonable diligence" if the licensee of such a reporting station does nothing more than require its employees to execute affidavits stating that they will not violate laws and regulations prohibiting payola.

There are numerous other less obvious factors that can play into designing an adequate compliance plan. For example, some small market stations have personnel that both sell advertising and serve as on-air talent. The temptation to quietly promise an advertiser some undisclosed plugs on-air in order to seal an ad deal and make a sales commission may be hard to resist. Similarly, stations that permit ad agencies to pay talent fees directly to station employees rather than channeling such payments through the station increase the likelihood of such payments being "adjusted" to reflect undisclosed on-air mentions.

Deciding what is an adequate payola/plugola compliance plan for a particular station involves assessing what must be done to prevent payola/plugola from *ever* occurring. Unlike some regulatory areas where having an adequate paper trail is nearly a total defense to accusations against the licensee, payola tends to be a "strict liability" violation. The licensee is required to exercise adequate diligence to prevent payola/plugola, so if payola occurs, the FCC or Department of Justice can conclude that the diligence exercised by the licensee must have been inadequate (as was the associated compliance plan).

As a result, compliance plans need to be sufficiently comprehensive to prevent payola/plugola, as opposed to just allowing the licensee to claim that it has a policy prohibiting payola. Admittedly, it may not be realistic to implement a practical plan that makes payola/plugola *impossible*, but a comprehensive plan allows the licensee to mitigate the damage by demonstrating that it had an extensive system in place to prevent it. The corollary benefit to the licensee is that if the employee engaging in payola had to go to great lengths to circumvent the system, it demonstrates to authorities that the payola was the result of a determined "bad apple", and not a "culture of payola" at the station.

Even a rudimentary compliance plan must include a clear written policy prohibiting payola/plugola that sets forth the station's requirements, standards, and procedures relating to payola/plugola matters, regular distribution of that policy to employees, and the collection of affidavits from employees on a regular basis stating that they are aware of and understand the law and station policy, that they have and will continue to comply with both, and that they are unaware of any facts that might suggest that station employees are engaging in payola/plugola. As discussed below, the affidavit may gather other information and related certifications from employees as well. An example of a very basic payola/plugola affidavit is attached to this Advisory.

Among the threshold issues that must be addressed in a payola/plugola policy is whether station employees are permitted to hold outside financial interests. It has been fairly common to prohibit such outside interests, but that is becoming increasingly difficult in a world where most employees have investment portfolios for retirement. A middle ground is to permit disclosed investments in mutual funds, where an employee's incentive to plug a particular business, stock or fund is attenuated by the minimal financial impact it would likely have.

Where a station permits employees to have outside financial interests, it needs to collect that information through its employee affidavits, and then be vigilant to ensure that no plugs for those interests are aired without adequate sponsorship identification. Allowing outside financial interests makes policing a station's content more challenging, and makes the station more susceptible to liability. For example, knowing that an employee has a certain outside financial interest but then failing to prevent that employee from plugging that interest on-air speaks poorly of the station's vigilance in preventing plugola.

To reduce opportunities for employees to engage in plugola, those employees with potentially conflicting outside interests should be insulated from the process of program selection when there is any possibility that the outside interest could cause the employee to compromise objective programming in favor of that interest. Consider, for example, a program director that has an interest in an outside concert promotions company. Under the rules, he or she should not be allowed to choose records to be played on-air that would promote a concert the outside company is handling without disclosing that interest. This does not mean that the station cannot play records by bands appearing in a concert the program director's company is promoting, or even that station announcers cannot talk about the concert. Rather, it means that the party with the conflicting outside interest must not be permitted to make programming decisions that could promote that interest unless management has been informed, decides to allow it, and full disclosure to the public is made.

Note in this example that the problem is the same whether the program director directly or indirectly influences the programming. In other words, insulating the program director serves no beneficial purpose if he or she successfully persuades other station employees to secretly promote his or her concerts on-air. It is because of the difficulty in policing this type of activity that most stations find it easier to just prohibit programming employees from having potentially conflicting interests.

Beyond prohibiting payola and plugola, a written compliance policy will address issues like outside financial interests, procedures for obtaining management approval to promote an outside financial interest (which should be done in advance, be in writing, and provide for appropriate sponsorship identification), and the need to notify management of any facts, or the receipt of anything of value from entities with an interest in obtaining airtime, that raises the possibility of payola/plugola. Even staff members who are not connected in any way with programming should be made familiar with the rules and instructed to report potential violations.

Moving beyond station employees, licensees are also required to exercise diligence with regard to programs obtained from networks, syndicators, or other program suppliers. For example, if a station knows, or has reason to believe, that payola may have influenced the content of program material it is planning to air, it must investigate and determine what action needs to be taken to ensure appropriate sponsorship identification. While there is an exception for theatrically-released movies aired on television, where the licensee is not required to determine which movie content (e.g., product placements) might have been sponsored, there has been some discussion of ending even this exception.

Consent Decrees as Compliance Models

In designing a compliance plan, it is instructive to look at what the FCC has required of licensees in its payola consent decrees. These requirements provide guidance as to what the FCC deems reasonable to prevent payola/plugola, at least where it believes violations may have already occurred. Since a compliance plan will almost always be considered in the context of a payola/plugola investigation, being able to demonstrate that the compliance policy is modeled after the FCC's own requirements can only help in demonstrating that the station has seriously sought to prevent payola/plugola.

In that regard, each of the FCC consent decrees requires the appointment of a company-wide compliance officer, who must be available to all employees by telephone and email to provide advice on compliance and to receive reports of potential violations. Groups with stations in multiple markets must also appoint compliance contacts in each market to work with the corporate compliance officer in implementing and monitoring the compliance plan. There must also be a compliance "hotline" for employees seeking advice on compliance and to report potential violations.

The consent decrees also require immediate mandatory payola/plugola training of all programming personnel with repeat training occurring every twelve months. All contracts with programming personnel must include a contract clause relating to compliance with the payola/plugola requirements. No money or items of value may be accepted from a record label, record label employee, or independent music promoter, except where the independent music promoter certifies in writing that no compensation it receives from record labels is based upon airplay. Stations may accept promotional items from record labels to give away on-air, at station events, or for charity, as long as the recipients are not station employees or their families. Stations must announce the value of the prize and identify the record label as the provider of the prize. Record labels may arrange for artists to appear at station events, interviews, and broadcast performances as long as sponsorship identification requirements are met.

The consent decrees did permit stations to accept items of nominal value, such as CD's and items worth less than $25, including T-shirts, coffee mugs, posters, and pens. Larger items, such as meals, concert tickets, travel and lodging can be accepted only under restricted circumstances, where the cost is reasonable, a legitimate business purpose exists, and written records of the transaction are maintained.

Lastly, the consent decrees requires that stations maintain a database of all items of value received by the station or its employees from record labels, and include the disposition of those items. If awarded as contest prizes, the database must identify the recipient of the prize.

While not a requirement of the FCC consent decrees, stations have often found it useful to maintain a log of contacts between station personnel and record label or independent promoter personnel. Station management should review the "gift" database and "contacts" log regularly to spot any evidence of suspicious activity.

Payola/Plugola Compliance: A Journey Rather Than a Destination

Regardless of its content, **a compliance plan will only be as successful as the licensee's efforts to enforce it**. Merely putting the plan in place and then not watching for suspicious activity or following up when payola issues are raised will accomplish little. Worse, it presents the appearance of a licensee unconcerned with ensuring compliance with its legal obligations, or one which is perhaps quietly permitting the illegal activity to occur.

There is no compliance plan that can successfully prevent payola/plugola by its mere existence. The plan must be accompanied by vigilance on the part of management, and include a staff that is sufficiently well trained to know when they or others at the station are threatening to cross the boundaries of payola/plugola.

While popular culture has a very specific notion of "payola" as "pay for play" of songs, there are in reality hundreds of variations, most of which involve more traditional products. Knowing when sponsorship identification is needed, or at least wise to include, is critically important to any broadcast operation, whether it is payola, plugola, or something else entirely that is involved. The key principle to remember is that if a reasonable listener or viewer could be confused as to the source of program material, station management's collective eyebrow should be raised, and the issue of sponsorship identification must be addressed.

While the need for sponsorship identification is often obvious, that is not always the case, and in those situations, communications counsel should certainly be consulted. Counsel can also be helpful in determining the form and amount of sponsorship identification, which itself can sometimes raise complex issues. In all cases, the difficultly of inserting appropriate sponsorship identification should not be treated as a factor, since it will not be considered relevant in the least by the FCC or the Department of Justice in prosecuting an alleged violation.

In addition to the assistance of communications counsel, broadcasters will find it useful to have several relevant documents in hand for both training and compliance activities relating to payola/plugola. Attached to this Advisory are copies of: (a) Sections 317 and 507 of the Communications Act of 1934, as amended; (b) Section 73.1212 of the FCC's regulations; (c) the FCC *Public Notice* released September 3, 1975, outlining 36 interpretations of its sponsorship identification requirements; and (d) the FCC *Public Notice* released May 18, 1988 regarding payola and undisclosed promotions.

In addressing compliance with payola, plugola, and sponsorship identification requirements, stations have little room for error. Navigating the aftermath of a payola scandal is a challenging exercise in damage control, and one to which no station would ever wish to subject itself. The modern tendency to use email for most communications means that investigators have far more extensive evidence to pursue legal action than when telephone calls and handshakes were the order of the day. In addition, having scandalous emails released to the public causes further public relations damage for the affected broadcaster, with the public rarely giving the broadcaster the benefit of the doubt.

As a result, the time to address payola and plugola is before it happens. A comprehensive compliance plan accompanied with vigilant management is an essential ingredient of operating a modern broadcast station. At a time when the FCC is increasingly concerned about the transparency to the public of sponsored material, making sure that station staff is well-trained and capable of spotting and addressing payola, plugola, and other sponsorship identification is critically important.

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PAYOLA PLUGOLA AFFIDAVIT

I,____, hereby state that I have read and fully understand the following materials copies of which are attached hereto and will fully comply with the laws, regulations, policies, and rules contained therein:

(a) Sections 317 and 507 of the Communications Act of 1934, as amended;

(b) Section 73.1212 of the Federal Communications Commission's regulations;

(c) The FCC *Public Notice* released September 3, 1975, which sets forth the Commission's 36 interpretations of Section 317 and Rule Section 73.1212.

(d) The FCC *Public Notice* released May 18, 1988.

I have also read, understand and will fully comply with the attached "Statement of Station Policy," which prohibits employees who are in any way responsible for the selection of broadcast matter from (a) engaging in any outside business that might create a conflict of interest in program selection; (b) accepting anything of any value from persons in exchange for the inclusion of matter in a broadcast without the prior approval of management; and (c) promoting on the air anything in which any employee has a financial interest, by any means other than a standard paid commercial announcement, without the prior written approval of management. If I am ever unsure as to whether a course of action is prohibited under these rules or policies I will discuss in advance my intent to pursue that course of action with station management and obtain the written consent of top station management before engaging in any such activity.

____

(Affiant)

Subscribed and sworn to before me this _____day of_______________,_______.

____

Notary Public

My Commission Expires:

____

Section 317 of the Communications Act of 1934, as amended

Announcement of payment for broadcast
Disclosure of person furnishing

(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided,* That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

Disclosure to station of payments

(b) In any case where a report has been made to a radio station, as required by section 508 of this title, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

Acquiring information from station employees

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

Waiver of announcement

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

Rules and regulations

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section. June 19, 1934, c. 652, Title III, §317, 48 Stat. 1089; Sept. 13, 1960, Pub.L. 86-752, §8(a), 74 Stat. 895.

Section 507 of the Communications Act of 1934, as amended

Disclosure of payment to individuals connected with broadcasts
Payments to station employees

(a) Subject to subsection (d) of this section, any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

Production or preparation of programs

(b) Subject to subsection (d) of this section, any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

Supplying of program or program matter

(c) Subject to subsection (d) of this section, any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

Waiver of announcements under section 317(d)

(d) The provisions of this section requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Commission under section 317(d) of this title, an announcement is not required to be made under section 317 of this title.

Announcement under section 317 as sufficient disclosure

(e) The inclusion in the program of the announcement required by section 317 of this title shall constitute the disclosure required by this section.

Definition of "service or other valuable consideration"

(f) The term "service or other valuable consideration" as used in this section shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, or for use on a program which is intended for broadcasting over any radio station, unless it is so furnished in consideration for an identification in such broadcast or in such program of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property in such broadcast or such program.

Penalties

(g) Any person who violates any provision of this section shall, for each such violation, be fined not more than $10,000 or imprisoned not more than one year, or both. June 19, 1934, c. 652, Title V, §508, as added Sept. 13, 1960, Pub.L. 86-752, §8(b), 74 Stat. 896.

Section 73.1212 of the Rules of the Federal Communications Commission

Sponsorship identification; list retention; related requirements

(a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce: (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) by whom or on whose behalf such consideration was supplied: *Provided, however,* That "service or other valuable consideration" shall not include any service or property furnished either without or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond an identification reasonably related to the use of such service or property on the broadcast.

(i) For the purposes of this section, the term "sponsored" shall be deemed to have the same meaning as "paid for."

(b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section.

(c) In any case where a report has been made to a broadcast station as required by section 507 of the Communications Act of 1934, as amended, of circumstances which would have required an announcement under this section had the consideration been received by such broadcast station, an appropriate announcement shall be made by such station.

(d) In the case of any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance for which any film, record, transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast on which such material or service is used that such film, record, transcription, talent, script, or other material or service has been furnished to such station in connection with the transmission of such broadcast matter: *Provided, however,* That in the case of any broadcast of 5 minutes' duration or less, only one such announcement need be made either at the beginning or conclusion of the broadcast.

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent. Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection at the location specified by the licensee under §73.3526 of this chapter. If the broadcast is originated by a network, the list may, instead, be retained at the headquarters office of the network or at the location where the originating station maintains its public inspection file under §73.3526 of this chapter. Such lists shall be kept and made available for a period of two years.

(f) In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast.

(g) The announcement otherwise required by section 317 of the Communications Act of 1934, as amended, is waived with respect to the broadcast of "want ad" or classified advertisements sponsored by an individual. The waiver granted in this paragraph shall not extend to a classified advertisement or want ad sponsorship by any form of business enterprise, corporate or otherwise. Whenever sponsorship announcements are omitted pursuant to this paragraph, the licensee shall observe the following conditions:

(1) Maintain a list showing the name, address, and (where available) the telephone number of each advertiser;

(2) Make this list available to members of the public who have a legitimate interest in obtaining the information contained in the list. Such list must be retained for a period of two years after broadcast.

(h) Any announcement required by section 317(b) of the Communications Act of 1934, as amended, is waived with respect to feature motion picture film produced initially and primarily for theater exhibition.

NOTE: The waiver heretofore granted by the Commission in its Report and Order adopted November 16, 1960 (FCC 60-1369; 40 FCC 95), continues to apply to programs filmed or recorded on or before June 20, 1963, when §73.654, the predecessor television rule, went into effect.

(i) Commission interpretations in connection with the provisions of the sponsorship identification rules are contained in the Commission's Public Notice, entitled "Applicability of Sponsorship Identification Rules," dated May 6, 1963 (40 FCC 141), as modified by Public Notice, dated April 21, 1975 (FCC 75-418). Further interpretations are printed in full in various volumes of the Federal Communications Commission Reports.

[40 FR 18400, Apr. 28, 1975, as amended at 46 FR 13907, Feb. 24, 1981; 49 FR 4211, Feb. 3, 1984; 49 FR 33663, Aug. 24, 1984; 50 FR 32417, Aug. 12, 1985]

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION

SPONSORSHIP IDENTIFICATION RULES

Applicability

September 3, 1975

Revision of May 6, 1963 Public Notice, as modified by April 21, 1975 Public Notice.

With the development of broadcast service along private commercial lines, meaningful government regulation of the various broadcast media has from an early date embraced the principle that listeners are entitled to know by whom they are being persuaded. Thus, as far back as the Radio Act of 1927 and continuing with section 317 of the Communications Act of 1934 there has been an unvarying requirement that all matter broadcast by any station for a valuable consideration is to be announced as paid for or furnished, and by whom.

On September 13, 1960, a bill (S. 1898) was signed into law amending section 317 of the Act to redefine the situations in which broadcast licensees must make sponsorship identification announcements. In addition, the law (Public Law 86-752) added a new section 508 to the Act requiring disclosure by persons other than broadcast licensees who provide or receive valuable consideration for the inclusion of any matter in a program intended for broadcast. The persons to whom section 508 relates had previously not been directly subject to any previous provisions of the Act. Subsection (e) of the revised section 317 directs the Commission to prescribe appropriate rules and regulations to implement the Congressional intent expressed in the new wording of section 317. In adopting this legislation, the Congress also set forth a series of twenty-seven examples to illustrate the intended effect of the proviso clause in amended section 317(a).

In 1963, the Commission revised the sponsorship identification rules for the broadcast services (34 FCC 829) thereby implementing amended section 317. By *Report and Order*, adopted April 17, 1975, in Docket No. 19513, these rules were further amended (and consolidated as new section 73.1212) effective May 30, 1975 (FCC 75-417). When the 1963 rule revision was made, the Commission also adopted a *Public Notice*, entitled "Applicability of Sponsorship Identification Rules," which contained thirty-six illustrative interpretations (40 FCC 141), including the twenty-seven examples set forth by the Congress. These interpretations, except for Interpretation 33, are consistent with the 1975 rule revisions. To reflect the provisions of new section 73.1212, Interpretation 33 was revised by *Public Notice,* dated April 21, 1975 (FCC 75-418). The 1975 *Report and Order* also amended the sponsorship identification rules for origination cablecasting (section 76.221) to conform to the new section 73.1212 for broadcasting. The interpretations of the 1963 *Public Notice* as modified by the 1975 *Public Notice* are applicable to origination cablecasting as well as to the broadcast services. The present document is a revision of the 1963 *Public Notice*, incorporating both the 1975 rule changes and the revised Interpretation 33.

*   *   *

The following are illustrative interpretations of section 317 and the Commission's rules, Interpretations 1 to 27, inclusive are incorporated without change from House Report 1800 (86th Congress, 2d Session):

A. *Free records*.[1]

1. A record distributor furnishes copies of records to a broadcast station or a disc jockey for broadcast purposes. No announcement is required unless the supplier furnished more copies of a particular recording than are needed for broadcast purposes. Thus, should the record supplier furnish 50 or 100 copies of the same release, with an agreement by the station, express or implied, that the record will be used on a broadcast, an announcement would be required because consideration beyond the matter used on the broadcast was received.

2. An announcement would be required for the same reason if the payment to the station or disc jockey were in the form of cash or other property, including stock.

3. Several distributors supply a new station, or a station which has changed its program format (e.g. from "rock and roll" to "popular" music), with a substantial number of different releases.[2] No announcement is required under section 317 where the records are furnished for broadcast purposes only; nor should the public interest require an announcement in these circumstances. The station would have received the same material over a period of time had it previously been on the air or followed this program format.

4. Records are furnished to a station or disc jockey in consideration for the special plugging of the record supplier or performing talent beyond an identification reasonably related to the use of the records on the program. If the disc jockey were to state: "This is my favorite new record, and sure to become a hit; so don't overlook it," and it is understood that some such statements will be made in return for the record and this is not the type of statement which would have been made absent such an understanding, and the supplying of the record free of charge, an announcement would be required since it does not appear that in those circumstances the identification is reasonably related to the use of the record on that program. On the other hand, if a disc jockey, in playing a record,

[1] In view of the attention which has been given to the problem of free records, they are treated herein as a special category. It should be noted, however, that the same principles apply to records as to other property or services furnished for use on or in connection with a broadcast.

[2] A question has been raised with respect to a situation where a distributor furnishes to a station free of charge an entire music library with the understanding, express or implied, that only its records would be played on the station. To the extent that such an arrangement may run afoul of the antitrust laws or may constitute an abdication by the station of its licensee responsibility, an announcement under section 317 would not cure it.

states: "Listen to this latest release of performer "X", a new singing sensation," and such matter is customarily interpolated in the disc jockey's program format and would be included whether or not the particular record had been purchased by the station or furnished to it free of charge, it would appear that the identification by the disc jockey is reasonably related to the use of the record on that particular program and there would be no announcement required.

B. *Where payment in any form other than the matter used on or in connection with the broadcast is made to the station or to anyone engaged in the selection of program matter.*

5. A department store owner pays an employee of a producer to cause to be mentioned on a program the name of the department store. An announcement is required.

6. An airline pays a station to insert in a program a mention of the airline. An announcement is required.

7. A perfume manufacturer gives five dozen bottles to the producer of a give-away show, some of which are to be identified and awarded to winners on the show, the remainder to be retained by the producer. An announcement is required since those bottles of perfume retained by the producer constitute payment for the identification.

8. An automobile dealer furnishes a station with a new car, not for broadcast use, in return for broadcast mentions. An announcement is required; the car constituting payment for the mentions.

9. A Cadillac is given to an announcer for his own use in return for a mention on the air of a product of the donor. An announcement is required since there has been a payment for a broadcast mention.

C. *Where service or property is furnished free for use on or in connection with a program, but where there is neither payment in consideration for broadcast exposure of the service or property, nor an agreement for identification of such service or property beyond its mere use on the program.*

10. Free books or theater tickets are furnished to a book or dramatic critic of a station. The books or plays are reviewed on the air. No announcement is required. On the other hand, if 40 tickets are given to the station with the understanding, express or implied, that the play would be reviewed on the air, an announcement would be required because there has been a payment beyond the furnishing of a property or service for use on or in connection with a broadcast.

11. News releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program. No announcement is required.

12. A Government department furnishes air transportation to radio newscasters so they may accompany a foreign dignitary on his travels throughout the country. No announcement is required.

13. A municipality provides street props on a program. No announcement is required.

14. A hotel permits a program to originate on its premises. No announcement is required. If, however, in return for the use of the premises, the producer agrees to mention the hotel in a manner not reasonably related to the use made of the hotel on that particular program, an announcement would be required.

15. A refrigerator is furnished for use as part of the backdrop in a kitchen scene of a dramatic show. No announcement is required.

16. A Coca-Cola distributor furnishes a Coca-Cola dispenser for use as a prop in a drugstore scene. No announcement is required.

17. An automobile manufacturer furnishes his identifiable current model car for use in a mystery program, and it is used by a detective to chase a villain. No announcement is required. If it is understood, however, that the producer may keep the car for his personal use, an announcement would be required. Similarly, an announcement would be required if the car is loaned in exchange for a mention on the program beyond that reasonably related to its use, such as the villain saying: "If you hadn't had that speedy Chrysler, you never would have caught me."

18. A private zoo furnishes animals for use on a children's program. No announcement is required.

19. A university makes one of its professors available to give lectures in an educational program series. No announcement is required.

20. A well-known performer appears as a guest artist on a program at union scale because the performer likes the show, although the performer normally commands a much higher fee. No announcement is required.

21. An athletic event promoter permits broadcast coverage of the event. No announcement is required in absence of other payment by the promoter or agreement to identify in a manner not reasonably related to the broadcast of the event.

D. *Where service or property is furnished free for use on or in connection with a program, with the agreement, express or implied, that there will be an identification beyond mere use of the service or property on the program.*[3]

[3] Of course, in all these cases, if there is payment to the station or production personnel in consideration for the exposure, an announcement is required.

22. A refrigerator is refurnished by X with the understanding that it will be used in a kitchen scene on a dramatic show and that the brand name will be mentioned. During the course of the program the actress says: "Donald go get the meat from my new X refrigerator." An announcement is required because the identification by brand name is not reasonably related to the particular use of such refrigerator in this dramatic program.

23. (a) A refrigerator is furnished by X for use as a prize on a giveaway show, with the understanding that a brand identification will be made at the time of the award. In the presentation, the master of ceremonies briefly mentions the brand name of the refrigerator, its cubic content, and such other features as serve to indicate the magnitude of the prize. No announcement is required because such identification is reasonably related to the use of the refrigerator on giveaway show in which the costly or special nature of the prizes is an important feature of this type of program.

(b) In addition to the identification given in (a) above, the master of ceremonies say: "All you ladies sitting there at home should have one of these refrigerators in your kitchen" or "Ladies, you ought to go out and get one of these refrigerators." An announcement is required because each of these statements is a sales "pitch" not reasonably related to the giving away of the refrigerator on this type of program.

The significance of the distinction between the identification in (a) and that in (b) is, that in (a) it is no more than the natural identification which a broadcaster would give to a refrigerator as a prize if he had purchased the refrigerator himself and had no understanding whatever with the manufacturer as to any identification. That is to say, in situation (a), had the broadcaster purchased the refrigerator he would have felt it necessary, in view of the nature of the show, adequately to describe the magnitude of the prize which was being given to the winner. On the other hand, the broadcaster would not, where he had purchased the refrigerator, have made the type of identification in situation (b), thus providing a free sales "pitch" for the manufacturer.

24. (a) An airplane manufacturer furnishes free transportation to a cast on its new jet model to a remote site, and the arrival of the cast at the site is shown as part of the program. The name of the manufacturer is identifiable on the fuselage of the plane in the shots taken. No announcement is required because in this instance such identification is reasonably related to the use of the service on the program.

(b) Same situation as in (a), except that after the cameraman has made the foregoing shots he takes an extra closeup of the identification insignia. An announcement is required because the closeup is not reasonably related to the use of the service on the program.

25. (a) A station produces a public service documentary showing development of irrigation projects. Brand X tractors are furnished for use on the program. The tractors are shown in a manner not resulting in identification of the brand of tractors except as may be recognized from the shape or appearance of the tractors. No announcement is

required since the identification is reasonably related to the use of the tractors on the program.

(b) Same situation as in (a), except that the brand name of the tractor is viable as it appears normally on the tractor. No announcement is required for the same reason.

(c) Same situation as in (b), except that a closeup showing the brand name in a manner not required in the nature of the program is included in the program, or an actor states: "This is the best tractor on the market." An announcement is required as this identification is beyond that which is reasonably related to the use of the tractor on the program.

26. (a) A bus company prepares a scenic travel film which it furnishes free to broadcast stations. No mention is made in the film of the company or its buses. No announcement is required because there is no payment other than the matter furnished for broadcast and there is no mention of the bus company.

(b) Same situation as in (a), except that a bus, clearly identifiable as that of the bus company which supplied the film, is shown fleetingly in highway views in a manner reasonably related to that travel program. No announcement is required.

(c) Same situation as in (a), except that the bus, clearly identifiable as that of the bus company which supplied the film, is shown to an extent disproportionate to the subject matter of the film. An announcement is required, because in this case by the use of the film the broadcaster has impliedly agreed to broadcast an identification beyond that reasonably related to the subject matter of the film.

27. (a) A manufacturer furnishes a grand piano for use on a concert program. The manufacturer insists that enlarged insignia of its brand name be affixed over normal insignia on the piano. An announcement is required if an enlarged brand name is shown.

(b) Conversely, if the piano furnished has normal insignia and during the course of the televised concert the broadcast includes occasional closeups of the pianist's hands, no announcement is required even though all or part of the insignia appears in these closeups. Here the identification of the brand name is reasonably related to the use of the piano by the pianist on the program. However, if undue attention is given the insignia rather than the pianist's hands, an announcement would be required.

28. (a) An automobile manufacturer or dealer furnishes to a producer of television programs a number of automobiles with the understanding that the producer will use them, or some of them, in some of his programs which call for the use of automobiles; and that the automobiles may be used for other business purposes in connection with the production of the programs, such as transporting the cast, crew, equipment and supplies from location to location or transporting executive personnel to business meetings in connection with the production of the programs. There is no understanding that there will be any identification on the television programs beyond an identification which is

reasonably related to the use of the automobiles on the programs. No other consideration is involved. Under such uses, no announcement is required.

(b) If in addition to the facts stated in (a), it is understood between the producer and the supplier that one or more of the automobiles may be, and they are, used for other purposes not related to the production of the program, an announcement is required.

29. (a) A hotel permits a program to originate from its premises and furnishes hotel services, such as room and board for cast, production and technical staff, and also furnishes other elements for use in connection with the programs to be broadcast, such as electricity and cable connections, free of charge, and with no other consideration. There is no understanding that there will be an identification of the hotel on the program beyond that reasonably related to the use made of the hotel on the program. No announcement is required.

(b) If the hotel pays money or furnishes free or at a nominal charge any services or items which are not for use on or in connection with the program (e.g., furnishing free or at a nominal charge room and board for the producer for any period of time not related to the production of the program at the hotel site), an announcement is required.

E. *Effective Date*.

30. Does section 317 as amended on September 13, 1960 apply to programs or portions of programs produced or recorded prior to September 13, 1960? No, unless valuable consideration was provided to a broadcast station (rather than to a producer or other person) for the broadcast of the program or the inclusion of any program matter therein and the program was broadcast after said date.

F. *Nature of the announcement*.

31. A station broadcast spot announcements which solicit mail orders from listeners. The sponsor is merely referred to in the announcements and in the mail order address as "Flower Seeds" or "Real Estate" or "the Record Man." Such a reference to the sponsor of the announcements is insufficient to constitute compliance with the Commission's sponsorship identification rules because it is limited to a description of the product or service being advertised. The announcement requirement contemplates the explicit identification of the name of the manufacturer or seller of goods, or the generally known trade or brand names of the goods sold. (See Commission's *Public Notice* entitled "Sponsor Identification on Broadcast Station," FCC 50-1207, 6 R.R. 835).

32. A station broadcasts "Teaser" announcements utilizing catch words, slogans, symbols, etc., designed to arouse the curiosity of the public by telling it that something is "coming soon." The sponsor of the announcements is not named therein, nor is any generally known trade or brand name given, but it is the intention of the station and the advertiser to inaugurate at a later date a series of conventional spot announcements at the conclusion of the "teaser" campaign. Announcements of this type do not comply with the

Commission's sponsorship identification rules. All commercial matter must contain an explicit identification of the advertiser or the generally known trade or brand name of the goods being advertised. (See *Memorandum Opinion and Order In The Matter of Amendment of § 3.119(e) of the Commission's Rules,* FCC 59-939, 18 R.R. 1860.)

33. A station broadcasts an announcement or other material on behalf of a candidate for public office or on behalf of the proponents or opponents of a bond issue (or any other controversial issue of public importance). The station announces a "disclaimer" or states that the matter "was a paid political announcement." Such announcement *per se* does not comply with the sponsorship identification rule. The rule does not require that either of these type of announcement be made but rather that identification announcement be made which fully and fairly discloses the true identity of the person or persons or entity by whom or on whose behalf payment was made or promised, or from whom or on whose behalf services or other valuable consideration was furnished. If the station knows or by the exercise of reasonable diligence could know that a person or persons, or entity is acting on behalf of another, the announcement(s) shall identify the person(s) or entity on whose behalf such action is being taken. If the entity on whose behalf such action is being taken is a corporation, committee, association, or other group, the announcement(s) shall divulge the name of such group. Additionally, a station broadcasting any matter on behalf of such group shall make available for public inspection at the place which the station has designated that its file is available for inspection under Section 1.526 of the rules (the station's main studio or other accessible place in the community of the station's license) a list of the chief executive officers, members of the executive committee, or members of the board of directors of that entity. If the broadcast is network originated, the list may be retained at the network's headquarters office or at the location where the originating station maintains its public inspection file under Section 1.526.

34. Must the required sponsorship announcement on television broadcasts be made by visual means in order for it to be an "appropriate announcement" within the meaning of the Commission's rules?

Not necessarily. The Commission's rule does not contain any provision stating whether aural or visual or both types of announcements are required. The purpose of the rule is to provide a full and fair disclosure of the facts of sponsorship, and responsibility for determining whether a visual or aural announcement is appropriate lies with the licensee. (See *Commission Telegram to Mr. Bert Combs,* FCC Public Notice of April 9, 1959, Memo No. 71945).

G. *Controversial Issues*.

35. (a) A trade association furnishes a television station with kinescope recordings of a Senate committee hearing on labor relations. The subject of the kinescope is a strike being conducted by a labor union. The station broadcasts the kinescope on a "sustaining" basis but does not announce the supplier of the film. The failure to make an appropriate announcement as to the party supplying the film is a violation of the Commission's sponsorship identification rules dealing with the presentation of program matter involving

controversial issues of public importance. Moreover, the Commission requires that a licensee exercise due diligence in ascertaining the identity of the supplier of such program matter. An alert licensee should be on notice that expensive kinescope prints dealing with controversial issues are being paid for by someone and must make inquiry to determine the source of the films in order to make the required announcement. (See *KSTP, Inc.,* 17 R.R. 553 and *Storer Broadcasting Co.*, 17 R.R. 556a.) A station which has ascertained the source of kinescope is under an additional obligation to supply such information to any other station to which it furnishes the program.

(b) Same situation as above, except that the time for the program is sold to a sponsor (not the supplier of the film) and contains proper identification of the advertiser purchasing the program time. An additional announcement as to the supplier of the films is still required, for the reasons set forth above.

(c) Same situation as in (a) or (b), above, except that only excerpts from the film are used by a station in its news programs. An announcement as to the source of the films is required. (See *Westinghouse Broadcasting Co.*, 17 R.R. 556d).

36. A church group plans to film the proceedings of its national convention and distribute film clips "dealing with numerous matters of profound importance to members of (its) faith" in order to "disseminate to the American people information concerning its objectives and programs." The groups request a general waiver under section 317(d) of the Communications Act so that it need not "waste" any of the short periods of broadcast time donated to it by making sponsorship identification announcements. In the below-cited case, the Commission did not grant such a waiver because of the absence of information indicating that the subject matter of the clips was not controversial and because the alleged "loss" of a few seconds of air time was not of decisional significance vis-a-vis Congressional and Commission policy relating to issues of public importance. (See *Petition of National Council of Churches of Christ,* FCC 60-1418).

Adopted: May 1, 1963, and modified April 17, 1975.

FEDERAL COMMUNICATIONS COMMISSION
[SEAL]
VINCENT J. MULLINS, Secretary
[FR DOC 75-23720 Filed 9-8-75; 8:45 a.m.]

PUBLIC NOTICE
Federal Communications Commission

FCC 88-175
37377
May 18, 1988

COMMISSION WARNS LICENSEES ABOUT PAYOLA AND UNDISCLOSED PROMOTION

On February 25, 1988, four persons were indicted in United States District Court in Los Angeles, California, as a result of a two-year investigation of "payola" practices in the broadcast industry. One of those indicted is charged with having made "undisclosed payments from 1980 to 1985 in the form of cash and cocaine" to station personnel in order to secure airplay for certain records. These indictments make this a propitious time for us to remind broadcast licensees that payola is not only a violation of the United States Criminal Code, but may also subject broadcasters to sanctions under the Communications Act.

Payola is the unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to achieve airplay for any programming. Section 507 of the Communications Act requires those persons who have paid, accepted, or agreed to pay or accept such payments to report that fact to the station licensee before the involved matter is broadcast. In turn, section 317 of the Act requires the licensee to announce that the matter contained in the program is paid for, and to disclose the identity of the person furnishing the money or other valuable consideration.

Both section 317(c) of the Act and section 73.1212(b) of the Commission's rules require that each licensee "exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals" information to enable the licensee to comply with the sponsorship identification requirements of section 317 of the Act. The "reasonable diligence" standard can require a higher duty of care by stations whose formats or other circumstances make them more susceptible to payola. Thus, for example, we would expect stations that report to record charting services to demonstrate greater diligence to prevent improper conduct by its principals and employees than would a station with an all news format. It may fall short of "reasonable diligence" if the licensee of such a reporting station does nothing more than require its employees to execute affidavits stating that they will not violate laws and regulations prohibiting payola.

Failure to make the reports required by section 507 of the Act can subject the violator to criminal penalties of a fine of up to $10,000 or imprisonment of up to one year, or both. Thus, the Department of Justice has primary jurisdiction for the enforcement of the law. See, e.g., United States v. Vega, 447 F.2d 698 (2d Cir. 1971). The Commission is cooperating with the Department of Justice by referring pertinent evidence that comes to our attention.

The Commission notes that licensees play a critical role in preventing payola, and the Commission's enforcement staff will investigate substantive allegations of payola that come to its attention. In many situations a station may be a victim of payola practices. Therefore, the Commission is willing to assist concerned stations by informally advising them as to whether a particular situation constitutes a potential rule or statutory violation. The Commission emphasizes, however, that a broadcaster's failure to comply with section 317 of the Act and 47 C.F.R. section 73.1212(b) may result in the imposition of administrative sanctions, including monetary forfeiture or initiation of revocation proceedings.

Action by the Commission May 18, 1988. Commissioners Patrick (Chairman), Quello and Dennis.