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Memorandum to Clients

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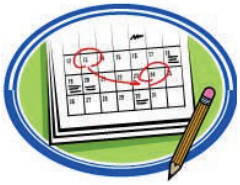

After the shutdown

FCC Sets New Filing Deadlines Following Reopening

[*Editor's Note: Because of the government shutdown that extended from October 1-16, the FCC was inactive for more than half of this past month. As a result, the Commission has left us with less to write about this month than usual, and this issue of the Memo to Clients is accordingly somewhat shorter than normal.*]

When it reopened for business after the 16-day government shutdown, about the first thing the FCC did was to announce on its website that all "Commission filing deadlines" that occurred during the shutdown or that would have occurred up to and including October 22 (with a very limited exception) would be suspended until further notice.

Approximately 12 hours later, that further notice was provided in a public notice establishing new filing dates for documents whose deadlines were affected by the shutdown. Pay close attention.

Except as otherwise noted (and please check the exceptions):

- Filings that would have been due October 1–6 became due on ***October 22***.
- Filings that would have been due October 7–16 became due ***16 calendar days after the original filing date***. (Example: A filing that originally would have been due on October 16 will now be due on November 1, 16 days later.) If the new date falls on a weekend or holiday, filings are due on the following business day.
- Regulatory and enforcement filings that would have been due October 17–November 4 are due on ***November 4, 2013***.

The deadlines for responsive pleadings to any of the above are extended by the same number of days.

The public notice does not expressly address the deadline for placing items in television stations' online public inspection files. Such placements are technically not "filings" in the usual sense. However, the online public file system is maintained by the FCC and was thus unavailable to TV licensees on October 10 (the day by which quarterly issues/programs lists, kidvid commercial compliance certifications and website compliance reports were due in public inspection files). Logically, the 16-day across-the-board extension should apply here as well. While the FCC has not yet clarified this as we had hoped it might, any TV station that has not already uploaded its lists and reports would be well-advised to take care of those chores as soon as possible.

Exceptions to the extensions described above include:

The deadlines for Petitions for Reconsideration that came due during the shutdown moved to ***October 22***. (Interesting rationale for this particular exception: The deadline for petitions for reconsideration is statutory, so the FCC is technically powerless to waive the deadline; as a work-around, the FCC simply decided that it would not consider itself open for the filing of documents having statutory deadlines until October 22.)
Special Temporary Authorities expiring October 1–22 are extended until November 4.

The public notice also lists these ten proceedings that are being handled differently. None of these directly affects broadcasters.

Finally, the FCC warned that individual bureaus and offices may further modify these deadlines by public notice. Check with us on www.CommLawBlog.com for updates.

Inside this issue . . .

Let me tell you how it will be . . .

Could this Mad Plan Harm the Mad Man?

Elimination of tax deduction for advertising expenses under discussion

By Frank Montero
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[*Editor's Note: Rob Schill, of FHH's Government Relations group, contributed to this article.*]

For ages, federal policy has encouraged advertisers to advertise by making it cost-effective, tax-wise. But now, some in Congress are reportedly thinking about reversing that longstanding tradition.

The ripple effects of such a reversal on all businesses associated, directly or indirectly, with "advertising" in its broadest terms could be seriously bad news.

Historically, of course, advertising has been treated by the IRS as a deductible business expense. So every dollar spent on advertising could be effectively ignored for tax purposes. The more money spent on advertising, the less would be subject to taxes. Why not spend it on promotion rather than pay it to Uncle Sam?

This has been good news for advertisers and everybody else in the ad biz, including media offering access to audiences, producers, writers, actors, etc., etc.

But it appears that some in Congress have a new approach in mind. According to a "government alert" from the American Advertising Federation (AAF), there are proposals under consideration in both the House and Senate affecting the ability to expense advertising fees, including a proposal to amortize advertising costs. The AAF is urging its members to press their legislators to vote against any measure that would limit a business's ability to deduct the full cost of advertising in the year it is incurred.

The impetus for change now appears to be wrapped up in the ongoing appropriations and debt ceiling issues afflicting Congress (and may extend into a continued tax reform effort thereafter). According to AdWeek, the House Ways and Means Committee, led by its chairman Rep. David Camp (R-Mich.), has discussed the possibility of repealing the deduction available for advertising expenses. Dan Jaffe, top lobbyist for the Association of National Advertisers (ANA), has advised that "[w]e've been told by House staff that they are seriously looking into some limitations on the deduction."

The problem with imposing any such limitations should be obvious. A change in the tax treatment of ad expenses could potentially add hundreds of millions of dollars to marketers' tax bills. That in turn would discourage, rather than encourage, advertising, which could significantly reduce ad budgets. And that would significantly reduce revenue for ad-supported media and the broad universe of industries (*e.g.*, production, copywriting, acting) symbiotically linked to advertising.

A restructuring of the ability to expense advertising fees would affect the media and advertising industries in much the same way that elimination of the mortgage interest deduction would upset the home lending and housing market.

Some representatives of the broadcast industry have recognized the storm clouds looming and have tried to get ahead of the problem. In July, New Jersey Broadcasters Association (NJBA) CEO, Paul Rotella, sent a letter to Sen. Max Baucus (D-MT), chairman of the Senate Finance Committee, Sen. Orrin Hatch (R-UT) and Senator Bob Menendez (D-NJ) about the issue of advertising deductibility.

In his letter, Rotella wrote:

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Do you know whether your website "tracks"? If not, you'd better find out

New California Online Privacy Requirements Have Nationwide Reach

By Paul J. Feldman
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In an effort to bring some "transparency" to the murky practice of data collection on the Internet, California has expanded its Online Privacy Protection Act (CalOPPA) to include two new disclosure requirements.

Before you turn the page and move on to the next article because, what the heck, you don't live in California so this expansion couldn't possibly affect you, think again.

CalOPPA applies to ANY commercial website or online service that collects personally identifiable information (PII) about "individual consumers residing in California who use or visit its commercial Web site or online service". So if your website collects PII (trust us, most websites do), and any visitors to your site happen to live in California (even if they're not physically there when they happen to visit your site), CalOPPA appears to apply to you.

If you've got a website that might be visited by California residents, what do you do?

The new law, which kicks in January 1, 2014, requires affected Internet operators to disclose in their online privacy statements (a) how their online operations "respond" to "Do Not Track" technology and (b) whether other parties may collect PII about visitors to the operator's site. (The specific language is included in new subsections (b)(5)-(7) to Section 22575 of California's Business and Professions Code.)

What is "Do Not Track" technology?

It's a response to the ubiquitous collection of data, for commercial and other purposes, from Internet users. That data collection, occasionally referred to as "tracking" and often achieved through the insertion of "cookies" onto a visitor's computer, makes the collected data available to website operators and other parties who can slice and dice the gathered information and then use it for targeted online commercial purposes. Tracking routinely occurs in the background while users browse away, blissfully unaware that their PII is being recorded, analyzed and incorporated in advertising plans. Often, the first hints the user might get that she's been tracked are the targeted ads that arrive on her screen.

So far, such data collection is completely legal. To provide users with a way to counter tracking, virtually all of the major browser developers have in recent years included "Do No Track" options in their software settings. Those options generally permit a user to instruct her/his browser to send a "do not track" message to all websites visited.

But the websites visited are under no obligation to comply with the user's wish (as expressed through his/her browser settings) not to be tracked. So invoking one's "Do Not Track" options is kind of like pinning a large sign reading "Don't Take My Picture" to one's back while walking through an area bristling with surveillance cameras. It's theoretically possible that somebody on the other end of one or another of those cameras might be willing and able to turn the camera off as you walk by, but it's pretty unlikely.

Some companies have committed to honoring "Do Not Track" requests, but many have not. And while a number of organizations, including the World Wide Web Consortium, have worked to come up with a standardized approach to the issue, those efforts have thus far been fruitless.

"Do Not Track" technology is reminiscent of the "Do Not Call" registry instituted several years ago to prevent unwanted telephone solicitations – both are intended to provide consumers with the opportunity to avoid commercial intrusions. But there are important differences. A telephone solicitor who violates the Do Not Call prohibition is subject to sanctions by the government; an online operator who ignores a "Do Not Track" signal currently is not.

And when a telephone solicitor does violate the Do Not Call prohibition, the consumer knows it because the consumer receives the prohibited solicitation. But a user often has no way of knowing when an online operator does not or cannot respond to a user's "Do Not Track" signal.

That's where California's new law enters the picture.

CalOPPA already required website operators that collect PII about California residents to "conspicuously post" their privacy policies and to comply with those policies. Under the recent expansion, those privacy policies must now also disclose:

- how the Operator "responds to Web browser 'do not track' signals or other mechanisms that provide consumers the ability to exercise choice regarding the collection of personally identifiable information about an individual consumer's online activities over time and across third-party Web sites or online services, if the operator engages in that collection"; and
- "whether other parties may collect [PII] about an individual consumer's online activities over time and across different Web sites when a consumer uses the operator's Web site or service."

So if you've got a website that might be visited by California

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Point . . .

Who Needs the FCC?

By Mitchell Lazarus
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[*Editor's Note: Despite Mitchell Lazarus's use of the editorial "we", the views expressed in this article are his alone. Others here at FHH may share some or all of his views; some may not. Ditto for our readers. We encourage anyone who agrees or disagrees with Mitchell to follow Jon Markman's lead — see the article on the next page — and let us know by sending along a comment.*]

The recent government shutdown was applauded by some who believe that small government is better, and so, by extension, that no government at all must be better still.

That got us to thinking. Not about the whole government, just the piece we know best: the FCC. Suppose the FCC closed for good. Would anybody notice? (Other than us; we'd have to find another line of work.)

In other words: How essential is the FCC to a functioning society?

How essential is the FCC to a functioning society?

A lot of what the FCC does has social value, in the eyes of many. But set that aside. Are any of the FCC's responsibilities not only valuable, but indispensable to how we live?

We wouldn't ask the question unless we had an answer.

We think the operation of our culture and commerce depends on at least three of the FCC's functions. Two of these occur mostly outside the public's view – and perhaps outside the view of those who favor a drastically limited government. All relate to radio communications: not just broadcast, but also two-way radios, cell phones, Wi-Fi, air traffic control, and scores of other applications. Perhaps a modern society can function without radio, but our society could not. And radio cannot effectively function without the FCC exercising these powers:

1. ***Licensing***. If everybody transmits at once, no one can be heard. The FCC's licensing authority, and its back-up enforcement powers, limit who can transmit on what frequency so as keep everyone intelligible. To be sure, some argue that wireless carriers perform a similar function among their own subscribers, without governmental authority. But that is possible only because the FCC's licensing regime keeps third-party interlopers out of the carriers' frequency bands.

2. ***Technical rules***. For licensing to work, each radio transmitter must stay on its own frequency and avoid stray emissions on other people's frequencies. These capabilities make transmitters more expensive. Unchecked market forces favor cheaper transmitters, which cause more interference to others. Similarly, when hobbyists booted up the first "home computers" in the mid-1970s, they brought massive interference to TV reception in their neighborhoods – a matter of little interest to the computer manufacturers because it did not impair sales. The FCC's technical rules for transmitters and digital devices limit all such interference, keeping the spectrum clean enough for reliable communications. The FCC's parallel process for equipment approval prevents manufacturers from cutting corners on these rules in search of a pricing advantage.

3. ***International treaty negotiations***. Radio waves blow right by international boundaries. Since the advent of commercial radio in the 1920s, countries have routinely worked out treaties with each other to avoid causing and receiving interference. Active U.S. participation continues today with FCC guidance and coordination. Only a national government can conduct these negotiations, because only a national government can sign a treaty that binds the myriad of radio users within its borders.

We don't mean to disparage everything else the FCC does – just to highlight a few functions without which much of country grinds to a halt. We hope those who favor limited government will respect these – at least if they hope to continue getting Twitter updates on their phones. Of course, some may have different views as to which FCC activities are essential. Others might argue that the functions above can be implemented by private concerns. Please let us know what you think. By U.S. mail, if necessary.

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It is vital to the health of the U.S. economy that advertising costs be retained in the Internal Revenue Code as an ordinary and necessary business expense that businesses deduct pursuant to section 162 (a).

The deduction for advertising costs promotes tax fairness because it is central to allowing a business to properly calculate its net income and ultimately the amount of tax it must pay, not unlike the deduction for employee salaries, rent, utilities and the other ongoing costs of a business. In contrast to many tax expenditures, advertising is essential to the growth of our economy. For instance, just in the State of New Jersey, advertising accounts for $187 billion of its $966 billion total economic output and drives sales of products and services that help support 554,407 jobs in the state.

Frankly, Rotella could not have said it better, and it would be wise for the advertising, media and marketing industries to follow the leads of the NJBA, the AAF and ANA in reaching out to their legislators and monitoring activities on Capitol Hill. I know we will be.

. . . Counterpoint

Yeah, Who DOES Need the FCC?

By Jon Markman
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In his piece on the opposite page, my colleague Mitchell Lazarus addresses some core functions of the FCC that make it "not only valuable, but indispensable to how we live". With all due respect to Mitchell – who has forgotten more about the FCC, spectrum, and telecom law in the last month than I could hope to learn in a decade – I have a different take.

The government shutdown prompts a conversation on just what are the "essential" tasks of the Federal government (keeping in mind that the Federal government is just one of the many levels of government we have in the U.S.).

In his piece, Mitchell alludes to some of the extreme posturing inspired by the government shutdown, such as claims that the shutdown demonstrated the irrelevance of the Federal government and proved that smaller government is good and no government is even better. I tend to believe that this was mostly rhetoric used by one side to rally their base and/or strengthen their bargaining position in the budget negotiations; I suspect that the speakers in fact support much of what the Federal government does. But insofar as they were representative of honest beliefs, they are indicative of a far more extreme position than the norm.

Most people will admit that some of the FCC's work is unnecessary.

In fact, most small-government advocates (*e.g.*, libertarians) are different from no-government advocates. The two are as different from one another as believers in the regulatory state are different from Communists or dictators who advocate total government control over all aspects of life. Beliefs about government lie along a complex spectrum, not a binary. At least one poll (taken in 2010) indicates that most Americans believe that the existing Federal government is larger than is necessary or ideal, even though they implicitly favor at least *some* government to provide some level of services.

I think that most people, even many who work at the Commission, will admit that some of the FCC's work is unnecessary, either because the regulatory initiatives weren't a good idea in the first place, or because the world has changed and they are no longer necessary. Some of the more egregious examples, like the comparative hearing process, have been eliminated, but others remain. Even a fan of the regulatory state should be able to admit that there are ill-advised, outdated or unnecessary FCC regulations that can and should be jettisoned. But in the spirit of fairness, I'll take the three core functions of the FCC which Mitchell highlights in his piece as my focus here.

Licensing. As Mitchell points out, "if everyone transmits at once, no one can be heard." But the same is true of land: if everyone tries to use the same land, no one can use it at all. That's why we have private ownership of land. We could have set up a complex Federal agency to license land to various entities for a few years at a time, sometimes via billion-dollar auctions and sometimes for just an application fee, sometimes allowing the license to be bought and sold and sometimes not. But we didn't, and now that idea would seem silly. There's no reason why the licensing function of the FCC could not be replaced by a private ownership of spectrum rights, which would be analogous to private ownership of real estate.

How could this work in practice? Congress could, at least in theory, pass a law (shocking, I know) granting actual property rights in – as opposed to mere licenses to use – the spectrum, probably based on the way the spectrum is currently allocated. If you operate a radio station licensed to broadcast at a certain frequency in a certain place, under my theoretical law you would *own the right* to do that, not just a license to do it. If you want to sell that right to whomever you please, be they a foreigner or a felon or someone who already owns 17 radio stations in that city, you wouldn't have to get the FCC's permission; you would, as Nike would say, just do it.

Some might respond that this would be the death of all but the most profitable enterprises, that more and more of the spectrum would be taken for use by mobile broadband operators. Arguably, what people are willing to pay for something is the way they show how important it is to them, so the profitability of a business is a decent proxy for its value to the public. But putting that aside, the real estate analogy still has an answer.

If I buy land in downtown Washington, D.C., I'm not allowed to put a skyscraper or a garbage dump or a cement factory on it just because I own it. Zoning laws and other regulations routinely limit what you can do with your property. Similar limitations could apply to spectrum ownership.

Congress could allocate parts of the spectrum to particular uses (radio, television, radio astronomy, etc.) and allow other parts to be more open, letting the market make decisions within each area and generally in the open bands. Some parts of the spectrum could also be re-

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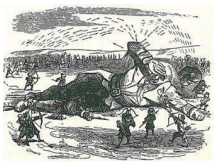

Shutdown follow-up

LPFM Window Extended, LPFM Application Rules Clarified

In further fallout from the October shutdown of the federal government, the Commission has extended the LPFM filing window by 16 days. As a result, the window – which has been open since the FCC reopened its doors again on October 17 – will stay open until ***November 14, 2013 at 6:00 p.m. EST.*** Please revise your calendars accordingly.

Before finalizing and filing any applications, though, you should be sure to take a look at the first order the Commission released when it got back to work post-shutdown. In fairness to the Commission, it had adopted this order – the Sixth Order on Reconsideration (*Sixth LPFM Recon Order*) – on September 30, the day *before* the shutdown. But it wasn't able to get the order out the door before Congress's shenanigans slammed the door shut on October 1, so the order sat in limbo for the 16 days of the shutdown.

The Sixth LPFM Recon Order clarifies a couple of points that everyone should be aware of.

In the *Sixth LPFM Recon Order* the Commission has rejected a number of petitions for reconsideration filed with respect to last December's Sixth Report and Order in the long-running LPFM rulemaking. The *Sixth LPFM Recon Order* largely leaves things the way they were: eligibility and attribution rules remain unchanged; LP10 stations are still a no-go (ditto for LP50 stations, which had been proposed by one petitioner); and, once one LPFM application from an MX grouping has been granted, the Commission will ***not*** take the time and trouble to sift through the losers to see if any of them could be granted, too.

The *Sixth LPFM Recon Order* does clarify a couple of points that LPFM applicants and others should be aware of. In particular, the Commission specifies that post-window LPFM amendments that reduce the applicant's comparative or basic eligibility will be held *against* the applicant. (Conversely, long-established policy provides that an LPFM applicant will ***not*** be permitted to improve its comparative position through post-window amendments.)

The Commission makes a couple of relatively small changes to the rules mandating protection that LPFM applicants must accord to the input channels of translators and boosters. While LPFMers have always been expected to protect input signals even if those signals were coming from some other translator (as opposed to a full-power) station, the text of the relevant rule as originally adopted seemed to accord that protection only to input signals from full-service stations. No more: the rule has been tweaked so that it clearly applies to both full-service *and* translator inputs.

The *Sixth LPFM Recon Order* also helps LPFM applicants somewhat with respect to their obligations relative to protection of off-air input signals on third adjacent channels to the proposed LPFM station. Originally, the applicable rule barred any actual interference to such input signals "at all locations". But, at the urging of an LPFM-oriented petitioner, the Commission has concluded that that original approach was too broad. Rather, the "only technically relevant" point at which predicted interference should be measured is the location of the translator's receive antenna.

And as to which input signals are entitled to protection, the Commission has now made clear that the magic date of June 17, 2013 applies. That, of course, is the date that marked the public notice of the LPFM window opportunity. Our readers will recall that, when it issued that notice, the Media Bureau made clear that LPFM applicants would have to protect translator proposals that had been filed *prior to* June 17, but ***not*** proposals filed on or after June 17. With the *Sixth LPFM Recon Order*, the Commission has now clarified that LPFM applications must protect translator input signals that were either (a) in use prior to June 17 or (b) proposed in an application filed with the Commission prior to that date.

The *Sixth LPFM Recon Order* addresses a number of other details of varying specificity and applicability. Would-be LPFM applicants would be well-advised to take a careful look at the entire order before finalizing their applications. Fortunately for them, they've now got an extra 16 days in which take care of that chore.

(Continued from page 3)

residents, what do you do?

First, it's important to remember that the new law does ***not*** require you to respond to Do Not Track messages; it requires only that you *disclose* how you do or don't respond. So you can ignore Do Not Track messages and collect PII despite them, but if you do that you will need to say so in your privacy policy. Of course, that may not go over well with your site's visitors, whom you would presumably prefer not to alienate. But that's a problem between you and your visitors, not you and the State of California.

If you do respond to Do Not Track messages, you'll need to disclose how you respond. The new provisions of CalOPPA don't specify exactly how detailed your disclosure must be, but presumably it should accurately reflect your response.

If you don't know how your website is set up to deal with Do Not Track messages, now would be a good time to investigate that question. In order to be sure that you're in compliance with a wide variety of Internet-related requirements, you should in any event be familiar with the intricacies of your site. That includes not only your own business's data collection and processing practices, but also those of any third parties to whom you have given access to your site.

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Tips from the top

LPFM Update: Finding Translator Input Info in the CDBS Database

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As reported in the article on the preceding page, as soon as it cranked back up after the government shutdown, the FCC issued an order that, among other things, provided LPFM applicants additional guidance with respect to their obligation to protect FM translators' off-air input signals on third adjacent channels. To provide for such protection, of course, the LPFM applicant must first know what off-air input signals it's supposed to be protecting. And now, as a follow-up to the Commission's order, the Media Bureau has released a notice providing some tips on tracking down that information.

The good news here is that data on FM translator input signals are available. The bad news is that, to get to those data, you'll have to wade into the deep waters of the CDBS database and then grope around a bit. This is not for the faint of heart. (The Bureau "encourages" applicants to review the "readme" file before trying to download any data – a sure sign that accessing and understanding the data may not be as easy as one might think.)

The FCC's databases are less than complete and reliable.

According to the notice, FM translator input information can be found in either of two data tables (the "facility" table and the "int_translator" table). But the data fields to look for differ from one table to the other and the data entries may not be intuitively obvious to some folks.

For example, if you're trying to determine the "delivery method" of an input signal, you go to the "delivery_method" field in the "int_translator" table. That makes sense, but when you get there you find either a "D" or a "V", values that aren't especially helpful unless you've read the notice's footnote tipping you off to the less-than-obvious fact that "'D' denotes off-air signal delivery, 'V' denotes off-air signal delivery from ('via') another translator".

Oh, and did we mention that the data in one table may be inconsistent with data in the other? Acknowledging that, the Bureau advises that applicants should rely on the "assoc_facility_id" data in the "facility" table to identify the station being rebroadcast by the translator. But sometimes that "assoc_facility_id" field is empty. When that happens, applicants should use the "int_translator" table.

And despite traditional cautions against making assumptions, the Bureau instructs that:

> [i]n instances where the "assoc_facility_id" specifies the facility ID number of an authorized translator, LPFM applicants should assume that the translator is rebroadcasting the signal of the referenced authorized translator, directly off-air, and thus entitled to Section 73.827 protections. Furthermore, in instances where there is no information available about the delivery method, applicants should assume that the input signal is received directly off-air.

FM translator licensees should be comforted – and LPFM applicants concerned – by the Bureau's further admonition that specific determinations concerning any particular translator's input signal and/or delivery method may be made if the translator licensee can "document proper and timely notification". In other words, it's possible that some data that were submitted to the Commission never made it into the database at all.

All of this is a good faith effort on the Bureau's part to deal with the grim and ugly truth that the information about translator input signals stored in the FCC's databases is less than complete and reliable. That's partly because some translators were authorized before the Commission even started collecting and recording these data. It's also partly because, since collection/recordation began, input station and delivery method data have been submitted in several different forms. It's probably also at least in part attributable to the fact that, historically, such data have not been of particularly great importance in the overall scheme of FCC regulation.

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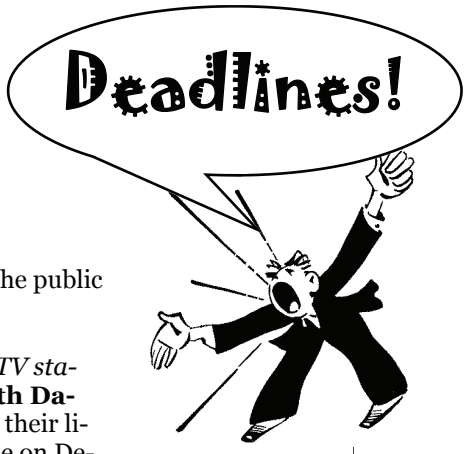
The new CalOPPA rules permit you to satisfy the disclosure requirement by providing a hyperlink "to an online location containing a description ... of any program or protocol the operator follows that offers the consumer [choices on tracking]." Also, for enforcement purposes, operators should be aware that, before they can be penalized for failing to make the necessary disclosures, they will be notified of the problem and given 30 days to remedy it.

Of course, another solution is simply not to collect PII. Remember – CalOPPA applies only to operators who collect PII. If you're not collecting, you have no obligations under the statute. However, that may not be consistent with your business purposes, or with the efficient operation of your website because under CalOPPA, "persistent identifiers" necessary for the smooth interaction of consumers with web applications may fall under the definition of PII. (Theoretically, you could avoid liability under CalOPPA by somehow screening out California residents from access to your site – but even if you were inclined to try such an approach, it's not clear how effective it would be.)

The new CalOPPA requirements provide an excellent impetus to all website operators to review their PII practices and update their privacy policies as may be necessary. And while you're at it, why not also undertake a broader review of data collection operations and privacy policies as well?



December 1, 2013

Radio Post-Filing Announcements – *Radio* stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1, and February 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements – *Television, Class A television* and *LPTV stations originating programming* located in **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1, and February 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Radio License Renewal Pre-Filing Announcements – *Radio* stations located in **New Jersey** and **New York** must begin their pre-filing announcements with regard to their applications for renewal of licenses on December 1. These announcements then must be continued on December 16, January 1, and January 16.

Television License Renewal Pre-filing Announcements – *Television* and *Class A television* stations located in **Kansas**, **Nebraska** and **Oklahoma** must begin their pre-filing announcements with regard to their applications for renewal of license on December 1. These announcements then must be continued on December 16, January 1, and January 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

December 2, 2013

Biennial Ownership Reports – All *licensees* and *entities holding an attributable interest in a licensee of one or more AM, FM, TV, Class A television, and LPTV* stations must file a biennial ownership report on the FCC Form 323. Please recall that sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports, as well as other licensee entities. All reports must be filed electronically. The Ownership Report must reflect the respondent's attributable interest holders as of October 1, 2013.

DTV Ancillary Services Statements – All *DTV licensees* and *permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. *Please note that the group required to file includes Class A TV, LPTV, and TV translator stations that are offering digital broadcasts*. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

Radio License Renewal Applications – *Radio* stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications – *Television* stations (including *Class A*, *LPTV* and *TV translator* stations) located in **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located

(Continued on page 9)

(Continued from page 8)

in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota** and **Vermont** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports – All *noncommercial radio* stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

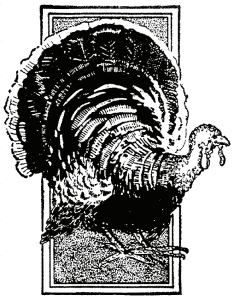
January 10, 2014

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the third quarter reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

Commercial Compliance Certifications – For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be uploaded to the public inspection file.

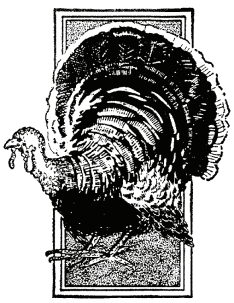
Website Compliance Information – *Television* and *Class A television* station licensees must upload and retain in their online public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists – For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.



Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 28-29 (Thanksgiving weekend),
December 25 and January 1.
We will be open on Monday, November 11
(the federal holiday in honor of Veterans' Day).



(Continued from page 5)

served for general, unlicensed public use, such as for Bluetooth, Wi-Fi, or public safety transmissions, much like a park or other public space is available for such use. If, in the future, Congress decided to reallocate some of the reserved spectrum (remembering that the open spectrum will do this via the market) for a different use (as it is now doing with the complex incentive auction), it could simply do what a zoning board does: change the rules for future construction, but grandfather in existing uses. That allows for the new use, lets the change occur gradually and with less disruption, and allows the current occupants to be the ones who profit from the change. Allowing the market to allocate the spectrum to its most profitable uses might mean a lot more mobile broadband and Top 40 music today, but tomorrow, it might mean something else entirely.

Technical Rules. Mitchell is of course correct when he notes that interference is a serious problem – but so are trespassing, theft, and other violations of property rights. If we treated spectrum the same way we treat land, we would not be abandoning industries and users to the Wild West. Spectrum owners would still have access to courts to protect and enforce their rights. The judicial system may, at the moment, be overloaded and not equipped with the technical expertise to handle these types of cases *en masse*. But there are specialized courts which handle bankruptcy, immigration, military, patents and other technical and complex issues – surely there could be one to adjudicate radio interference issues (particularly if Congress would fully fund the Courts).

Many if not all of the current functions of the FCC could be performed by private actors and existing government institutions.

While trespass of land or chattel is certainly easier to visualize and understand than radio interference, existing laws could still be tweaked to deal with the latter. In the radio context, interfering transmitters could be identified with relative ease and their owners or operators served with cease-and-desist letters. In the case of interfering devices, Congress or the courts could create a civil action against manufacturers of interfering devices (if existing tort remedies did not already afford adequate relief). There would likely be situations where interference would be hard to trace, but in those cases, the FCC would be no better equipped to stop the interference than private bodies or the courts.

Preapproval of devices and the technical standards which the FCC promulgates are a tougher question. Mitchell – based on considerable experience – points out that manufacturers may cut corners and cause interference without some regulator looking over their shoulder. But there are very few areas of life where the government is the one who tells manufacturers how to make their products work with one another or has to approve products before they go on the market, even if there is potential harm if they're not made well. Children's toys, bikes, most food products, even cars are subject only to statutory or regulatory requirements and post hoc rule enforcement to keep us safe. Private organizations, rather than the government, impose their own regulatory-like order.

For example, ICANN coordinates the Internet's domain name system. The Institute of Electrical and Electronics Engineers is responsible for setting Wi-Fi standards. Bluetooth SIG sets standards for Bluetooth technology. Other standards-setting bodies establish rules and standards, and manufacturers voluntarily comply so that their products will be compatible with what the user already owns, and therefore easier to use. Sometimes this leads to bad outcomes, but generally it allows for lower costs and much greater innovation, flexibility, and choice in the market.

International Treaty Negotiations. Even a libertarian will tell you that one of the core functions of the government is to deal with foreign countries. We expect our government – not private companies or individuals – to handle outsiders, whether militarily or diplomatically. The State Department generally does a pretty good job of that on its own when it comes to lots of tricky, complex, technical treaties. Resolution of the particular issues involved with radio treaties might require the formation of a group within the State Department (to include engineers, communications lawyers, and economists); but it does not require an entire agency of the power and size of the FCC.

Reliance on State Department representatives, rather than the FCC, to deal with international negotiations would still be a use of government power, rather than a true delegation to the private sector. It might thus be viewed as merely a re-branding, a substitution of one government regulator for another. But by narrowly circumscribing the authority of a department within an agency (like the State Department) through clearly limited delegation of power, we could ideally prevent the gradual accretion of power that can occur in a stand-alone independent agency.

I believe that many if not all of the current functions of the FCC could be performed by private actors and existing government institutions. Are there good things that the FCC does? Of course. Are there excellent, hard-working people there? Absolutely. But questioning whether a government agency's role is essential need not be a criticism of the agency, its employees, or its con-

Tomorrow's Broadcast Leaders, Trained by Today's

If you've ever wondered where tomorrow's broadcast leaders will be coming from, look no further than the Broadcast Leadership Training program (BLT). Created by the National Association of Broadcasters Education Foundation (NABEF), the BLT is a 10-month Executive MBA-style program that exposes talented senior level broadcast execs to the fundamentals of successful radio and TV operation. (Check out the BLT website for information on how to apply for next year's program.)

And who teaches BLT participants? A wide range of professionals and academics who know what they're talking about – including (and here we're quoting the BLT website) "leading communications attorneys". So it should not surprise you that the October 19 session on "Choosing and Working with Your Legal Advisors" was led by none other than FHH mavens (and *Memo to Clients* contributors) Frank Montero and Dan Kirkpatrick. Frank and Dan took their tutees through practical questions they're likely to confront: the types of lawyers that a broadcaster would need; how to select various lawyers; billing issues; how to use your lawyer; and related topics.

This year's class includes: Jeff Anderson; Pamela Barber; David Benton; Derrick Chresfield; Twanda Dula; James Finch; Robert Koplar; Mario Mendoza; Veronica Moroian; Elizabeth Russell Neuhoff; Efren Padilla; Oscar Rodriguez; Andy Ruback; John Treviño; Ty Shea; Benjamin Van Ness; Chris Weimer; and Michelle Wright. They're shown in the photo below, along with Michelle Duke (of the NAB) and Trila Bumstead (current dean of the BLT program) and Frank and Dan. How can you tell that they're leaders on the rise? They're all sporting their CommLawBlog shades. (Don't you wish you had your pair?)

FHH - On the Job, On the Go

On November 1, **Frank Jazzo** will be attending the fall meeting of the Rockefeller College Advisory Board in Albany, N.Y., at the Rockefeller College of Public Affairs & Policy at the University at Albany, State University of New York.

Mitchell Lazarus will speak at a conference on "Radio Spectrum Pollution: Facing the Challenge of a Threatened Resource" in Boulder, Colorado on November 14. The sponsor is Silicon Flatirons Center at the University of Colorado.

If you're interested in the FCC's recent relaxation of its foreign ownership rules – and the impact that that relaxation might have on commerce nationally and globally — **Don Evans** and **Frank Montero** shared their expertise on that particular topic in a webinar titled "What the FCC's Relaxed Foreign Ownership Regulations Mean for Global Commerce"on October 23. The webinar was sponsored by Bloomberg BNA. (As noted elsewhere on this page, on October 19 **Frank M** – along with **Dan Kirkpatrick** – taught a day-long session at the National Association of Broadcasters Education Fund's Broadcast Leadership Training program.)

And if you're planning to be in the vicinity of greater Callao, Virginia sometime between November 9-24, don't forget to get your tickets to *A Shot in the Dark*, a presentation of the Westmoreland Players, a local community theater still going strong after more than 30 years. Slated to tread the boards in the role of Benjamin Beaurevers is FHH's own **Alan Campbell**. **Alan** is a veteran thespian with the Players — this is his 18th performance with the troupe. The character of Beaurevers, of course, netted Walter Matthau a Tony in 1962. No pressure here, right? Yo, **Alan** – break a leg!

On the Lighter Side . . .

TERMS AND CONDITIONS

Please review the following terms and conditions carefully before your use of the Service. These constitute a legally enforceable Agreement between you and the Company which will govern our mutual rights and responsibilities.

1. ***Your Privacy***. Your privacy rights are important to us. While we cannot guarantee that the Private Information we become aware of in connection with the Service will not be hacked by Unauthorized Third Parties, we commit that we will not intentionally supply your Private Information to anyone other than (i) persons who duly pay us for the information, (ii) Governmental Authorities or persons purporting to be Governmental Authorities, (iii) our friends, and (iv) lawyers. We may make use of your Private Information for marketing purposes, to develop new products, to locate your assets in the event we ever have to sue you, to examine your tax returns, or for any other purpose.

2. ***Intellectual Property***. The content you supply us in connection with the Service is called "Intellectual Property." Once you enter it into our database, you abandon all rights to the IP and irrevocably assign all of your right and title in the IP to us. We may re-publish it, revise it, punch it up, substitute other people in your photographs, or simply sell the IP as our own. Thank you. To the extent there is any liability for defamation resulting from your IP, you will remain the "author" of the IP and agree to indemnify for us for any damages we suffer from your carelessness or intentional misconduct.

3. ***Free Use***. As advertised, your initial use of the Service is provided free of charge. We do reserve the right, however, to change this policy in the future at any time without notice or warning to you. In that event, you authorize us to make small monthly withdrawals from your checking and savings accounts which will appear on your bank statements as "service charges" that you will probably never notice or question. We may make such withdrawals in perpetuity.

4. ***Your Rights in the Event of a Dispute Regarding this Agreement***. The purpose of this Agreement is to ensure that you have no rights under this Agreement, but should you choose to assert rights, you will be responsible for paying all of our legal fees, regardless of whether we are found to be in the wrong.

5. ***Limitation on Damages***. In no case shall you be entitled to any damages greater than 25 cents, which, together with an additional two dollars, may get you a cup of coffee. On the other hand, in the event that you are found liable, we may elect to be compensated by either (i) money damages, including punitive, special, consequential, direct and indirect damages, or (ii) your first born child.

6. ***Waiver of Rights***. To the full extent permitted by law, you hereby waive all rights you can possibly waive, including, without limitation, the right to a trial by jury, the right to habeas corpus, the right to remain silent, and the right to life, liberty and the pursuit of happiness.

7. ***Governing Law***. The law governing this Agreement shall be the law of the Island Commonwealth of Togo, which happens to be an investor in the Company.

8. ***Acceptance***. By clicking "I accept" below, you are certifying that you have carefully read this Agreement in its entirety, that you have gone over it in detail with your personal attorney, that you fully understand its consequences, and that you think it is perfectly fair. You will not later claim to have just clicked on the "I accept" button without actually having read this, and if you do so claim, you agree that in addition to other remedies available to us, we or our agents may inflict physical punishment upon you, up to and including the fracture of limbs.

[__] I accept!

Terms and Conditions

In light of on-going developments in the law of privacy and users' rights, the current *Memo to Clients* curmudgeon-in-residence, Don Evans, has prepared the above sample list of Terms and Conditions. These should be suitable for most, if not all, business arrangements in which one side (ideally, you) is holding all the cards. The reproduction above is, for the limited purpose of making them legible to you this one time only, magnified approximately ten times beyond the recommended type size. Once you have read them, they should never be presented to any third party in a type size of more than one point. Of course, if you do use them, you will owe Don royalty payments in perpetuity, as provided in the above Terms and Conditions.