



FEDERAL COMMUNICATIONS COMMISSION

**Enforcement Bureau**

April 2020

# **Enforcement Overview**

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## INTRODUCTION AND DISCLAIMER

This *FCC Enforcement Overview (Overview)* is intended to help stakeholders better understand and comply with the rules governing the Federal Communications Commission’s enforcement process. Unless otherwise specified in this *Overview*, the term “FCC” may refer to the full Commission or to the Enforcement Bureau acting on delegated authority.

The *Overview* is for informational purposes only. It does not amend, replace, or supersede any statute, proceeding, or rule adopted by the FCC. It does not bind the FCC and does not create any rights, benefits, expectations, or defenses—substantive or procedural—that are enforceable by any party in any manner. Although we have attempted to cover many parts of the rules that might be important to stakeholders, the coverage is not exhaustive. Furthermore, the FCC retains the discretion to adopt approaches on a case-by-case basis, where appropriate, that may differ from the discussion in this *Overview*.

The FCC may revise this *Overview*, without public notice, to reflect changes in the FCC’s approach to implementing a rule, or it may clarify or update the text of the *Overview*. Comments, recommendations, or calls for further assistance may generally be directed to the FCC’s Consumer Center or to the government affairs staff with the Consumer & Governmental Affairs Bureau (CGB).

1-888-CALL-FCC (1-888-225-5322)

TTY: 1-888-TELL-FCC (1-888-835-5322)

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Please send any questions or suggestions regarding this Overview to [EnforcementOverview@fcc.gov](mailto:EnforcementOverview@fcc.gov).

## **I. OVERVIEW OF THE ENFORCEMENT BUREAU'S STRUCTURE**

### **A. General Information about the Enforcement Bureau**

#### **1. Mission of the Bureau**

The Enforcement Bureau (EB or Bureau) has primary responsibility for the FCC's enforcement of the Communications Act of 1934, as amended (Act),<sup>1</sup> other statutes, and the FCC's rules, orders, and terms and conditions of licenses and other authorizations.

EB has authority to investigate complaints and resolve potential violations of the Act and the FCC's rules, regulations, and orders. It also has the authority to conduct investigations by, for example, issuing Letters of Inquiry (LOIs) and subpoenas (with the approval of the Office of General Counsel), conduct audits, inspect licensee and/or operator facilities, and collect information.<sup>2</sup> EB is also responsible for serving as trial counsel in formal hearings, mediating and settling disputes, and coordinating with other federal, state, and local government agencies on enforcement matters.<sup>3</sup>

The FCC is committed to the strong enforcement of the laws and FCC's regulations. With limited staff and funds, we strive to use our resources effectively and regularly reassess our priorities based on emerging enforcement issues.

#### **2. Points of Contact**

EB encourages stakeholders to contact the Bureau with inquiries about EB's process and to report any abuses of that process.

For additional information, please call 1-888-225-5322 or go to [www.fcc.gov/enforcement](http://www.fcc.gov/enforcement).

### **B. Bureau Structure and Responsibilities**

Provided below is a short summary of EB's organizational structure and the subject matter handled by each EB division. Further details, including the names of current EB managers, are available in the Bureau's section of the FCC website: <https://www.fcc.gov/enforcement>.

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<sup>1</sup> 47 U.S.C. § 151 *et seq.* The Act is organized by "Title," which refers to subdivisions within the statute that are dedicated to particular types of services. For example, Title II of the Act governs common carriage services. FCC personnel frequently refer to titles by number as a shorthand reference to the legal subject matter at issue.

<sup>2</sup> 47 CFR § 0.111 (a)(17), (h).

<sup>3</sup> 47 CFR § 0.111 (a)(20), (24).

## **1. Office of the Bureau Chief**

The Office of the Bureau Chief (OBC) supervises the work of the Enforcement Bureau's Divisions and Offices. The OBC is also primarily responsible for coordination with other Bureaus and Offices within the FCC and with law enforcement agencies.

## **2. Telecommunications Consumers Division**

The Telecommunications Consumers Division (TCD) focuses on protecting consumers from fraudulent, misleading, and other harmful practices involving telecommunications. TCD's functions include:

- Tackling high-volume and/or especially pernicious and disruptive robocalls by investigating and penalizing robocallers, working with industry partners to stop the calls, and working with federal and local authorities to share information about robocallers to aid in enforcement efforts;
- Investigating the practices of companies engaged in various telecommunications-related activities, including common carriers, manufacturers of telecommunications equipment, telemarketers and other companies utilizing telecommunications equipment for unsolicited advertisements;
- Resolving formal complaints brought by consumers, including those involving the accessibility of telecommunications services and equipment to persons with disabilities; and
- Consulting with internal and external organizations to ensure that FCC rules provide the maximum protection for consumers.

## **3. Investigations and Hearings Division**

The Investigations & Hearings Division (IHD) conducts investigations and takes enforcement actions across a broad range of issues involving virtually all services subject to FCC jurisdiction. IHD's functions include:

- Investigating and taking appropriate enforcement action against broadcast licensees, cable operators, DBS operators, and wireless licensees for violations of Title III, Title VI, and associated FCC rules;<sup>4</sup>
- Investigating and taking appropriate enforcement action against telecommunications carriers for violations of Title II and associated FCC rules and orders;

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<sup>4</sup> Note that certain types of broadcast enforcement matters are handled by the FCC's Media Bureau. In addition to the FCC's Enforcement Bureau, the Media Bureau enforces the Commission's rules in the license renewal context, when it evaluates if a licensee's broadcast station "has served the public interest, convenience, and necessity" and whether there have been serious violations of the Act or FCC rules. *See* 47 U.S.C. § 309(k). Additionally, the Media Bureau has enforcement responsibilities in certain discrete areas, including enforcement of the Commission's political programming rules, the cable and broadcast must-carry rules, and the rules related to broadcast retransmission consent, among others (which are enumerated in section 0.61 of the Commission's rules). *See* 47 CFR § 0.61(e)-(f).

- Overseeing the Equal Employment Opportunity (EEO) compliance of television and radio broadcast licensees, as well as multichannel video programming distributors (MPVDs), such as cable and DBS operators, and satellite radio;
- Investigating and taking appropriate enforcement action for violations of various FCC transparency rules concerning broadband services, cable television, and other communications offerings;
- Investigating and taking appropriate enforcement action for Universal Service Fund (USF) rule violations;<sup>5</sup> and
- Serving as FCC trial staff for all administrative hearings.

#### **4. Fraud Division**

The Fraud Division (FD) has primary responsibility for investigating and enforcing the most complex and egregious violations of the Communications Act and the FCC's rules as they pertain to USF support, with a particular emphasis on addressing fraudulent activity. The functions performed by the FD include:

- Investigating and taking appropriate enforcement actions in cases involving alleged fraudulent receipt of federal funds from the four USF programs: E-rate, Lifeline, High Cost, and Rural Health Care;
- Coordinating with other offices and bureaus within the FCC to ensure the integrity of the USF programs;
- Coordinating with the office of Inspector General, and other federal and state agencies to maximize enforcement efforts related to USF programs; and
- Support, on an as-needed basis, for TCD investigations of potential violations of accessibility funding program rules.

#### **5. Market Disputes Resolution Division**

The Market Disputes Resolution Division (MDRD) serves an adjudicatory role, resolving formal complaints filed against common carriers by market participants, entities, or organizations (wireline, wireless, or international) alleged under section 208,<sup>6</sup> which allows entities to file a complaint with the Commission for acts of carriers that violate the Act. MDRD also resolves complaints filed by cable operators, telecommunications carriers, utilities, and other parties related to the reasonableness of rates, terms, and conditions of pole attachments. MDRD facilitates dispute resolution by engaging the parties in mediation.

#### **6. Spectrum Enforcement Division**

The Spectrum Enforcement Division (SED) conducts investigations and takes enforcement actions against complaints primarily involving wireless equipment matters, such as electronic devices that are advertised, sold, or operated without proper authorization under the FCC's

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<sup>5</sup> Where the violation appears to involve fraud on the Universal Service Fund, any enforcement action will likely be handled by the Fraud Division.

<sup>6</sup> Section 208 of the Act provides that any person complaining of anything done or omitted to be done by any common carrier in contravention of the Act may file a complaint with the Commission. 47 U.S.C. § 208.

technical rules, e.g., unauthorized drone accessories that could interfere with aviation frequencies. Other investigations involve entities that operate unauthorized wireless services, such as unauthorized satellite transmissions or unlicensed wireless data networks, which could jeopardize government operations and authorized commercial wireless operations. SED also focuses on public safety and technical issues such as jamming devices that threaten cellular networks and GPS, 911 system failures, and other equipment requirements, including labeling requirements and user manual disclosures for radiofrequency devices. SED investigates licensees that fail to comply with the terms of their licenses and widespread interference matters. In addition, SED provides engineering and technical support to the Enforcement Bureau.

## **7. Office of the Field Director/Regional and Field Offices**

The Enforcement Bureau’s Office of the Field Director is located at the FCC’s headquarters and provides management, technical, and legal support to the Regional and Field Offices. Regional and Field Offices serve as the Bureau’s means of responding to enforcement issues across the country, with a special emphasis on wireless and broadcast interference (i.e., “pirate radio”) matters—and top priority given to public safety matters. The FCC has field offices located across the United States in three regions. Region One covers the northeastern United States. Region Two covers the central and southern United States and the Commonwealth of Puerto Rico. Region Three covers the western United States including Alaska, Hawaii, and the Pacific island territories. All EB Field Agents hold electronics engineering degrees.

The Field Office functions include:

- Executing on-scene investigations, inspections, and audits;
- Immediately responding to safety of life matters;
- Investigating and resolving individual interference complaints;
- Investigating violations in all licensee and/or operator services;
- Coordinating with local and state public safety entities; and
- Carrying out special priorities of the FCC.

## **II. EB’S INVESTIGATIVE PROCESS**

The agency’s enforcement process begins with collecting information that may lead to pursuit of a case. The initial information about a possible violation can come from different sources. Entities, particularly common carriage providers in the consumer protection context, are frequently selected for investigation based on the volume of consumer complaints filed against them.<sup>7</sup> Alternatively, a common carrier may be identified for investigation as the result of formal or informal complaints filed by another carrier. Other possible violations may be identified through the receipt of informal information, written or oral, from another interested party. In the broadcast area, most FCC investigations stem from written complaints received by listeners, viewers, or other licensees. Many investigations and inspections conducted by the Enforcement Bureau’s Field Offices stem from receipt of complaints from governmental agencies about interference problems, including public safety agencies (such as the Coast Guard

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<sup>7</sup> The FCC’s CGB receives and initially processes informal consumer complaints against common carriage providers.



or the Federal Aviation Administration), and from other FCC licensees. Referrals for possible enforcement action also may come from other FCC Bureaus, Offices, Office of Inspector General, inquiries from Congress; other federal, state, or local governmental agencies; and news reports.

Once EB learns of a potential violation, it reviews the complaint or referral, along with any supporting information, to determine whether to pursue the allegation. Throughout this process, a target of the investigation may engage with EB to explain the target's activities or dispel concerns about alleged violations.

#### **A. Oral Requests/Informal Requests**

FCC staff may orally request information from a member of the public or a regulated entity about a matter within the FCC's jurisdiction. Such a request may be made in person, by telephone, or by email. The material might be used for background and information purposes, during the course of an investigation or to supplement a company's response to a more formal Letter of Inquiry, as described below.

#### **B. Letters of Inquiry (LOIs)**

A Letter of Inquiry (LOI) is a formal investigative tool. The letter becomes part of the record if an investigation leads to an actual enforcement action. EB typically addresses an LOI to a current FCC licensee, an applicant for an FCC license, or a carrier that holds one or more FCC authorizations. The letter may be used to investigate a matter brought to the FCC's attention informally, to determine whether to continue an investigation beyond the preliminary stage, or to gather more information during an ongoing investigation where the record evidence is insufficient. The letter will typically identify the potential violations of the Act or the rules and provide a brief summary of the factual and legal background of the investigations. The letter will also include instructions for filing a response and for submitting confidential information.

The FCC has held that the failure to respond to an LOI as ordered is a violation of an agency order.<sup>8</sup> Accordingly, the FCC may open separate forfeiture proceedings if an LOI recipient fails to respond to the letter or provides incomplete information. With respect to the latter, the FCC takes potential "misrepresentation" or "lack of candor" cases very seriously.<sup>9</sup>

#### **C. Subpoenas**

A subpoena requires the recipient to release information related to a particular matter under investigation. Information obtained through a subpoena can be used as a basis for further FCC enforcement action, or it may be referred to the U.S. Department of Justice (DOJ) for civil action or criminal prosecution in court.

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<sup>8</sup> See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589 (2002) (forfeiture paid).

<sup>9</sup> See 47 CFR § 1.17. See generally *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 F.C.C.2d 1179 (1986) (subsequent history omitted).

Section 409(e) of the Act provides that the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation.<sup>10</sup> Section 0.111(h) of the FCC’s rules authorizes the Chief of the Enforcement Bureau to issue administrative non-hearing subpoenas.<sup>11</sup>

#### **D. Compulsory Testimony**

The FCC may order the appearance of individuals to testify if the agency determines that such testimony is necessary to assist its investigation. Section 409 of the Act provides the authority to compel such attendance and testimony.<sup>12</sup>

Witnesses compelled to testify before the FCC have the right to counsel.<sup>13</sup> The attorney’s participation is limited to advising the client, making objections, and asking clarifying questions at the conclusion of the examination.<sup>14</sup> There are no automatic rights of cross examination or presentation of evidence.<sup>15</sup> Witnesses also have a right to a transcript or copy of any document or testimony that the witness was compelled to provide.<sup>16</sup>

#### **E. Field Inspections**

The Act authorizes the FCC to:

[I]nspect all [wireless] installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this title, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.<sup>17</sup>

Agents in EB’s Field offices—all of whom are electronics engineers—may conduct inspections of FCC-regulated activities. The purpose of the on-site inspection is to determine compliance

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<sup>10</sup> 47 U.S.C. § 409(e).

<sup>11</sup> 47 CFR § 0.111(h).

<sup>12</sup> 47 U.S.C. § 409(e), (h). In addition, depositions may also be required in a hearing on a written record. *See Procedural Streamlining of Administrative Hearings*, EB Docket No. 19-214, Notice of Proposed Rulemaking, 34 FCC Rcd 8341, 8345, para. 7 (2019) (*Written Hearings NPRM*).

<sup>13</sup> 47 CFR § 1.27.

<sup>14</sup> 47 CFR § 1.27(a), (b), and (c).

<sup>15</sup> 47 CFR § 1.27(d).

<sup>16</sup> 47 CFR § 1.10.

<sup>17</sup> 47 U.S.C. § 303(n). This provision explicitly refers to “radio” installations, but the term in this context refers to “stations,” which are defined to extend beyond broadcast services to encompass all non-governmental wireless transmissions and related equipment. *Id.* §§ 153(40), 153(42).

with applicable provisions of the Act, FCC’s rules, FCC orders, and terms and conditions of FCC authorizations. During on-site inspections, Field Agents determine whether the facility is operating:

- Pursuant to FCC authorizations, if required;
- At its authorized location and on the authorized frequency;
- Within authorized technical and operational parameters;
- In accordance with specific rules applicable to that facility. For example, a cable system may be inspected to determine whether it complies with the FCC’s EAS and cable signal leakage rules; and
- In compliance with FCC antenna registration, lighting, and painting rules.

Technical measurements taken during inspection comply with standard engineering practices or follow specific procedures set by the FCC. For example, Field Agents have a specific measurement procedure for determining the strength of signal leaks at cable systems and have a specific procedure for determining field strength of unlicensed FM stations to determine whether a license is required.

#### **F. Closing Investigations**

Once an investigation is completed, the Bureau may decide to close the matter without taking further action. In the case of FCC-initiated investigations, including those based on consumer complaints, the Bureau, as a general matter closes a case by making a notation in its records without notifying the target or complainant. There may be circumstances, however, where the Bureau may notify the target (or others) that such an investigation is closed.

### **III. SANCTIONS AND REMEDIES FOR VIOLATIONS**

After collecting information about a potential violation, the FCC thoroughly analyzes it to determine whether there is an apparent violation of the Communications Act or the FCC’s rules, regulations, and orders. If the FCC determines that the matter should be prosecuted, the FCC may pursue a number of sanctions and remedies.

#### **A. Citations**

The Commission must first issue a citation to a person or entity that is a “nonregulatee” that has violated the Act and/or the FCC’s rules. Entities that have not applied for, or do not hold, FCC licenses or other authorizations are considered “nonregulatees.” Under section 503(b)(5) of the Act,<sup>18</sup> a citation is designed to provide notice to parties that one or more actions violate the Act and/or the FCC’s rules—and that they could face a monetary forfeiture if the conduct continues.

Although a citation is usually required against nonregulatees before the FCC can propose a forfeiture (i.e., NAL) for a violation, some statutes permit the FCC to forgo a citation and move straight to an NAL against a nonregulatee. For instance, in the case of a caller illegally

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<sup>18</sup> 47 U.S.C. § 503(b)(5).

“spoofing” its telephone number by displaying a fake number as its caller ID, the Commission may issue an NAL without first issuing a citation against a nonregulatee.<sup>19</sup> Additionally, the requirement to issue a citation does not apply if the person involved is:

- Engaging in activities for which a license, permit, certificate, or other authorization is required (e.g., unauthorized operation of a broadcast station);
- A cable television system operator;
- Transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to 47 U.S.C. § 307(e); or
- In the case of a violation of section 303(1), the person involved is a nonlicensee tower owner who previously has received notice of the obligations imposed by section 303(q) from the FCC or the permittee or licensee who uses that tower.<sup>20</sup>

Also, a citation is not required before the issuance of:

- An admonishment,
- A Notice of Violation,
- A cease-and-desist order or license revocation proceeding,
- An *in rem* seizure,
- Criminal prosecution (although some other notification may be required), or
- Certain specific types of violations, such as violations of the Truth-in-Caller-ID Act.

Citations may be issued by letter or order and must include the following information:

- The name and address of the target;
- A description of the facts surrounding the violation;
- A citation to the statutory or rule provision that has been violated, including a description of the requirements of the cited provision(s);
- A statement that subsequent violations of that provision of the Act and/or the relevant FCC rules may result in imposition of a monetary forfeiture and other sanctions, if applicable;<sup>21</sup> and

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<sup>19</sup> The Truth in Caller ID Act empowers the Commission “to proceed expeditiously to stop and... assess a forfeiture penalty against, any person or entity engaged in prohibited caller ID spoofing without first issuing a citation” against the violator. *Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, WC Docket No. 11-39, Report and Order, 26 FCC Rcd 9114, 9132, para. 47 (2011). The Truth in Caller ID Act only requires that the Commission provide the requisite notice under section 503(b)(3) of the Act (notice and opportunity for a hearing before the Commission or an administrative law judge) or section 503(b)(4) of the Act (Notice of Apparent Liability) before assessing a forfeiture for unlawful spoofing. 47 U.S.C. § 227(e)(5)(A).

<sup>20</sup> The Commission has ruled that the notice efforts spelled out in the *Antenna Structure Report and Order* are sufficient and that no further notice is necessary. See *Streamlining the Commission’s Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission’s Rules Concerning Construction, Marking and Lighting of Antenna Structures*, 11 FCC Rcd 4272, 4297, para. 61 (1995).

<sup>21</sup> 47 CFR § 1.80(d)(3) (“When the requirements of this paragraph have been satisfied with respect to a particular violation by a particular person, a forfeiture penalty may be imposed upon such person for conduct of the type described in the citation *without issuance of an additional citation.*”) (emphasis added).

- A statement indicating that the target may request an interview with an FCC official within a reasonable period of time at the nearest FCC office to the target’s place of residence, including information on how to schedule such an interview or, alternatively, that the target may submit a response in writing to a specified FCC address.

## **B. Sanctions Directly Issued by EB Field Agents**

The Bureau’s Field Agents may issue two types of notices to entities that apparently are operating transmission equipment or other devices without the necessary FCC license, permit, or other authorization. Neither of the notices discussed below carry a monetary penalty, but they may lead to additional EB investigations that could result in the imposition of a forfeiture or other sanction.

### **1. Notices of Violation**

If an EB Field Agent uncovers noncompliance, by licensees or an entity that holds a permit or other FCC authorization, with the Act, FCC rules, or terms of FCC licenses or authorizations, EB Field Agents generally issue a Notice of Violation (NOV). The NOV informs the target of its violation, and it also requires the target to respond to the allegations. Based on the response to an NOV, the FCC may decide to take no further action, conduct a further inspection, issue a follow-up NOV, or issue an NAL.

The NOV also can serve as the initial notice that the FCC must, in most cases, issue to a licensee before the agency may proceed to a license revocation, a license suspension, or a cease-and-desist proceeding in court.<sup>22</sup>

An NOV may be issued to a licensee, permittee, or a holder of other FCC authorizations. Under the FCC’s rules, the Bureau may issue NOVs to licensees or permittees, but not to unauthorized operators.<sup>23</sup> An NOV is not required before issuance of an NAL. However, the NOV may be sent simultaneously with an NAL. In such cases, the rules that apply to NALs govern.<sup>24</sup>

The NOV may include the following:

- A list of each statutory and/or rule provision violated and an explanation of what each provision requires,
- A description of the facts surrounding each separate violation,
- The deadline for responding to the NOV (usually no more than 20 days from receipt of the NOV) and a description of any documentation or information that must be included in the response, and
- The address of the Regional Office to which the response should be sent.

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<sup>22</sup> See 47 CFR § 1.89(a).

<sup>23</sup> 47 CFR § 1.89. Unauthorized operators typically are issued a Notice of Unauthorized Operation or a warning letter. See discussion in section III.B.2.

<sup>24</sup> 47 CFR § 1.89(a).

The response to an NOV must be submitted directly to the address for the Regional Office that issued the NOV is located. In all cases, the response must include a statement of actions taken to correct the condition or omission complained of and to prevent its recurrence.<sup>25</sup>

## **2. Notice of Unauthorized Operation**

If an FCC Field Agent uncovers radio/wireless transmissions activity by a person or entity that should have—but lacks—a license, permit, or other FCC authorization, EB Field Agents generally issue a Notice of Unauthorized Operation (NOUO). The NOUO informs the unauthorized operator of the violation, demands that it cease operating, and warns it of the potential penalties if it continues to operate without an authorization. For example, the FCC issues NOUOs in pirate radio cases to inform the operator that a broadcast station license is required and that continued operation without a license may result in additional sanctions. The Commission has found that issuing NOUOs are cost-effective in two respects. First, they often convince the target to immediately cease its unauthorized transmissions. Second, responses to NOUOs frequently provide evidence of the identity of the true operator of the unauthorized transmitter.

Use of NOUOs is not limited to pirate radio operators. For instance, Field Agents issue NOUOs to unauthorized users of public safety frequencies, such as police, fire, and rescue.

### **C. Admonishments**

In contrast to citations and NOVs, an admonishment is an enforcement sanction that makes findings of fact and conclusions of law regarding violations of the Act and rules, although it does not go further by imposing a monetary forfeiture or other concrete sanctions. Admonishments may be appropriate in cases where the violation at issue is deemed minor or where a monetary penalty is not possible or would not be effective. An admonishment generally closes the matter, but continued noncompliance may result in more severe enforcement action later.

A target may file a petition for reconsideration or application for review of an admonishment. In certain instances, the findings of fact and conclusions of law set forth in an admonishment can be used by the FCC's Office of the Managing Director to direct the recovery or withholding of federal funds from service providers.

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<sup>25</sup> 47 CFR § 1.89(c).

## D. Monetary Forfeitures

The FCC may assess a monetary forfeiture for violation of the Act, the FCC's rules, an FCC order, or the terms and conditions of an authorization. The FCC's general legal authority to impose a monetary forfeiture can be found at section 503(b) of the Act.<sup>26</sup> That provision states:

- (b)(1) Any person who is determined by the Commission ... to have –
- (A) Willfully or repeatedly failed to comply substantially with terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;
  - (B) Willfully or repeatedly failed to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention or other agreement to which the United States is a party and which is binding upon the United States;
  - (C) Violated any provision of section 317(c) or 508(a) of this Act<sup>27</sup>; or
  - (D) Violated any provision of section 1304, 1343, or 1464 of title 18, United States Code<sup>28</sup>

Shall be liable to the United States for a forfeiture penalty. A forfeiture penalty shall be in addition to any other penalty provided for by the Act; except that this subsection shall not apply to any conduct which is subject to forfeiture under Title II, Part II or III of Title III, or section 506 of the Act.

The term “willful” means the conscious and deliberate commission or omission of an act, without regard to whether the person or entity intended to violate a statute or regulation.<sup>29</sup> The term “repeated” means the commission or omission of an act more than once or, if continuous,

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<sup>26</sup> 47 U.S.C. § 503(c).

<sup>27</sup> The two provisions concern undisclosed payments to broadcasters for airing certain content (“payola”).

<sup>28</sup> The provisions concern, respectively, the broadcast of lottery information, wire fraud, and obscenity.

<sup>29</sup> See 47 U.S.C. § 312(f). The legislative history of section 312(f)(1) of the Act clarifies that this definition of “willful” applies to both section 312 and 503(b) of the Act, and the Commission has so interpreted the term in the section 503(b) context. See also *Southern California Broadcasting Company*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, (1991).

on more than one day.<sup>30</sup> The Act provides statutory forfeiture authority for violation of specific provisions of the Act.<sup>31</sup>

## 1. Notices of Apparent Liability

A target of an enforcement action is entitled under the Act to receive an NAL before any monetary forfeiture may be imposed.<sup>32</sup> The NAL provides the target with notice of the alleged violations, the maximum penalty that could be imposed, and an opportunity to respond to or contest the proposed liability.<sup>33</sup> For most matters, an NAL must be issued within one year from the date of the violation.<sup>34</sup> Longer periods apply for some violations, and a deadline for FCC action may be extended via a case-specific tolling agreement.

Once an NAL has been issued, the target may:

- Pay the forfeiture,
- File a response arguing that the forfeiture should be cancelled or reduced, or
- Do nothing.

If the target pays the proposed forfeiture, the matter is closed and the NAL is considered a final FCC action. If the target files a response or does nothing, the FCC may issue a Forfeiture Order or an order cancelling the forfeiture.

An NAL is the FCC's charging document, akin to the filing of a complaint in a civil action. Unless the target elects to pay the proposed forfeiture, an NAL is not considered a final FCC action; instead, it simply serves to identify an apparent or alleged violation and a proposed sanction. As noted above, the target is not required to pay the forfeiture and has the right to file a response challenging the FCC's preliminary conclusions on matters of fact and law. Neither the fact that the NAL was issued nor the target's failure to pay the forfeiture can be used against the target unless the target has made a partial payment or the FCC later issues an order finding

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<sup>30</sup> See 47 U.S.C. § 312(f)(2). See *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 497 (5th Cir. 1980) (“continuous violation is made a separate offense each day it occurs and so becomes ‘repeated’ on the second day of the violation”) (quoting S. REPT. NO. 95-580, at 24, 1977 reprinted in U.S.C.C.A.N. 109, 132 (legislative history of amendment and reenactment of 47 U.S.C. § 503(b))). See also *Callais Cablevision, Grand Isle, LA*, 16 FCC Rcd 1359, 1362 para. 9 (2001) (“‘Repeated’ means commission or omission of an act more than once.”). One-time acts such as a simple failure to file a form, in contrast, are not continuous. See, e.g., *Custom Teleconnect, Inc.*, File No. EB-IHD-18-00027483, Notice of Apparent Liability for Forfeiture, DA 19-150, 2019 WL 1424488 (Enf. Bur. Mar. 27, 2019) (company penalized for committing one violation of the annual filing and certification rule for providers of provider of inmate calling services).

<sup>31</sup> See 47 CFR § 1.80 Note.

<sup>32</sup> 43 U.S.C. § 503.

<sup>33</sup> See *id.*

<sup>34</sup> See 47 CFR § 1.80(c)(4).



liability and requiring payment.<sup>35</sup> The NAL approach is used primarily in cases in which the FCC plans to impose a monetary forfeiture.

NALs must be in writing and must be sent by certified or registered mail to the last known address of the person or entity that is the target of the NAL. In addition, NALs shall include the following information:<sup>36</sup>

- The identity of each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization that the target of the NAL apparently violated or with which the target apparently failed to comply;
- The nature of the act or omission charged against such person and the facts upon which such charge is based;
- Whether the violation is willful, repeated, or both;
- The date(s) on which the conduct occurred;
- The amount of the proposed forfeiture;
- The period of time (usually 30 days from the release date of the NAL) by which payment or a response is due; and
- Procedures, including an address for submission of payment or for submission of responses requesting reduction or rescission of the NAL.

## **2. Commencement of a Hearing**

Another procedural mechanism for assessing a forfeiture is a hearing. Under this approach, the FCC issues a Notice of Opportunity for Hearing (NOH). The target is entitled to a trial-like hearing before an Administrative Law Judge (ALJ) conducted under procedures set out in subpart B of Part 1 of the FCC's rules. The ALJ's decision is reviewable by the full Commission and appealable to the federal appeals court without payment of the forfeiture. The process is more procedurally formal and usually more time consuming than other cases. Hearings may be used in cases concerning potential license revocation or serious questions concerning the truthfulness of assertions made in FCC applications.<sup>37</sup> In some cases, the hearing may be conducted entirely on a written record.<sup>38</sup>

## **3. Forfeiture Orders**

In a forfeiture order, the FCC considers the target's NAL response (or lack thereof) and other pertinent evidence, and either:

- Assesses a forfeiture in the amount proposed in the NAL; or

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<sup>35</sup> Section 504(c) of the Act forbids the Commission from using the issuance of an NAL, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued. 47 U.S.C. § 504(c).

<sup>36</sup> 47 U.S.C. § 503.

<sup>37</sup> 47 U.S.C. § 312(a)-(c).

<sup>38</sup> See *Written Hearings NPRM*, 34 FCC Rcd at 8343-44, paras. 4-5.

- Assesses a forfeiture in an amount less than that proposed in the NAL (typically if the target can offer mitigating evidence or establishes an inability to pay the amount proposed).

Instead of issuing a forfeiture order, the Commission could close the case or enter into a consent decree with the target.

In response to a forfeiture order, the target may:

- Pay the forfeiture,
- File a petition for reconsideration or application for review, or
- Do nothing.

If the target appeals the Forfeiture Order through a Petition for Reconsideration (PFR) or Application for Review (AFR), the FCC may issue a Memorandum Opinion and Order on the merits. If the target fails to pay or contest the forfeiture, the FCC may refer the case to the U.S. Department of Justice (DOJ) for enforcement.<sup>39</sup>

#### 4. Forfeiture Calculations and Adjustments

The dollar amount of a forfeiture is case specific. The Act and FCC rules provide for significant flexibility in determining the monetary forfeiture, but they identify maximum amounts for certain violations or entities and factors that the FCC must consider in setting any forfeiture amount.

With respect to the latter, the FCC must consider “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such matters as justice may require.”<sup>40</sup> In implementing Section 503(b) of the Act, the FCC has established base forfeitures for some common violations to reflect “the degree of harm or potential for harm that may arise from the violation.”<sup>41</sup> In addition, the FCC has established upward and downward adjustment factors it considers in determining forfeitures.

An upward forfeiture adjustment may be warranted when the party:

- (1) *Engaged in egregious conduct.* An upward adjustment for egregiousness might be warranted where a target shows a sweeping disregard for the FCC’s authority or, if applicable, when a violation undermines certain fundamental FCC functions or policies. Targets may also act egregiously when they deceive or mislead consumers about charges or services, or when they ignore numerous consumer complaints.

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<sup>39</sup> In addition, the FCC may, and sometimes does, refer a case to DOJ even if a PFR or AFR is pending.

<sup>40</sup> 47 U.S.C. § 503(b).

<sup>41</sup> *Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17098, para. 20 (*Forfeiture Policy Statement*), *recon. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

- (2) *Committed the violations intentionally.* The clearest example of an intentional violation is a case in which a target receives notice from the FCC that certain conduct is unlawful but continues to commit the violation.
- (3) *Caused substantial harm.* Violations causing or having the potential to cause substantial harm may take many forms. Examples include:
  - a. Violations that create risk to public safety (for example, failures to provide 911 service or to protect against excessive radiofrequency radiation). This factor may include indirect public safety impacts (for example, interference to police or fire department communications, tower lighting violations);
  - b. Violations that damage FCC programs or subvert regulatory processes (for example, defrauding USF programs or auction collusion);
  - c. Violations that detrimentally affect consumers (for example, certain types of robocalls, non-emergency use of EAS tones in programming, “cramming” unauthorized charges on telephone bills); or
  - d. Violations affecting a large number of consumers.
- (4) *Previously violated an FCC requirement.* The FCC may consider a prior violation of any FCC requirement, even if the prior violation does not relate to the type of violation at issue in the current matter.<sup>42</sup>
- (5) *Violated FCC requirements repeatedly or continuously.* If an act (or failure to act) that constitutes a violation occurs more than once or for more than one day, the FCC may treat these violations as separate offenses. In some cases, however, treating these violations as “repeated” or “continuous” may result in an excessive penalty, and the FCC may exercise its discretion to treat repeated or continuous violations as an upward adjustment factor. The FCC may consider the relative danger or the duration of the repeated or continuous conduct.
- (6) *Is sufficiently large that a smaller forfeiture would not deter misconduct.* The FCC has recognized that “for large or highly profitable communications entities, the base forfeiture amounts . . . are generally low.”<sup>43</sup>

A downward forfeiture adjustment may be warranted when the target:

- (1) *Committed a minor violation.* Purely technical violations that cause no interference or consumer harm may fall into this category.
- (2) *Showed good faith compliance efforts or voluntarily disclosed the violation.* The FCC may reduce forfeitures when a target undertakes good faith measures to detect and correct violations, implements a compliance program, or voluntarily discloses its violation(s) before FCC independently becomes involved in a matter.
- (3) *Has a history of overall compliance.*
- (4) *Demonstrated an inability to pay the forfeiture.* In assessing a target’s purported inability to pay, the FCC may consider the revenues of the parent, affiliate, or subsidiary companies. The fact that a target files for bankruptcy will not

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<sup>42</sup> 47 CFR § 1.80 (listing “[p]rior violations of any FCC requirements” as one upward adjustment factor for section 503 forfeitures).

<sup>43</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17099, para. 24.

automatically warrant a reduction. Moreover, other factors, such as egregious behavior, may obviate a forfeiture reduction based on inability to pay.

In each case, the FCC must analyze the particular facts presented and other matters as justice may require.

## 5. Limitations on Assessment of Forfeitures

*Limits on Monetary Liability.* The Act, in conjunction with the Debt Collection Improvement Act of 1996, imposes limits on the amounts of forfeitures that may be assessed. These limits are determined by the type of violation and the regulatory status of the target.<sup>44</sup> The Enforcement Bureau annually adjusts forfeiture penalties for inflation.<sup>45</sup>

*Delegated Authority Limits.* EB has authority to assess on its own any forfeiture amount that does not exceed \$100,000 for common carriers and \$25,000 for all other entities. NALs or forfeiture orders that propose or assess greater amounts must be issued by the full Commission. The Bureau also has authority to enter into consent decrees that involve monetary payments.

*Statute of Limitations for Forfeiture Actions.* The FCC must assess a forfeiture—through the NAL process or in a hearing—within the time limits set in section 503(b) of the Act.

For broadcast licensees, the NAL or Notice of Opportunity for Hearing (NOH) may be issued if the violation occurred during the current license term or within a year of the violation.<sup>46</sup>

For common carriers and all others, the NAL or NOH usually must be issued within one year of the violation, unless a tolling agreement has extended the deadline in a specific case. There are some variants; for example, the FCC has two years to issue an NAL for a violation of the Truth-in-Caller ID Act.

Section 503(b)'s one-year statute of limitations applies only to monetary forfeitures. The Act does not contain a statute of limitations for the issuance of citations, forfeiture orders, admonishments, NOVs, or commencement of cease-and-desist or revocation proceedings.

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<sup>44</sup> See 47 CFR § 1.80 for current maximum forfeiture amounts.

<sup>45</sup> The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires agencies to adjust civil monetary penalties for inflation. Pub. L. No. 114-74, § 701, 129 Stat. 584, 599. The 2015 Inflation Adjustment Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, which is codified, as amended, at 28 U.S.C. § 2461 note (Inflation Adjustment Act). OMB issues an official inflation multiplier by December of every year. The Enforcement Bureau then issues an Order applying the multiplier to the applicable forfeiture penalties. NALs should apply the adjusted for inflation amounts at the time of adoption. Forfeiture orders should apply the adjusted forfeitures that were in place at the time of the NAL.

<sup>46</sup> For example, if a broadcast station violated the public inspection file rule on December 1, 2000 and the station's license expired on December 1, 2005, and was renewed on January 1, 2006, then the Commission could have issued an NAL or NOH for that violation at any time during the same license term (i.e., prior to January 1, 2006). If the violation occurred on November 29, 2005, the Commission has until November 28, 2006 (one year from the date of the violation) to issue an NAL or NOH.

The DOJ has five years to institute enforcement proceedings brought pursuant to Section 504.<sup>47</sup> Federal appellate courts have interpreted this provision differently, but the majority of courts that have addressed the issue have held that a claim first accrues, for purpose of determining when the five-year period begins to run, from the date of the last administrative (i.e., FCC) action. The last administrative action may be the Forfeiture Order, when it is uncontested, or the disposition of any subsequent administrative review.<sup>48</sup>

### **E. Cease-and-Desist Letters**

The FCC has authority under section 312(b) of the Act to issue an order requiring a person to cease and desist from violating the Act or the FCC's rules and regulations. The agency's determination that a violation has occurred can arise from a complaint proceeding or an investigation initiated by the FCC itself.

The Commission has delegated authority to EB to initiate "show cause" proceedings to obtain a cease-and-desist order as long as the matter raises no novel questions of fact, law, or policy.

Section 312(b) authorizes the FCC to order those who have violated any FCC rule, regulation, or the Act "to cease and desist from such action."<sup>49</sup> Before issuing such an order, the FCC shall serve upon the licensee an order to show cause why a cease and desist order should not be issued.<sup>50</sup> This type of proceeding typically involves an adjudicatory hearing before an administrative law judge.<sup>51</sup>

Before issuing a "show cause" order to initiate such a proceeding, the FCC generally must issue notice of the pending enforcement action.<sup>52</sup> This notice usually takes the form of an NOV if the case involves investigation by a Field Agent or an LOI if the investigation is being handled by EB headquarters personnel.

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<sup>47</sup> "[A]n action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued[.]" 28 U.S.C. § 2462.

<sup>48</sup> See, e.g., *U.S. v. Meyer*, 808 F.2d 912 (1<sup>st</sup> Cir. 1987) (holding five-year statute of limitations for enforcement of civil penalties is triggered on the date that penalty is administratively imposed, rather than on the date the predicate violation occurs); accord *U.S. v. Godbout-Bandal*, 232 F.3d 637 (8<sup>th</sup> Cir. 2000) (holding that when an Act authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the general statute of limitations for collection of civil penalties will not begin to run until that administrative process has resulted in a final determination). But cf. *United States v. Core Labs. Inc.*, 759 F.2d 480 (5<sup>th</sup> Cir.1985) (holding that the date of the *underlying violation* is the date on which the statute of limitations begins to run) (emphasis added).

<sup>49</sup> 47 U.S.C. § 312(b).

<sup>50</sup> 47 U.S.C. § 312(c).

<sup>51</sup> 47 U.S.C. § 312(c). There may be situations, however, when a live, in-person hearing may not be necessary. Review on a solely written record may be appropriate when the case presents no factual disputes or the target does not request a live hearing.

<sup>52</sup> See 47 CFR § 1.89(a). Section 1.89(a) provides an exception to this rule for cases of "willfulness or those in which public health, interest or safety requires otherwise."

Once a section 312(b) cease-and-desist hearing before an ALJ begins, EB serves as trial staff for all hearings conducted pursuant to 5 U.S.C. § 556 regarding applications, revocation, forfeitures, and other matters designated for hearing.<sup>53</sup> During the hearing, as with other section 312 hearings, the FCC bears the burden of proceeding with the introduction of evidence and the burden of proof.<sup>54</sup> Events or circumstances constituting waiver of the right to hearings are specified in section 1.92 of the FCC's rules.

## **F. Revocation**

One of the most serious enforcement sanctions available to the FCC is revocation of a license, construction permit, or authorization. The FCC will typically open a revocation proceeding for violations that raise significant questions about whether a licensee, permittee, or authorization holder has the basic qualifications to hold an FCC license, permit, or authorization and/or whether it is in the public interest for an entity to remain a licensee, permittee, or authorization holder. The FCC can pursue revocation under several provisions of the statute, including: (1) section 159, for unpaid regulatory fees; (2) section 214, to revoke authorization of a common carrier; and (3) section 312, to revoke a broadcast license or construction permit. The target generally is entitled to notice, which usually comes in the form of an NOV or an inquiry letter, and an opportunity to respond.<sup>55</sup>

Before the FCC can revoke a license, section 312(c) requires it to issue an order to show cause why the license should not be revoked. An order to show cause begins a hearing proceeding to determine whether a license should be revoked. The FCC bears the burden of proceeding with the introduction of evidence and the burden of proof. Revocation matters may be designated for a hearing before an Administrative Law Judge.

## **G. Criminal Prosecutions**

Section 501 of the Act authorizes the FCC, in cooperation with federal prosecutors, to impose a fine of not more than \$10,000 and/or the criminal penalty of imprisonment for up to a year for a

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<sup>53</sup> See 47 CFR § 0.111(25)(b). All hearings are restricted proceedings. This means that no party to any hearing proceeding (whether a hearing proceeding on a "written record" or a hearing proceeding before the ALJ) may make any presentation to (or have any discussions with) any FCC decision-making personnel without making that presentation available to or in the presence of every other party to the hearing proceeding. See 47 CFR §§ 1.1208 and 1.1202(b). EB is treated like any other party to the hearing proceeding. Thus, the Chief, Enforcement Bureau, and his or her staff, cannot communicate with any FCC decision-making personnel – including the Chairman, Commissioners, and Office of General Counsel – about the substance of a pending hearing matter without giving all other parties the opportunity to be present.

<sup>54</sup> 47 U.S.C. § 312(d). As a general matter, the standard of proof is the "preponderance of the evidence" standard. See, e.g., *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to provide In-Region InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20568-69, paras. 45-46, n.87 (1997); *Bender v. Clark*, 744 F.2d 1424, 1429 (10th Cir. 1984) ("The traditional standard required in a civil or administrative proceeding is proof by a preponderance of the evidence [and t]he traditional preponderance standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard.") (citations omitted).

<sup>55</sup> See 47 CFR § 1.89(a).

party convicted of willfully and knowingly violating the Act.<sup>56</sup> A second conviction for violating any provision of the Act is punishable by a fine of not more than \$10,000 and/or imprisonment for up to two years. The FCC itself has no authority to initiate criminal action; instead it must refer the matter to the DOJ.

## **H. In Rem Seizures**

Section 510(a) of the Act states:

Any electronic, electromagnetic, radio frequency, or similar device, or component thereof, used, sent, carried, manufactured, assembled, possessed, offered for sale, sold, or advertised with willful and knowing intent to violate section 301 or 302(a) [of the Act], or rules prescribed by the Commission under such sections, may be seized and forfeited to the United States.<sup>57</sup>

This remedy is used primarily in cases involving violations of section 301 of the Act (unlicensed operation of radio/wireless transmission equipment).<sup>58</sup> Using section 510 of the Act, FCC field Agents, in conjunction with the U.S. Marshals Service and the local U.S. Attorney's Office, have seized radio transmitting equipment from pirate radio stations across the country.<sup>59</sup>

## **I. Consent Decrees**

A consent decree is a negotiated settlement between the FCC and a party that sets forth the terms and conditions to which the party must conform in exchange for the termination of an investigation or forfeiture proceeding. The FCC may enter into settlement discussions at any stage of the enforcement process. If the target agrees to pursue settlement, the FCC enters into discussions to reach a mutually agreeable resolution.

Consent decrees generally provide a description of the alleged misconduct and a statement of the measures that party will take to address the alleged misconduct. The measures may include a

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<sup>56</sup> 47 U.S.C. § 501.

<sup>57</sup> 47 U.S.C. § 510(a).

<sup>58</sup> 47 U.S.C. § 301. Operating a radio transmitter that permits radio frequency energy transmission within the territorial boundaries of the United States without a license issued by the FCC is a violation of section 301 of the Act. In addition to the provisions of section 301, section 73.277(b) of the Commission's rules specifically require stations in the FM radio frequency band to be licensed by the Commission. 47 CFR § 73.277(b). In most instances, an individual license is issued to a specific person or entity operating an FM broadcast radio station. Section 15.1 of the rules, in conjunction with section 15.239, permits non-licensed operation of certain very low power radio transmitters on the FM Band (88-108 MHz) without a license, provided that the field strength of the operation does not exceed 250  $\mu$ V/m at three meters. Such non-licensed operation is an authorized operation without an individual license. An unlicensed operation, on the other hand, is one that is not authorized by either an individual license or the rules and is, therefore, a violation of section 301 of the Act.

<sup>59</sup> Press Release, FCC, FCC's Ramped Up 'Pirate Radio' Enforcement Yields Results (Apr. 11, 2018), <https://www.fcc.gov/document/fccs-ramped-pirate-radio-enforcement-yields-results>.

plan for improving future compliance, reporting to the FCC on compliance, and a payment to the United States Treasury or to parties affected by the conduct at issues.

A consent decree is a final settlement with the FCC and becomes effective when the full Commission or Bureau Chief issues an Adopting Order. Consent decrees often allow faster resolution of an investigation and can specify actions to ensure future compliance.

#### **IV. DESCRIPTION OF CASE HANDLING**

##### **A. Requests for Confidentiality**

Any request for confidentiality of certain information or documents must strictly comply with the FCC's confidential treatment rule,<sup>60</sup> including a statement of the reasons for withholding the materials from inspection. The request must also include a schedule of the information or documents for which confidentiality is requested that states, individually as to each such item, the information required by section 0.459(b) of the FCC's rules. "Blanket" requests for confidentiality or a casual request, including simply stamping pages "confidential," will not be considered a proper request for confidentiality, and those materials will not be treated as confidential.<sup>61</sup>

Stakeholders should contact Enforcement Bureau staff with any questions regarding the rules regarding the submission of non-public documents to the Enforcement Bureau.

##### **B. Tolling Agreements**

EB may seek a tolling agreement with the target of an investigation, which "tolls" (i.e., extends) the statutory deadline for enforcement action applicable to the particular case.<sup>62</sup> Tolling agreements can provide much needed time for the Enforcement Bureau to complete investigations, draft Notices of Apparent Liability, and/or negotiate consent decrees, and such agreements also can be used to afford a target additional time to respond to FCC subpoenas or other requests for information. The Bureau's goal is to ensure the Bureau accomplishes its work swiftly and without sacrificing excellence yet also remain flexible enough to enter into tolling agreements when they are in the public interest.

To avoid creating backlogs and unnecessary delays, the tolling period should be as short as possible under the specific circumstances of an individual case.

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<sup>60</sup> 47 CFR § 0.459.

<sup>61</sup> See 47 CFR § 0.459(c). *American Broadband & Telecomm. Co.; Jeffrey S. Ansted*, Notice of Apparent Liability for Forfeiture and Order, 33 FCC Rcd 10308, 10367, paras. 180-85, 192 (2018).

<sup>62</sup> In many cases, the standard one-year deadline applies, 47 U.S.C. § 503(6)(B), but in certain other circumstances, the deadline may extend longer. See, e.g., 47 U.S.C. § 503(6)(A) (deadline may be congruent with the current term of a broadcast license).



### **C. Holds on License Applications**

The FCC's Enforcement Bureau may direct one of the agency's licensing bureaus (such as the Wireless Telecommunications Bureau or Media Bureau) to place a hold on a license application while an enforcement investigation is pending.

## **V. COMMUNICATIONS BETWEEN THE ENFORCEMENT BUREAU AND TARGET**

### **A. Initiating Settlement Discussions**

A target may initiate settlement discussions with EB at any time during the course of an investigation. Alternatively, the Bureau itself may raise the possibility of settlement to the target of an investigation.

### **B. Clarifying Scope of Letters of Inquiry, Subpoenas, and Other Requests for Information**

The FCC attempts to draft LOIs, subpoenas, and other requests for information as narrowly as possible. Targets are free to contact EB staff to clarify or potentially modify the scope of any request or directive seeking information.

### **C. Self-Reporting of Violations**

The FCC encourages voluntary disclosure of noncompliance and will consider such disclosures when negotiating consent decrees or calculating monetary forfeiture penalties. In determining whether the disclosure was voluntary and whether the target took meaningful corrective action, the FCC will consider whether the target:

- Has promptly corrected a violation that it discovered on its own initiative.
- Has promptly disclosed the violation to EB. A target should not wait to notify the Bureau until after it has fully corrected the problem.
- Has cooperated fully with any EB investigation that is necessary after the initial voluntary disclosure.
- Is willing to publicly disclose its noncompliance.

## **VI. MEDIATION AND COMPLAINT ADJUDICATION**

EB's Market Disputes Resolution Division (MDRD) mediates and adjudicates complex disputes brought against common carriers (47 U.S.C. § 208), commercial mobile data services providers (47 CFR § 20.12), or utility pole owners (47 U.S.C. § 224) by market participants, entities, or organizations. The disputes concern a wide variety of subjects, including access stimulation, intercarrier compensation, interconnection/collocation, tariff interpretation, number portability, payphone compensation, data roaming, and pole attachment access and rates.

Individual or business consumers seeking information about informal complaints should contact CGB.<sup>63</sup> For assistance with disputes against cable operators, contact the Media Bureau.<sup>64</sup>

### **A. Dispute Resolution Options**

MDRD offers a number of methods for resolving disputes:

- Confidential staff-supervised mediation (section 208 and 224 disputes)
- Informal common carrier complaints that do not involve consumers (section 208 disputes)
  - Note: Consumer informal complaints against common carriers (including informal complaints filed by most business consumers) should be filed with, and are handled by, CGB through its Consumer Complaint Center, available at <https://consumercomplaints.fcc.gov/hc/en-us>.
- Formal common carrier complaints (section 208 disputes)
- Accelerated Docket complaints (certain section 208 disputes)
- Pole attachment complaints (section 224 disputes)
- Primary jurisdiction referrals

Each process is discussed briefly below. Before initiating any proceedings, prospective parties should contact MDRD staff at (202) 418-7330 to discuss procedural options and potential election of forum issues.<sup>65</sup>

### **B. Mediation**

Before parties enter into formal litigation at the FCC, MDRD strongly encourages parties to attempt to settle or narrow the dispute on an informal basis. To assist the parties, MDRD attorneys are available to conduct voluntary mediations at FCC headquarters in Washington, DC. Section 208 of the Act provides that any person complaining of anything done or omitted to be done by any common carrier in contravention of the Act may file a complaint with the Commission. The goal is to enable the parties to achieve a relatively swift, inexpensive resolution of the dispute. Many cases that would have been adjudicated complaints have been resolved informally without further litigation as a result of staff-supervised mediation.

Parties may initiate confidential mediation before filing a formal complaint by submitting a request in writing to the Chief of MDRD.<sup>66</sup> The letter should describe the facts, alleged violation(s) of the Act, and the remedy sought, and it should attach relevant documentary evidence. Additionally, a party may include a request for mediation in an informal common carrier complaint (described below). Once MDRD receives a mediation request, it typically will

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<sup>63</sup> As of 2019, interested parties may reach CGB's Consumer Complaint Center at <https://consumercomplaints.fcc.gov>.

<sup>64</sup> As of 2019, interested parties may reach the MB's Policy Division at (202) 418-7200.

<sup>65</sup> See 47 U.S.C. § 207. See, e.g., *Bell Atlantic Corp. v. MFS Communications, Inc.*, 901 F.Supp 835 (D. Del 1995).

<sup>66</sup> See 47 CFR § 1.737.

forward the request to the opposing party and request a response. Mediation is strictly voluntary. Parties are encouraged to contact Division staff at (202) 418-7330 to obtain information regarding MDRD's mediation program, options for handling an immediate dispute, and possible election of forum concerns.

### **C. Section 208: Common Carrier Complaints**

MDRD handles Section 208 complaints brought by market participants, entities, or organizations against common carriers (wireline, wireless or international carriers). (In contrast, complaints filed by consumers or other businesses against carriers are handled by CGB.) Section 208 complaints may be filed using the informal or formal complaint process or, in certain instances, the Accelerated Docket, as described below.

### **D. Informal Complaints**

The informal common carrier complaint process enables complainants to resolve disputes without the time and expense associated with formal complaint adjudication. In addition, filing an informal complaint will toll the statute of limitations deadline that otherwise would apply to formal procedural efforts to resolve the case; that formal complaint conversion option, discussed below, must be completed within six months.

Complainants that are market participants, entities, or organizations may file an informal complaint against a common carrier by submitting a letter to the MDRD Chief describing the alleged violation of the Act. (As of 2019, such complaints should be addressed to Rosemary McEnery, MDRD Chief, FCC Enforcement Bureau, 445 12th Street SW, Washington DC 20554.) There is no fee associated with filing an informal complaint. The letter must include the name of the defendant carrier, a complete statement of the facts, and the relief sought. In addition, the complainant may request mediation in the informal complaint letter.<sup>67</sup>

Once MDRD receives an informal complaint, it will transmit the complaint to the defendant carrier and typically will require the defendant to submit a response within 30 days. Even before the response deadline, parties can explore the possibility of private settlement or engage in FCC-supervised mediation.<sup>68</sup> If unsatisfied with the defendant's response and unable to resolve the dispute through private settlement or subsequent mediation, a complainant has six months from the date of the response to convert the informal complaint into a formal complaint and maintain the filing date of the informal complaint.<sup>69</sup> Informal complaints do not result in written orders issued by the FCC.

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<sup>67</sup> See sections 1.716-1.718 of the FCC's rules (47 CFR §§ 1.716-1.718) for details about filing an informal complaint.

<sup>68</sup> Mediation pursuant to a request in an informal complaint, like mediation pursuant to rule 1.737 above, is confidential and strictly voluntary. The only difference is that, in the informal complaint context, the filing date is tolled for six months, pending mediation.

<sup>69</sup> See 47 CFR § 1.718.

Prospective complainants should be aware that some courts have construed the filing of an informal complaint to be an election of forum that may affect subsequent litigation options.<sup>70</sup> For this and other reasons, parties should consult MDRD staff before filing any informal complaint or mediation request.

In contrast, consumers—including individuals and businesses—seeking to file an informal complaint against a common carrier should submit their concern to the FCC’s CGB. The informal complaint process requires no complicated legal procedures, has no filing charge, and does not require the complaining party to appear before the FCC. For information on filing an informal complaint, visit CGB’s guide at <https://www.fcc.gov/consumers/guides/filing-informal-complaint>.

### **E. Formal Complaints**

Unlike informal complaints, formal complaints are subject to detailed procedural rules and filing requirements. In most cases, parties to formal complaints should be represented by attorneys familiar with FCC procedures. Before filing a formal complaint, complainants should contact MDRD staff to discuss the issues in dispute and explore the possibility of resolution through pre-complaint mediation supervised by FCC staff.

The formal complaint process is similar to federal court litigation in that it involves a complaint, answer, and reply, and often discovery, motions, and briefs. The FCC’s rules require more detailed submissions than the Federal Rules of Civil Procedure, however, so complainants in formal Section 208 complaints must provide specific facts and proof regarding all claims at the time of submitting the complaint itself. Moreover, discovery is usually not as expansive as in federal court. Consequently, a formal complaint must contain as much factual support as possible at the initial filing stage. This support can be in the form of sworn affidavits and documentary evidence. Because the FCC has discretion to reject later briefing, parties must provide well-reasoned legal arguments in their initial pleadings. Formal complaint proceedings result in a written order issued by the Enforcement Bureau or the full Commission.

Before filing a Section 208 formal complaint, complainants should carefully review the applicable procedural rules contained in sections 1.720-1.740 of the FCC’s rules (47 CFR §§ 1.720-1.740). Prospective litigants also should review the FCC’s Reports and Orders adopting these rules, which appear in the FCC Record.<sup>71</sup>

A filing fee is required for all formal complaints.<sup>72</sup> It is important to review the most recent version of the rules pertaining to filing a formal complaint, particularly those relating to the filing

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<sup>70</sup> See 47 U.S.C. § 207.

<sup>71</sup> See *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, 33 FCC Rcd 7178 (2018); *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed when Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997), Order on Reconsideration, 16 FCC Rcd 5681 (2001) (*Formal Complaints Recon Order*); *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure Relating to the Filing of Formal Complaints Under Section 208 of the Communications Act and Pole Attachment Complaints Under Section 224 of the Communications Act*, Order, 29 FCC Rcd 14078 (2014).

<sup>72</sup> See 47 CFR § 1.1106.

fee. For up-to-date information about filing fees, contact the FCC's Helpline at 1-888-225-5322, and for any questions regarding filing procedures, contact MDRD staff at 202-418-7330. Failure to comply with any of these procedural requirements can result in the dismissal of a complaint.

#### **F. Section 224: Pole Attachment Complaints**

Section 224 of the Communications Act authorizes the FCC to regulate attachments by cable television systems or providers of telecommunications service to utility poles, ducts, conduits, and rights-of-way. The FCC has a statutory duty to ensure that the rates, terms, and conditions for attachments are just and reasonable, and that cable television systems and telecommunications carriers have non-discriminatory access to utility poles, ducts, conduits, and rights-of-way.

In preparing a complaint alleging a violation of section 224, a complainant should carefully review the applicable procedural rules contained in sections 1.720-1.740 and 1.1401-1.1415 of the FCC's rules (47 CFR §§ 1.720-1.740, 1.1401-1.1415). Before filing a complaint, prospective complainants should contact MDRD staff at 202-418-7330 to discuss the issues in dispute and to explore the possibilities for resolution through pre-complaint mediation before FCC staff, as described above. Parties should note that under section 224(c), the FCC only handles pole attachment complaints if the relevant state does not regulate pole attachments

#### **G. Primary Jurisdiction Referrals**

A court invokes the "primary jurisdiction doctrine" when it has authority over a case but the dispute requires the resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative agency.<sup>73</sup> The FCC has released a Public Notice providing guidance concerning primary jurisdiction referrals.<sup>74</sup> Any party involved in a lawsuit against a common carrier that a court has referred to the FCC should review the Public Notice and contact MDRD at 202-418-7330 before filing any papers with the agency.

### **VII. HEARING PROCESS**

#### **A. Basics of the Administrative Hearing Process**

Traditionally, an administrative hearing involves a factual investigation (the discovery process), summary decision and/or trial briefs, and a trial with live testimony and the presentation of evidence before an administrative law judge (ALJ). The FCC has the authority to conduct these hearings pursuant to section 556 of the Administrative Procedure Act.<sup>75</sup> In appropriate cases, the

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<sup>73</sup> See, e.g., *Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc.*, 965 F.2d 1118 (D.C. Cir. 1992).

<sup>74</sup> See *Primary Jurisdiction Referrals Involving Claims under the Communications Act*, Public Notice, 29 FCC Rcd 738 (2014).

<sup>75</sup> See 5 U.S.C. § 556; see also 47 CFR § 1.201(a).

Commission may determine that a hearing may proceed on a solely written record.<sup>76</sup> Such circumstances include cases in which there is no dispute about the facts.

## **B. Types of Hearings**

Most FCC hearings are conducted by an ALJ. The ALJ is ordered to resolve the factual matters at issue as well as initially determine how, in light of those issues, the FCC should resolve the matter. The ALJ's initial decision is sent to the full Commission as a recommendation, which the FCC may accept or reject as a final decision.

### **1. License Applications and/or Renewals**

For each application for a license and construction permit filed with the FCC, the licensing bureaus (such as WTB and MB) must determine whether the applicant and/or licensee has the citizenship, character, financial, technical, and other qualifications to be an FCC licensee.<sup>77</sup> The licensing bureaus must also determine whether granting the application will serve the public interest, convenience and necessity.<sup>78</sup> When there are substantial and material questions of fact as to whether an applicant and/or licensee meets these qualifications, the FCC must designate the application(s) for a hearing.<sup>79</sup>

### **2. Revocation Proceedings**

The FCC has the authority to revoke any license or construction permit for a number of reasons, including, but not limited to, demonstrations that a licensee has made knowingly false statements to the FCC, has willfully or repeatedly violated FCC rules, and/or otherwise fails to meet the citizenship, character, financial, technical, and other qualifications to be an FCC licensee.<sup>80</sup> Before revoking such a license or construction permit, the FCC must provide the licensee/permittee with an opportunity to appear and give evidence on these matters.<sup>81</sup>

### **3. Cable Carriage Disputes**

If a video programming network has a dispute with a cable company regarding carriage of its programming, it may under some circumstances bring the matter before an ALJ.<sup>82</sup>

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<sup>76</sup> See *Written Hearings NPRM*.

<sup>77</sup> See 47 U.S.C. § 308(b).

<sup>78</sup> See 47 U.S.C. § 309(a).

<sup>79</sup> See 47 U.S.C. § 309(e), (i).

<sup>80</sup> See 47 U.S.C. § 312(a).

<sup>81</sup> See 47 U.S.C. § 312(c).

<sup>82</sup> See, e.g., 47 U.S.C. § 616; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2652, para. 34 (1993 Program Carriage Order).

#### 4. 800 MHz Rebanding Disputes

If the parties to an 800 MHz rebanding dispute are unable to resolve their differences even after referral to a Transition Administrator or other mediator, and any party to the dispute wishes to appeal the decision released by the Chief, Public Safety and Homeland Security Bureau (PSHSB), the matter will be set for an administrative hearing before an ALJ.<sup>83</sup>

##### C. Matters Designated for Hearing

Depending on the type of matter being presented, the document used to initiate a hearing can be titled “Hearing Designation Order,” “Order to Show Cause,” “Notice of Opportunity for Hearing,” or a combination thereof. Generally, such documents are collectively referred to as HDOs. The Enforcement Bureau has authority to act as trial staff in all hearings before the ALJ, even if the matters in the HDO originated with a bureau other than EB. The rules regulating the hearing process (*i.e.*, timing, pleading requirements, types of discovery, presentation of evidence) can be found at part 1, subpart B of the FCC’s rules.<sup>84</sup>

After the HDO is released, parties must file a notice of appearance confirming that they are prepared to appear at the hearing and present evidence. The ALJ will set a scheduling conference, and the parties will begin the process of developing an evidentiary record on the matters set forth in the HDO. The parties and the ALJ also will set a date for an evidentiary hearing, at which time witnesses will testify and evidence will be presented to the ALJ.

A hearing is a public proceeding. All documents related to a hearing proceeding are filed in a public docket. All oral testimony is public. For this reason, the parties usually enter into a protective order to address the handling of confidential and/or other sensitive information during the proceeding.

As noted above, the ALJ will consider the complete record and issue an “Initial Decision,” but that determination is not final. Instead, it is sent as a recommendation to the full Commission, which makes the ultimate judgment for the agency. Parties have an opportunity to “appeal” the ALJ’s initial decision by filing “exceptions” to the Commission. This document is similar to an appellate brief. The FCC may also request oral argument, but that step is very rare. After considering the complete evidentiary record, proposed findings of fact, any exceptions filed, and any oral argument, the full Commission will release a “Final Decision.”

Hearings are “restricted” proceedings for the purposes of *ex parte* communications, as defined by FCC rules.<sup>85</sup> Accordingly, no party to a hearing, including EB hearing staff, may make any presentation to—or have any substantive discussions with—any FCC decision-making personnel without making that presentation available to, or in the presence of, every other party to the hearing.<sup>86</sup> At a minimum, “FCC decision-making personnel” includes the ALJ and his or her

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<sup>83</sup> See 47 CFR § 90.677(d)(2).

<sup>84</sup> See 47 CFR §§ 1.201-1.364.

<sup>85</sup> See 47 CFR § 1.1208 (identifying “all proceedings that have been designated for hearing” as “restricted proceedings” to which the *ex parte* rules apply).

<sup>86</sup> 47 CFR §§ 1.1208 and 1.1202(b).

staff, the Chairman and other Commissioners and their staff, and the General Counsel and Office of General Counsel staff.



## **VIII. GLOSSARY OF ACRONYMS**

**AFR** – Application for Review

**ALJ** – Administrative Law Judge

**CD** – Consent Decree

**CGB** – Consumer and Governmental Affairs Bureau

**DBS** – Direct Broadcast Satellite Operator

**DOJ** – U.S. Department of Justice

**EAS** – Emergency Alert System

**EB** – Enforcement Bureau

**EEO** – Equal Employment Opportunity

**FD** – Fraud Division

**HDO** – Hearing Designation Order

**IHD** – Investigations & Hearings Division

**LOIs** – Letters of Inquiry

**MB** – Media Bureau

**MDRD** – Market Disputes and Resolution Division

**MPVDs** – Multichannel Video Programming Distributors

**NALs** – Notices of Apparent Liability

**NOH** - Notice of Opportunity for Hearing

**NOUO** – Notice of Unauthorized Operation

**NOV** – Notice of Violation

**OBC** – Office of the Bureau Chief

**OFD** – Office of the Field Director

**PFR** – Petition for Reconsideration

**PSHSB** – Public Safety & Homeland Security Bureau

**SED** – Spectrum Enforcement Division

**TCD** – Telecommunications Consumers Division

**USF** – Universal Service Fund

**WTB** – Wireless Telecommunications Bureau