

FCC Issues Sweeping Enforcement Advisory Cautioning Against Improper Use of Emergency Alert Tones and Settles Related Investigations with Television, Cable, and Radio Outlets

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The FCC made clear last week that protecting the integrity of the Emergency Alert System (EAS) and Wireless Emergency Alerts (WEA) remains a high priority, and that the agency will diligently prosecute what it considers to be misuse of the EAS codes and the EAS and WEA Attention Signals. Through an FCC Enforcement Advisory and a series of Consent Decrees in which violators agreed to pay a total of over \$600,000 (see related News Release), the FCC warned broadcasters, cable operators, satellite providers, and others that create or produce programming for transmission that they should not use the EAS codes and the EAS and WEA Attention Signals (*or simulations thereof*) under any circumstances other than a genuine alert, an authorized test of the EAS, or a permissible Public Service Announcement (PSA).

Background.

Section 11.45(a) of the Commission's rules states that "[n]o person may transmit or cause to transmit the EAS codes or Attention Signal, or a recording or simulation thereof, in any circumstance other than in an actual National, State or Local Area emergency or authorized test of the EAS;" or for FEMA-approved EAS PSAs and authorized live code tests.

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Section 10.520(d) of the Commission's rules prohibits any person from transmitting the WEA common audio attention signal, or a recording or simulation thereof, in any circumstance other than in an actual National, State, or Local Area emergency or authorized test, except "as designed and used for [PSAs] by federal, state, local, tribal and territorial entities, and non-governmental organizations in coordination with those entities, to raise public awareness about emergency alerting, provided that the entity presents the PSA in a non-misleading manner, including by explicitly stating that the emergency alerting attention signal is being used in the context of a PSA for the purpose of educating the viewing or listening public about emergency alerting."

The Enforcement Advisory.

In a bold headline, the FCC's Enforcement Advisory states that "**FALSE, FRAUDULENT, OR UNAUTHORIZED USE OF THE EMERGENCY ALERT SYSTEM OR WIRELESS EMERGENCY ALERT CODES OR ATTENTION SIGNALS IS STRICTLY PROHIBITED.**" In both the Advisory and the simultaneously released Consent Decrees, the FCC states that it has "repeatedly warned that the use of simulated or actual EAS Tones for non-authorized purposes – such as commercial or entertainment purposes – can lead to dangerous 'alert fatigue' whereby the public becomes desensitized to the alerts, questioning whether the alerts are for a real, imminent threat, or some other cause." The Advisory also cautions that because the EAS Tones include operative data elements, their use can result in false activations of the EAS, the spread of false information, and block legitimate EAS activations, thus creating a threat to public safety.

The Advisory reviews the rules cited above and explains that they apply to entities that distribute programming containing a prohibited signal intended for subsequent or simultaneous transmission to the public – regardless of whether that entity itself distributes the unlawful signal directly to consumers. The FCC advises that the rules also applies to a person who transmits an unlawful signal, even if that person did not create or produce the prohibited signal in the first instance. Therefore, the prohibition applies to a broadcaster, cable operator or satellite carrier that transmits programming containing a prohibited signal, even if the programmer that embedded the sound is not under common ownership or control with the respective broadcaster, operator, or carrier.

The Advisory points out that false or fraudulent use of the EAS code or EAS and WEA Attention Signals (or simulations thereof) also may violate section 325(a) of the Communications Act, which prohibits transmission of false distress signals. Moreover, the FCC says, for broadcast licensees, false or fraudulent EAS signals may violate the Commission's prohibition against broadcast hoaxes.

The Advisory further notes that if an EAS participant has "actual knowledge" that it has transmitted or otherwise sent a false alert to the public, section 11.45(b) of the FCC's rules require the participant to email the Commission, informing it of the event and of relevant details. By contrast, a participant that lacks actual knowledge that it has issued a false alert is not required to take any action.

The Advisory warns that failure to comply with the rules may subject a violator to sanctions including, but not limited to, substantial monetary forfeitures. The Enforcement Bureau states that it may treat *each* unauthorized transmission as a separate violation for purposes of calculating a proposed forfeiture.

The Consent Decrees.

Along with the Enforcement Advisory, the FCC announced that it had entered into four separate consent decrees – together requiring a total of over \$600,000 in settlement payments – to resolve investigations into allegedly unlawful airing of alert tones or signals. In addition to a civil penalty, each consent decree requires the implementation of a three-year compliance plan including designation of a compliance officer, development of operating procedures and a compliance manual, compliance training, reporting of non-compliance, and periodic compliance reports.

- The settlement agreement with ABC, Inc. resolves the FCC’s investigation into the October 8, 2018 broadcast of the *Jimmy Kimmel Live!* late-night show, which used a simulated WEA tone three times during a sketch about the then-recent nationwide Presidential WEA test. ABC cited a “misunderstanding that the use of the tone was permissible.” The episode was distributed to ABC affiliates throughout the country three times (Eastern and Central, Mountain, and Pacific time zones) and over ABC’s eight owned and operated stations. The Consent Decree requires the payment of a \$395,000 civil penalty.
- The settlement with AMC, Inc. resolves the FCC’s investigation into a February 2019 episode of the *Walking Dead* program, which “inadvertently” used EAS tones in two different scenes during a “simulated emergency.” The Consent Decree requires the payment of a \$104,000 civil penalty.
- The settlement with Discovery, Inc. resolves the FCC’s investigation into an episode of the Animal Planet network’s program *Lone Star Law* that was transmitted to cable and satellite systems between January and March 2018. The edited and pre-recorded segment included an actual WEA signal captured in real time while Texas Game Wardens were being filmed by cameras during a response to Hurricane Harvey. The Consent Decree requires the payment of a \$68,000 civil penalty.
- The settlement with Meruelo Radio Holdings, LLC resolves the FCC’s investigation into a promo bed for a radio morning show in which sound effects, including EAS Tones, were overlaid with voiceovers, music, on-air chatter, and other effects. The promo was broadcast a total of 139 times on two stations, and the Consent Decree requires the payment of a \$67,000 civil penalty.

Notably, the penalties agreed to in the consent decrees vary widely and are in all cases substantial. Moreover, it is significant that in two of the four cases the investigations leading to the consent decrees appear to have been initiated without the filing of a complaint with the FCC.

Recommendations.

These actions follow a series of others that go back to at least 2013, when the FCC first stepped up its efforts to enforce its EAS-related rules by issuing a series of fines and consent decrees (which we wrote about here, here, and here) and an earlier Enforcement Advisory.

Last week’s Advisory and Consent Decrees make clear that the FCC will aggressively enforce its rules, with the underlying aim of preventing “dangerous alert fatigue.” Therefore, **we recommend that companies construe “simulation” of the EAS codes or Attention Signals broadly.** The FCC’s statements suggest that the

Enforcement Bureau will take action against commercial or entertainment uses of the EAS and WEA Attention Signals even where the context would suggest there is not an actual emergency – for example, abbreviations or distortions of the tones as attention-grabbers, where the tones underlie voiceovers and other sounds, where actual tones captured live are left in an edited, pre-recorded program, or where they may be chosen for authenticity in a dramatic depiction of an emergency situation.

By contrast, the FCC has stated that “general alarms or other loud noises, including bells; klaxons; and police, fire, or civil defense sirens, are not considered “simulations” of the EAS codes or Attention Signals, and therefore are not prohibited.”

Particularly in light of the FCC’s renewed focus on enforcing the prohibitions on misuse of the EAS codes and the EAS and WEA Attention Signals, ***we recommend that all companies involved in the creation or transmission of content for broadcast, cablecast, or transmission via satellite to viewers or listeners should implement training programs and other processes to ensure that they are not involved in the transmission of EAS tones, or any sounds that can be construed as a simulation thereof, outside of an actual emergency or other permissible use.***

Should you have questions, or desire assistance in developing compliance materials, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed on this client alert.