Womble Carlyle Sandridge & Rice
A Professional Limited Liability Company

FCC Consent Decrees: Payola Guidance

April 16, 2007

To: **Broadcast Clients**
From: **Peter Gutmann**

The Federal Communications Commission has released the details of consent decrees with four major broadcast groups. In exchange for terminating the FCC's investigation of payola allegations, CBS Radio, Citadel Broadcasting, Clear Channel and Entercom are to make "voluntary contributions" to the US Treasury of between $2 million and $4 million and agreed to adhere to a set of Business Reforms for the next three years.

Aside from the amounts of the contributions, the terms of the consent decrees and the associated Business Reforms are the same and may be considered as providing guidance to the industry as to the Commission's current view of acceptable promotional practices by record labels and radio stations.

The Business Reforms begin by restating the traditional payola ban on soliciting, receiving or accepting cash or other items of value from a record label or its representatives in exchange for providing or increasing airplay of music from the record label or any of its artists. The Commission now has further provided that no item of value may be accepted from an independent music promoter unless the promoter certifies in writing that it has not been compensated by the record label based upon airplay.

This general prohibition is subject to a major exception for permitted activity surrounding contests, promotions or giveaways. According to the consent orders, stations and their employees may solicit, receive and accept items of value to give away on the air, at station events or promotions, or for the benefit of charities. Such materials may include promotional items, gift cards, CDs, gift certificates, concert tickets, airfare, hotel rooms, vouchers and cash. However, they cannot be given to company employees or members of their immediate families or households. Moreover, if used in a contest, the rules and on-air announcements for the contest must clearly indicate the value of the prizes and identify the record label as the provider.

The Commission further clarified that stations and their employees may accept payment (whether cash or other items of value) from record labels for on-air advertising, provided that proper sponsorship identification announcements are made. In addition artists may appear at events or interviews for which their record label has subsidized "reasonable" costs, so long as on-air announcements identify the record label as a sponsor. Beyond the restrictions that apply to all on-air advertising and promotion, stations and labels may enter into commercial transactions by which a station agrees to license, sell, distribute or promote a label's artists, songs or records.

The Commission has also defined several categories of “nominal consideration” which stations and their employees may solicit, receive and accept from record labels for use by the station without running afoul of the payola policies. These include:

- Electronic copies of songs and up to 20 copies of a CD for the purpose of familiarizing station employees with the recordings.
- Electronic copies of recordings for posting on station websites to familiarize visitors with the recordings.
- Promotional items such as t-shirts, key chains, coffee mugs, baseball hats, posters, pens and bumper stickers, intended for the personal use of station employees and having an individual value of $25 or less.
- Up to 20 concert tickets (including associated backstage or “VIP”-type passes) to be used by station employees (plus additional tickets for employees who are working at the concert).
- Gifts of up to $150 to commemorate an employee’s life events, professional achievements and holidays (such as for a birthday, wedding, birth of a child, job promotion or winning a music industry award).
- Meals and entertainment having a value of up to $150 per person (including an accompanying spouse or significant other) for an event attended by a record label employee and having a legitimate business purpose. Meals and entertainment exceeding $150 per person may be accepted if approved in writing by a station’s compliance officer consistent with the terms of a company-wide compliance plan that the consent decrees require each company to adopt.
- Reasonable travel and lodging expenses to attend live performances and appearances by record label artists for the purpose of familiarizing station employees with the artists, subject to a limit of 20 such trips annually to be allocated among all company employees.

The Commission notes that there may be a natural increase in airplay of an artist’s music during the period surrounding the artist’s appearance at an event, contest or giveaway promoting the artist. However, if the increase in airplay results from an agreement or understanding with the record label or the artist, then the increased airplay is considered to have been sponsored by the label or artist and must be identified as such.

The Commission has also imposed documentation requirements – a database record of: each item of value received from a record label; the disposition and identification of contest winners of prizes valued at more than $25; the addresses of recipients of prizes that exceed the monetary reporting threshold of the Internal Revenue Service (currently $600); and written agreements for all advertising by record labels.

Finally, the Commission required each of the four settling companies to engage in training to familiarize personnel with the requirements of the Business Reforms, to appoint a compliance officer, to designate a compliance contact in each market, to establish a hotline for employees to obtain advice on compliance and report violations, and to insert into all personnel contracts a clause relating to compliance with the sponsorship identification laws.

Enforcement of potential violations of these requirements is to be strict: upon issuance of a future Notice of Apparent Liability to any of the four companies alleging violation of the Commission's sponsorship identification laws, any accused employee is to be suspended, immediately investigated and required to undergo remedial training. If a violation is found, the employee is to be subject to further disciplinary action, including termination.

While the Commission's new guidelines only apply directly to the four settling parties, they comprise the Commission's most current thoughts about payola. Consequently, while not necessarily a safe harbor, they would seem to provide reasonable standards for stations' vigilance in this often gray area of policy.

If there is a common theme to the Commission's consent decrees and their associated Business Reforms, it seems to be that the closest scrutiny will be directed toward consideration having an on-air component, whether music exposure, publicity or contest prizes. The Commission seems to be taking a more indulgent view toward consideration that merely has the potential to influence broadcast content, such as promotional items for employee use, personal gifts, and attendance at concerts and artist appearances. The key, which has remained relatively constant over the last four decades, is disclosure of situations which an outsider might construe as conferring an unfair advantage to the provider in crafting a station's on-air product.

The Communications Lawyers at
Womble Carlyle Sandridge & Rice, PLLC

Peter Gutmann, (202) 857-4532, pgutmann@wcsr.com

Howard J. Barr, (202) 857-4506, hbarr@wcsr.com
Ross Buntrock, (202) 857-4479, rbuntrock@wcsr.com
John F. Garziglia, (202) 857-4455, jgarziglia@wcsr.com
Michael B. Hazzard, (202) 857-4540, mhazzard@wcsr.com
Mark Palchick, (202) 857-4411, mpalchick@wcsr.com
Michael H. Shacter, (202) 857-4494, mshacter@wcsr.com
Gregg P. Skall, (202) 857-4441, gskall@wcsr.com