ABC, Inc.

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Federal Communications Commission
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BY EMAIL AND BY HAND

Marlene H. Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

Attn: Melanie Godschall
Investigations and Hearings Division
Enforcement Bureau, Room 4-C330

Re: Station WABC-TV, New York, NY
Station KABC-TV, Los Angeles, CA
Station WLS-TV, Chicago, IL
Station KGO-TV, San Francisco, CA

File Nos. EB-06-IH-3732, -7006, -7010, and -3693

Dear Ms. Godschall:

We represent American Broadcasting Companies, Inc., licensee of WABC-TV, New York, N.Y. ("WABC"); ABC Holding Company, Inc., licensee of KABC-TV, Los Angeles, Cal. ("KABC"); WLS Television, Inc., licensee of WLS-TV, Chicago, Ill. ("WLS"); and KGO Television, Inc., licensee of KGO-TV, San Francisco, Cal. ("KGO").[1] We write in reply to the Letters of Inquiry ("LOI's") sent by Hillary S. DeNigro, Chief, Investigations and Hearings Division, on April 26, 2007 in the above matters inquiring about the use of certain video news release ("VNR") material in news reports aired: (1) by WABC on or about August 24, 2006; (2) by KABC on or about August 24, 2006; (3) by WLS on or about August 24, 2006; (4) by KGO on or about August 24, 2006; and (5) by KGO on or about June 28, 2006.

[1] American Broadcasting Companies, Inc.; ABC Holding Company, Inc.; WLS Television, Inc.; and KGO Television, Inc.; are all directly or indirectly wholly owned subsidiaries of ABC, Inc. ("ABC").

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What follows, in narrative form, are the answers to the questions posed by the LOI's.

Question 1

A. News Reports Concerning the FDA's August 24, 2006 Announcement About the Plan B Pill.

On August 24, 2006, the Food and Drug Administration (FDA) announced that it had approved the Plan B birth control pill, also known as the "morning after" pill, for over-the-counter sale without a prescription to women 18 and over. The pill had been available by prescription since 1999.

That day, Barr Pharmaceuticals, the maker of the Plan B pill, made generally available to the media via satellite feed, internet website, and videocassette a produced video press release and additional b-roll and soundbite materials related to the FDA's announcement (collectively "the Barr video press release" or "the Barr materials"). These materials included several soundbites about the FDA decision from two university professors – Kathleen Hill-Besinque, Associate Professor of Clinical Pharmacy at the University of Southern California School of Pharmacy, and Nancy Roberson Jasper, Assistant Clinical Professor of Obstetrics and Gynecology at the College of Physicians and Surgeons at Columbia University. In the soundbites, Professor Hill-Besinque and Professor Jasper briefly described the FDA's ruling and how the Plan B pill can be used to prevent unintended pregnancy. The b-roll material included images of the Plan B pills in their packaging, the pills coming off mechanical lines into their bottles, exterior and interior shots of Barr Laboratories buildings, and generic footage inside a pharmacy.

i. Reports Written, Produced and Distributed by ABC NewsOne or ABC News

ABC NewsOne is a news service operated by ABC News which supplies news material throughout the day to ABC owned stations and affiliated stations. The material distributed by ABC NewsOne includes affiliate news reports, ABC News reports previously broadcast over the ABC Television Network, and reports produced by ABC NewsOne.

On August 24, 2006, ABC NewsOne distributed five different news reports written and produced by ABC NewsOne about the FDA's Plan B pill announcement. These reports included: a report distributed at 12:21 PM ET, by ABC News correspondent Rob Simmelkjaer; reports distributed at 4:13 PM, 8:39 PM, and 9:39 PM ET, by ABC News correspondent Andrea Canning; and a report distributed at 5:29 PM ET which included images and an accompanying script but no tracking voice (the ABC NewsOne affiliate could use its own anchor or correspondent to provide the track). On August 25, 2006, ABC NewsOne wrote, produced and distributed at 3:40 AM ET an additional news report on the subject by ABC News correspondent Maya Kulycky.

At some point during the morning of August 24, ABC News obtained the Barr video press release materials by downlinking a satellite feed provided by Barr Pharmaceuticals for downloading, free of charge, by any interested news organization for their potential use as off-air resource material or on-air use. The use of such satellite downlinks to access corporate video press release and handout materials typically is not conditioned on any exchange of payment or other valuable consideration between the provider of the material and the news organization or any promise by the news organization to use the materials in any particular fashion or, indeed, at all. To the best of ABC's knowledge, neither ABC News, ABC NewsOne, ABC, nor any of their personnel received any payment or other valuable consideration from Barr Pharmaceuticals, from the public relations firm employed by Barr Pharmaceuticals (MultiVu Media Relations), nor from any representative of Barr Pharmaceuticals or MultiVu in connection with this material or these reports. To the best of ABC's knowledge, neither ABC News, ABC NewsOne, ABC, nor any of their personnel made any promise or representation to Barr Pharmaceuticals, MultiVu, or any representative of Barr Pharmaceuticals or MultiVu that any of the Barr materials would be used in any reports.

None of the reports produced and distributed by ABC NewsOne used or followed the script of the video press release distributed by Barr Pharmaceuticals. Instead, the scripts and images for all of the ABC NewsOne reports were based entirely on the editorial decisions of ABC NewsOne journalists. Each script reported on the FDA decision, reported on what it meant, and, notably, included comments from both supporters and critics of the Plan B pill, including persons who had opposed the proposal that it be made available over-the-counter.

The 12:21 PM report by correspondent Rob Simmelkjaer included, among other elements, a single soundbite from Professor Kathleen Hill-Besinque taken from the Barr video press release:

> This is a historic decision. For the first time in the 40-year history of oral contraceptives, American women 18 and over will have timely access to a safe and effective product to prevent unintended pregnancy in the event of a contraceptive failure.

The 4:13 PM and 8:39 PM reports by Andrea Canning included a slightly shortened version of the same soundbite from Professor Hill-Besinque:

> For the first time in the 40-year history of oral contraceptives, American women 18 and over will have timely access to a safe and effective product to prevent unintended pregnancy.

(The 4:13 PM and 8:39 PM reports distributed by ABC NewsOne were identical except that the on-camera "tag" by correspondent Canning was re-shot with a dark, nighttime background for the second report.)

For each report, ABC NewsOne indicated to stations on the script it provided with its transmitted report that Professor Hill-Besinque should be identified on-air with a superimposed graphic ("super") saying "Kathleen Hill-Besinque, USC School of Pharmacy."[2] Neither the report itself, nor any instructions from ABC NewsOne to its station affiliates identified the soundbite or any of the b-roll as having been distributed by Barr Pharmaceuticals in its video press release.

The other reports produced and distributed by ABC NewsOne on August 24 and August 25 – including the other Andrea Canning report, the untracked or "silent" report, and the Maya Kulycky report – did not include the soundbite from Professor Hill-Besinque or any other soundbites from the Barr video press release.

All five of the reports produced by ABC NewsOne did include some minimal b-roll that appears to have come from the Barr video press release, including brief images of Plan B pills in their packaging and in the manufacturing plant and brief exterior shots of the Barr Pharmaceuticals offices.[3] Most of the b-roll in each of the reports did not come from Barr Pharmaceuticals. None of the reports identified any of the material as having been distributed by Barr Pharmaceuticals, nor did ABC NewsOne provide such identifying information to its affiliated stations.

The inclusion of the Professor Hill-Besinque soundbite violated longstanding policy at ABC NewsOne and ABC News which generally prohibits the use of soundbites from video press releases or promotional handouts, unless the fact and source of the soundbite is itself newsworthy, in which case its source is to be accurately and prominently stated. ABC NewsOne policy further provides that the source of b-roll images taken from video press releases or hand-out material should generally be identified, and certainly so if the identity of the b-roll's source has any relevance to or bearing on the credibility or meaning of the b-roll. Since the reports were distributed, ABC NewsOne has reviewed its policies and requirements with its personnel.

As will be described further in the following section, each of the four ABC stations to which LOI's have been directed in this proceeding – WLS, KABC, KGO, and WABC – either aired one or more of these ABC NewsOne reports during their respective local newscasts, or used some of the material from the ABC NewsOne reports in preparing their own local news reports (as they are entitled to do under their agreement with ABC NewsOne), or both.

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[2] ABC NewsOne typically sends video without embedded supers so that affiliates who use the footage can provide the supers in their own graphic style. Suggested supers are included in the script that ABC NewsOne provides with the report.

[3] The video press release, including soundbites and b-roll, distributed by Barr Pharmaceuticals on August 24, 2006, can be viewed at http://www.prnewswire.com/broadcast/25238/consumer.shtml.

In addition to these reports produced and distributed by ABC NewsOne, ABC News included two reports written and produced by ABC News journalists about the FDA's Plan B announcement in the August 24, 2006 edition of the ABC News program World News with Charles Gibson, broadcast over the ABC Television Network. The first report focused on the FDA decision itself, the second on the reaction among young women and doctors. Both included statements from supporters and critics of Plan B. Neither report included the soundbite from Professor Hill-Besinque or any other soundbites from the Barr video press release. Each report included some minimal b-roll that appears to have come from the Barr materials. In the first report, by ABC News correspondent Jessica Yellin, the b-roll shot of the Plan B pills taken in their packaging from the Barr video press release was identified by ABC with the on-screen super "Barr Pharmaceuticals, Inc." In the second report, by ABC News correspondent Nancy Weiner, b-roll of Plan B pills in their packaging and pills on a manufacturing assembly line apparently taken from the Barr materials was not identified by source.

ABC News journalists also wrote, produced and broadcast a report about the FDA's Plan B announcement on the August 25, 2006 edition of the ABC News program Good Morning America. The report, by ABC News correspondent Jessica Yellin, did not include any soundbite from the Barr video press release. It did include brief images of the Plan B pills in their packaging that appears to have come from the Barr materials, although it was not identified as such on-air.

World News with Charles Gibson, including its reports about the Plan B announcement, and Good Morning America, including its report about the Plan B announcement, were broadcast on August 24 and August 25, respectively by each of the ABC stations to which the instant LOI's were sent (KABC, WLS, KGO, and WABC). The World News and GMA pieces were later re-fed by ABC NewsOne to NewsOne affiliated stations, including the ABC Stations, without on-screen supers, for the stations' use for excerpting in their own local newscasts. The script accompanying the ABC NewsOne retransmission of the first World News report included a suggested super for "Barr Pharmaceuticals," since such a super had been included in the World News broadcast.

ii. Reports Written, Produced and Distributed by Stations

In addition to their broadcast of the ABC Television Network World News and Good Morning America programs, each of those stations broadcast reports about the Plan B announcement during their respective local newscasts, as follows:

WLS, Chicago

WLS aired reports about the FDA's Plan B pill announcement during its 11 AM, 4:30 PM, and 10 PM local newscasts on August 24, 2006. The 10 PM report was rebroadcast the next morning during the station's 5 AM newscast.

Each of the reports was locally written and produced by WLS journalists but incorporated some footage from the pieces sent out by ABC NewsOne. Each included comments from both supporters and critics of the new, wider availability of Plan B.

The report broadcast in WLS' 4:30 PM newscast included a soundbite from Professor Hill-Besinque which WLS journalists took from an ABC NewsOne report and chose to include for purely journalistic reasons. WLS did not know and the report did not state that the soundbite had originally come from the Barr video press release. The other WLS reports did not include that soundbite or any other soundbite from the Barr materials.

All three of the reports included some minimal b-roll that appears to have been taken from the Barr video press release, taken by WLS from ABC NewsOne reports which had used them. The b-roll included shots of a Barr Pharmaceuticals building and shots of the Plan B pills in their packaging. WLS did not know and the reports did not state that the materials had originally come from Barr.

To the best of WLS' knowledge, no one at WLS independently downloaded or received the Barr press release or accessed the Barr materials used in the WLS reports from any source other than the ABC NewsOne reports. To the best of WLS' knowledge, neither WLS nor any WLS personnel received any payment or other valuable consideration from Barr Pharmaceuticals, from the public relations firm employed by Barr Pharmaceuticals (MultiVu Media Relations), nor from any representative of Barr Pharmaceuticals or MultiVu in connection with this material or these reports. To the best of WLS' knowledge, neither WLS nor any WLS personnel made any promise or representation to Barr Pharmaceuticals, MultiVu, or any representative of Barr Pharmaceuticals or MultiVu that any of the materials would be used in any reports.

KGO, San Francisco

KGO aired reports about the FDA's Plan B pill announcement during its 11 AM, 5 PM, 6 PM, and 11 PM local newscasts.

The report that KGO aired during its 11 AM newscast was the ABC NewsOne report by ABC News correspondent Rob Simmelkjaer, which KGO aired without change. KGO did not know and did not state on-air that the soundbite from Professor Hill-Besinque and some of the b-roll within that ABC NewsOne report had been taken by ABC NewsOne from the materials distributed by Barr Pharmaceuticals.

KGO produced its own reports about the Plan B pill announcement for its 5 PM and 6 PM shows, and rebroadcast the report from the 5 PM newscast later in its 11 PM newscast.

The report broadcast in the 5 PM and 11 PM newscasts was locally written and produced by KGO journalists. It included some material from the ABC NewsOne report

but consisted primarily of local material shot by KGO. It did not include any soundbite from Professor Hill-Besinque or any other soundbite from the Barr video press release. Like the ABC NewsOne reports, this report written and produced by KGO included comment from both supporters and critics of Plan B. The report did include some brief b-roll taken from the ABC NewsOne report that it appears came originally from the materials distributed by Barr. KGO did not know and the report did not state that the b-roll had originally come from Barr.

The report broadcast in the 6 PM show was locally written and produced by KGO journalists. Again, the report included soundbites from both supporters and critics of the Plan B pill. KGO journalists chose to include within the report for purely journalistic reasons a soundbite by Professor Hill-Besinque, which they took from an ABC NewsOne report. They also included for journalistic reasons some b-roll from the ABC NewsOne report that appears to have come from the Barr video press release. KGO did not know and the report did not state that the soundbite and the materials had originally come from Barr.

To the best of KGO's knowledge, no one at KGO independently downloaded or received the Barr press release or accessed the Barr materials used in the KGO reports from any source other than the ABC NewsOne reports. To the best of KGO's knowledge, neither KGO nor any KGO personnel received any payment or other valuable consideration from Barr Pharmaceuticals, from the public relations firm employed by Barr Pharmaceuticals (MultiVu Media Relations), nor from any representative of Barr Pharmaceuticals or MultiVu in connection with this material or these reports. To the best of KGO's knowledge, neither KGO nor any KGO personnel made any promise or representation to Barr Pharmaceuticals, MultiVu, or any representative of Barr Pharmaceuticals or MultiVu that any of the materials would be used in any reports.

KABC, Los Angeles

KABC aired reports about the FDA's Plan B pill announcement during its 11 AM, 4 PM, 5 PM, and 11 PM local newscasts on August 24, 2006, and during its 5 AM newscast on August 25.

The reports aired during the station's 11 AM, 5 PM, and 5 AM newscasts were ABC NewsOne reports by ABC News correspondents Rob Simmelkjaer, Andrea Canning, and Maya Kulycky, respectively. KABC did not know and did not state on-air that the soundbite from Professor Hill-Besinque that appeared in the Simmelkjaer and Canning reports had been taken by ABC NewsOne from the video press release materials distributed by Barr. In the Simmelkjaer piece, KABC added a "Barr Laboratories, Inc." super over a b-roll image of the exterior of the Barr Laboratories building, and in the Canning piece KABC added a "Barr Pharmaceuticals Inc." super over b-roll of Plan B pills in their packaging. No one at KABC recalls the circumstances under which these supers were added. KABC management assumes that in each instance a writer or producer, seeing the b-roll, concluded that it likely had come from Barr Pharmaceuticals

and decided to add the super in an exercise of caution. Other b-roll within the ABC NewsOne pieces that appears to have been taken by ABC NewsOne from the Barr video press release was not given a super by KABC.

The reports broadcast in the 4 PM and 11 PM newscasts were locally produced by KABC journalists. They included some material from the ABC NewsOne report as well as local material shot by KABC. Among the material that KABC journalists chose to include in the 4 PM report from the ABC NewsOne report for purely journalistic reasons was part of the soundbite from Professor Hill-Besinque, here further shortened to say only: "American women eighteen and over will have timely access to a safe and effective product to prevent unintended pregnancy." Like the ABC NewsOne reports and reports produced by the other ABC stations, the KABC-produced reports also included comment from critics of the Plan B pill. KABC did not know and the report did not state that the soundbite from Professor Hill-Besinque had originally come from a Barr video press release. Both the 4 PM and 11 PM reports included some brief b-roll from the ABCNews One report that it appears came from the Barr materials. In the 11 PM report, KABC added a "Courtesy Barr Pharmaceuticals" super over b-roll of pills on a conveyer belt. No one at KABC recalls the circumstances under which this super was added. KABC management assumes again that a writer or producer, seeing the shot of the pills in production, concluded that it likely had come from Barr Pharmaceuticals and decided to add the super in an exercise of caution. Other b-roll within the KABC-produced pieces that incorporated ABC NewsOne footage that appears to have been taken from the Barr video press release was not given a super by KABC.

To the best of KABC's knowledge, no one at KABC independently downloaded or received the Barr press release or accessed the Barr materials used in the KABC reports from any source other than the ABC NewsOne reports. To the best of KABC's knowledge, neither KABC nor any KABC personnel received any payment or other valuable consideration from Barr Pharmaceuticals, from the public relations firm employed by Barr Pharmaceuticals (MultiVu Media Relations), nor from any representative of Barr Pharmaceuticals or MultiVu in connection with this material or these reports. To the best of KABC's knowledge, neither KABC nor any KABC personnel made any promise or representation to Barr Pharmaceuticals, MultiVu, or any representative of Barr Pharmaceuticals or MultiVu that any of the materials would be used in any reports.

WABC, New York

WABC aired reports about the FDA's Plan B pill announcement during its noon, 5 PM, and 11 PM local newscasts on August 24, 2006 and during its 5 AM and 6 AM newscasts on August 25, 2006. The reports on August 25 did not appear to contain any material from the Barr video news release.

The report aired during the 11 PM newscast on August 24 was an ABC NewsOne report by Andrea Canning, which WABC aired without change. That report included the

soundbite from Professor Hill-Besinque and some b-roll taken from the materials distributed by Barr Pharmaceuticals. WABC did not identify the soundbite or those materials as having come from Barr Pharmaceuticals.

WABC produced its own reports about the Plan B pill announcement for its noon and 5 PM newscasts on August 24. The report in the 5 PM newscast did not include the Professor Hill-Besinque soundbite or any other soundbite from the Barr video press release. Instead, it included soundbites and other materials obtained locally by WABC journalists and some b-roll from the Barr video press release. Like the ABC NewsOne reports and the reports by the other ABC stations, the WABC report presented the position of critics of Plan B as well as supporters.

In the noon report produced by the station, WABC journalists, for purely journalistic reasons, chose to include two soundbites from the Barr video press release, neither of which was included in the ABC NewsOne reports. One of the soundbites was from Professor Hill-Besinque, in which she said: "Having Plan B available over the counter is great news for women 18 and over." The other soundbite taken by WABC journalists from the Barr video press release was from Professor Nancy Roberson Jasper of Columbia University, in which she said: "Over the counter access to Plan B is critical because it should be started within three days of unprotected sex." The report also included some b-roll from the Barr video press release as well as other b-roll and other interview material locally shot by WABC journalists. The report also presented the position of those critical of Plan B.

WABC personnel do not recall how they received access to the material distributed by Barr in its video press release. They believe that the station may have downlinked the material by satellite during a general morning satellite feed by Barr, available to any news organizations to download, perhaps simultaneously with ABC News.

To the best of WABC's knowledge, the inclusion of this material reflected purely editorial judgments by WABC journalists. To the best of WABC's knowledge, neither WABC nor any WABC personnel received any payment or other valuable consideration from Barr Pharmaceuticals, from the public relations firm employed by Barr Pharmaceuticals (MultiVu Media Relations), nor from any representative of Barr Pharmaceuticals or MultiVu in connection with this material or these reports. To the best of WABC's knowledge, neither WABC nor any WABC personnel made any promise or representation to Barr Pharmaceuticals, MultiVu, or any representative of Barr Pharmaceuticals or MultiVu that any of the materials would be used in any reports.

The use of these soundbites from the Barr material violated WABC's longstanding policies regarding video press releases. Following those reports, WABC personnel were reminded of the station's policy against the use of VNR material in news except under limited circumstances, with proper attribution, as described more fully below.

B. KGO Report of June 28, 2006

KGO's 6 PM local newscast on June 28, 2006, included a consumer advice piece with summer driving tips, particularly regarding car rentals. The piece – presented by KGO consumer correspondent Michael Finney – provided suggestions including: use websites to find the most inexpensive local gas stations (usually not the ones near the car rental agencies); avoid getting lost by getting good directions or using a GPS navigational system; consider relying on your credit card and your own auto insurance, rather than obtaining insurance through the rental company; avoid renting from airport locations, which tend to be more expensive; and consider bringing along your own entertainment for your children, rather than renting special equipment.

The report included three soundbites. One was from Lynn Hayes, identified on-air as Familytravel.com editor:

> To enjoy the time in the car with your kids, bring along things that they're gonna enjoy. Cards, books, movies, maybe a book on tape.

One was from Lauren Fix, identified on-air as Automotive Expert:

> One of the easiest ways to save money this summer is to get yourself a GPS unit. It'll give you directions and help you, like help you redirect around road blocks or collisions. It's a smart way so you're not getting zero miles to the gallon, you actually keep rolling and getting to your destination.

One was from Glen Mancuso, identified on-air as being with Allstate Insurance:

> The first thing you should do, if you didn't take the coverage through the rental company is call your company, call your agent, a local claims office.

Lynn Hayes is an editor at familytravel.com who has been quoted in publications such as Money magazine.[4] The soundbite included in the KGO report was not obtained in an interview by a KGO journalist. Rather, the soundbite was taken by the KGO producer of the report from a video prepared and distributed for Ms. Hayes by DWJ Television. The producer found and downloaded the video on the Pathfire news server. The Pathfire server is used by news services like ABC NewsOne and CNN NewsSource to distribute their news reports to affiliated stations. Public relations companies can also post video press releases and other video hand-out material on Pathfire. The use of the soundbite in the KGO report without proper identification violated KGO rules and policies.

[4] See, e.g., "Why Boomers Might Want to Travel in Packs," Money Magazine, July 2007, p. 42.

Lauren Fix has appeared numerous times as a car expert in taped and live segments on television programs such as CNN and NBC's Today show. See, e.g., Today, July 21, 2006; CNN, October 14, 2006. She has also been quoted as a car expert in numerous publications. See, e.g., USA Today, "More Hotels Give Guests Opportunity to Go Ahhh," Sept. 26, 2006, p. 5B; Essence, "Winter Safety Tips," December 2005, p. 204. The soundbite from Ms. Fix included in the KGO report did not come from an interview with a KGO journalist. Again, instead, the KGO journalist who produced the KGO report took the soundbite from a video prepared and distributed for Ms. Fix by a PR firm, DWJ Television, which the producer found and downloaded from the Pathfire service. The use of the soundbite in the KGO report, without proper identification, violated KGO rules and policies.

Finally, Glenn Mancuso is an Allstate agent. The soundbite from Mr. Mancuso used in the KGO report did not come from an interview with KGO but rather was taken from an Allstate VNR distributed by Medialink Worldwide, which the producer found and downloaded from the Pathfire server. Again, although Mr. Mancuso was properly identified as being with and representing Allstate, the use of the soundbite in the KGO report without identifying it as coming from an Allstate VNR violated KGO rules and policies.

The report also included, without attribution, some b-roll of rental car counters taken from the Allstate VNR.

After the use of VNR in this report was identified by the Center for Media and Democracy, KGO news director Kevin Keeshan investigated the matter and confirmed the improper use. The producer was later terminated for this and other infractions of station policy. Station personnel were reminded of the station's policies and procedures regarding video press release and other handout material.

To the best of KGO's knowledge, the inclusion of this material reflected purely editorial judgments by the KGO producer. To the best of KGO's knowledge, neither KGO, nor the KGO producer of the report, nor any KGO personnel received any payment or other valuable consideration from Lynn Hayes, Lauren Fix, Glen Mancuso, DWJ Television, Allstate Insurance, Medialink Worldwide, or any other person or entity in connection with this material or these reports. To the best of KGO's knowledge, neither KGO, nor the KGO producer of the report, nor any KGO personnel made any promise or representation to Lynn Hayes, Lauren Fix, Glen Mancuso, DWJ Television, Allstate Insurance, Medialink Worldwide, or any other person or entity in connection that any of the materials would be used in any reports.

Question 2

To the best of our knowledge, no employee or representative of WLS, WABC, KABC, KGO, ABC NewsOne, ABC News, ABC, Inc., or any of ABC's parent or

subsidiary companies received or was promised any consideration, from any source, in exchange for airing any of the Barr Pharmaceuticals video press release material or for including any of that material in any news report. To the best of our knowledge, no employee or representative of KGO, ABC, Inc., or any of ABC's parent or subsidiary companies received or was promised any consideration, from any source, in exchange for airing any of the video material in the June 28, 2006 report. Indeed, the News Departments of WLS, KABC, WABC, and KGO, the News Departments of their six sister ABC owned television stations, ABC NewsOne, and ABC News all strictly forbid (i) the receipt of payment or other valuable consideration of any kind in exchange for news coverage and (ii) the promise of news coverage in exchange for payment or valuable consideration of any kind.

Question 3

(a) The ten television stations directly or indirectly licensed to ABC, Inc., including but not limited to KABC, WLS, WABC, and KGO (collectively, the "ABC Stations"), strive at all times to comply fully with 47 U.S.C. § 317 of the Communications Act of 1934, as amended, and the Commission's sponsorship identification rules. The ABC Stations identify on-air any material for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the ABC Stations, from any person. In addition, where a report has been made to any of the ABC Stations of circumstances that would have required an announcement had the consideration been received by one of the Stations, an appropriate announcement is made. The ABC Stations also exercise reasonable diligence to obtain from their employees, and from other persons with whom they deal in connection with any program or program matter for broadcast, information to enable them to make the appropriate announcements. As noted above, the ABC Stations, ABC News, and ABC NewsOne all strictly forbid the receipt of any money or other valuable consideration in return for a promise to include material in a news report.

(b) The ABC Stations, ABC NewsOne, and ABC News have longstanding policies against airing video press release packages as news reports, and of using video and sound bites from video press releases in news reports only in limited circumstances and with appropriate attribution of the source of the material and/or the affiliation of the speakers. ABC Stations, ABC NewsOne, and ABC News may occasionally use excerpted video or interview material from video press releases or other hand-out video material from corporate, government, or other sources when the excerpt is relevant and newsworthy to a station-produced news report – e.g., a shot of a new car from a video press release in a station news report about new trends in fuel efficient automobiles, or an excerpt from a company spokesman touting a product in a station news report presenting criticism of that product's safety and referring specifically to the video press release. In using video press release material, it is the Stations' policy to identify the source of the material whenever it is appropriate and relevant to the viewer's understanding or evaluation of the information being presented. Thus, in the examples given above, it

would be Station, ABC NewsOne, and ABC News policy clearly to identify the source of the interview excerpt from the company spokesman, whereas it might or might not be deemed journalistically necessary to identify the images of the new car as having been provided by the car company, depending on the precise context.

After the events at issue here came to light, ABC NewsOne, ABC News, and the Stations reiterated their video press release policies to their news staff, including the staff involved in the particular incidents.

Question 4

Videotapes were hand-delivered to the Commission today. Transcripts are attached to this letter. No other responsive materials are available.

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It is important to emphasize, at the outset, that in none of the broadcasts at issue here did ABC NewsOne, ABC News, or the ABC Stations simply take a packaged report from a video press release and present it to the public as if it were a news report it had produced itself. To the contrary, each of these reports reflected the editorial writing, editing, and production of the journalists at ABC NewsOne, ABC News, and the ABC Stations, respectively. To the best of ABC's knowledge, no one at any of those news organizations received any payment or other consideration in return for placing, or promising to place, any of the video press release or hand-out materials in the news reports. To the best of ABC's knowledge, every decision regarding the inclusion of soundbites or other material in each of these reports was made entirely for journalistic reasons.

Moreover, each of the reports in question provided a service to the viewing public. The various reports produced and presented by ABC NewsOne, ABC News, and the Stations concerning the FDA's decision regarding Plan B all presented valuable and accurate information about this newsworthy development to viewers. Notably, all presented a range of viewpoints about the FDA announcement, including critics of the Plan B pill as well as supporters. The report produced and presented by KGO regarding driving tips also provided viewers with useful common sense suggestions and information.

ABC NewsOne, ABC News, and the news staffs of each of the ABC Stations are all committed to preparing and providing news reports of the highest journalistic caliber. Part of this commitment means identifying sources of information clearly and accurately. The journalistic policies of ABC NewsOne, the ABC Stations, and ABC News all provide that the affiliation of news interview subjects be identified to the extent that such affiliation is known or can easily be discovered and is relevant and material to the interview. The journalistic policies of ABC NewsOne, the Stations, and ABC News also provide that promotional materials distributed by a company or entity should be used in

news reports only in very limited circumstances and, if used, should be properly identified and attributed unless such identification is unnecessary given the material's context and use.

The June 28, 2006 report on consumer driving tips produced and broadcast by KGO, San Francisco, clearly violated the Station's news policies regarding the use of video press release material and appropriate source identification. Similarly, some of the reports produced and distributed by ABC NewsOne and the Stations – particularly those including soundbites from Professors Hill-Besinque and, in the case of WABC, Professor Jasper – violated their news policies on the use of video press release material and appropriate source identification that the ABC Stations' News Departments and ABC NewsOne strive for as a matter of good journalistic practice. Following the incidents, news management at the Stations and ABC NewsOne took steps to remind news personnel of their policies in this area.

Nevertheless, we firmly believe that in each of these cases, the use of the video press release material and the failure to provide full identification of its source did not constitute a violation of the sponsorship identification provisions of the Communications Act, the FCC rules promulgated thereunder, or any other federal law or regulation. To the best of ABC's knowledge, in none of these cases did any ABC personnel receive any money, service or other valuable consideration from the source or enter into a quid pro quo agreement to include matter in a broadcast in exchange for such consideration. For the FCC to require and to police the identification of the sources of information included in broadcast journalists' news reports in the absence of a quid pro quo agreement with the source and the broadcaster's receipt of valuable consideration beyond the material or information itself would go far beyond the plain meaning of the statutes and regulation at issue, far beyond their original intent, and far beyond previous interpretations they have received. It would also be flatly at odds with the First Amendment protection for broadcast journalists' newsgathering and editorial activities.

The Commission bases its authority for this inquiry, and its prior April 2005 Public Notice regarding video news releases in MB Docket No. 05-171, primarily on the sponsorship identification statute contained in section 317 of the Communications Act of 1934, as amended, and section 73.1212 of the Commission's rules. But the very words of the statute and rule, and their past construction by the FCC, make clear that they do not apply to the mere receipt or obtaining by a station of free interview material or video for possible use in a news report.

The classic case requiring sponsorship identification is that in which a broadcast station directly received money, service or other valuable consideration in exchange for promotional mention of particular products, services or companies. See 47 U.S.C. § 317(a); 47 C.F.R. § 1212(a). See also Letter to Earl Glickman, 3 F.C.C.2d 326 (1966) (illegal to solicit payments from clients desirous of station including certain matter in programs without including in such programs the fact that those third parties paid station

for inclusion of that matter). Section 317(a)(1) of the Communications Act of 1934, 47 U.S.C. § 317(a)(1), requires that:

> All matter broadcast by any . . . station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

Accord 47 C.F.R. § 1212(a). The same section of the statute immediately goes on to say:

> *Provided,* That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

Id.; accord 47 U.S.C. § 508(f); 47 C.F.R. § 121(a)(2). Until Congress added this proviso to the statute, the Commission was attempting to interpret section 317 as requiring sponsorship disclosure of all material provided to stations for free or for a nominal charge. See National Association for Better Broadcasting, 4 F.C.C. Rcd. 4988 (1989) at ¶ 15. This proviso was enacted by Congress in 1960 specifically to avoid some of the hardships resulting from this more expansive interpretation of section 317 by the Commission. Id.

The House Report on the 1960 amendments to the Act, H.R. Rep. No. 1800 (86th Congress, 2d Session), as reprinted in 1960 U.S.C.C.A.N. 3516, set out a number of illustrative examples intended as a guide to interpretation. These examples were included at the specific request of the FCC (see id. at 3538) (Letter from FCC Chairman Frederick W. Ford to the Honorable Oren Harris, May 20, 1960), and were reiterated without change by the FCC. Applicability of Sponsorship Identification Rules, 40 F.C.C. 141 (1963).

The illustrative examples make clear that a station's receipt of news releases and the availability of interview subjects were never intended to trigger the sponsorship identification requirement. Example 11 explicitly states:

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

Example 19 states:

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

These scenarios are precisely analogous to the situations at issue here, in which the stations received video materials that are the modern-day electronic equivalent of the written press release. Again, to the best of ABC's knowledge, no one at ABC NewsOne, ABC News, or the Stations received any money or anything else of value in exchange for airing any portion of the video press release material. Nor to the best of ABC's knowledge did anyone at ABC NewsOne, ABC News, or the Stations promise or agree to air anything they were provided, to do so in any particular form, or to include any mention at all, let alone any disproportionate mention, not reasonably related to the subject matter of the report, of particular organizations, products or services. Again, to the best of ABC's knowledge, the materials were provided and received unconditionally, without any corresponding promise or obligation on the part of ABC NewsOne, ABC News, or the Stations to use the materials at all, in any way. Thus, the quid pro quo that underlies the requirement of a sponsorship identification – the agreement to include specific material in a broadcast in exchange for valuable consideration – was entirely absent in the instant cases.

Again, this is not a case in which ABC *employees* received consideration in exchange for promotional mention. Section 507(a) of the Communications Act, 47 U.S.C. § 507(a), requires that:

> . . . [A]ny employee of a . . . station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

Read in conjunction with section 317(c) of the Communications Act, 47 U.S.C. § 317(c), this statute requires that promotional consideration paid to station employees, rather than directly to the station, must be disclosed on air. This statute was implicated, for example, where radio station listeners paid station announcers personally to dedicate programs to their friends or relatives and the station did not so indicate in the broadcast. See KMAP, Inc., 44 F.C.C.2d 971 (1974). It would also be implicated if radio program directors or disc jockeys received cash or other property to play a particular release or performer. In this case, however, to the best of ABC's knowledge, no one at the Stations, or at ABC NewsOne or ABC News, received any personal benefit. Rather, in each, journalists simply accessed video press release material which had been made available by a company or firm for accessing and potential use by any interested news organization, either on-air or purely as off-air resource material.

The Commission's April 2005 Public Notice on video news releases in MB Docket No. 05-171 (April 13, 2005) suggests that the Commission might also rely on Sections 507(c) and 317(b) and (c), 47 U.S.C. §§ 507(c), 317(b), (c), to regulate video news releases. But these statutory provisions, too, are inapposite. Section 507(c) provides:

> [A]ny person who supplies to any other person any program or program matter . . . intended for broadcasting over any . . . station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

Section 317(c) of the Act, 47 U.S.C. § 317(c), requires that a station "exercise reasonable diligence to obtain . . . from persons with whom it deals directly in connection with any program or program matter for broadcast . . . information needed to enable such licensee to make the announcement required by this section." Accord 47 C.F.R. § 1212(b). And section 317(b), 47 U.S.C. § 317(b), mandates that if a station receives a report "of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station." Accord 47 C.F.R. § 1212(c).

These statutory provisions cannot embrace the situation presented when a broadcast news organization uses parts of a video press release, electronic press kit, or other handout material in a news report that it has produced, using its own journalistic judgment. Again, the specific examples of the press release and the interview speaker cited in the House Report and by the Commission belie any suggestion that these provisions should be so broadly construed as to mandate sponsor identification in these circumstances. The journalistic use in a station's news reports of material gleaned from press releases, interviews, and their electronic equivalents – electronic press kits and video press releases – should not and cannot reasonably be viewed as the station's simple airing of a paid-for entertainment or "infomercial" program assembled and produced by an outside entity. The latter is the type of situation contemplated by above sponsor identification provisions; the former – the journalistic excerpting of materials distributed by others – is not. Again, the illustrative examples discussed above make clear that a station's receipt and journalistic excerpting of a press release or interview material do not trigger the sponsor identification requirements, just as playing a record on air that was provided to a radio station by a record label without disclosing the source does not, without more, violate the sponsor identification rule.

In sum, interpreting the above sections to render the journalistic use of these materials in these broadcasts materials received through an video press release or other handout without full source attribution a violation of statutory sponsor identification

requirements and associated FCC regulations would be a novel and unprecedented reading of these laws that is at odds with the clear intent of Congress' 1960 amendment.[5]

Nor do the reports in question raise a sponsorship identification issue under Section 73.1212(d) of the Commission's rules. That section provides:

> In the case of any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance for which any film, record, transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast on which such material or service is used that such...material or service has been furnished to such station in connection with the transmission of such broadcast matter.

As an initial matter, this provision is not applicable because the materials used in these reports did not constitute a discussion of a "controversial issue of public importance" as that phrase has been construed by the Commission and the courts. While there have been exceedingly few decisions dealing specifically with section 73.1212(d), it is clear that the Commission intended the phrase "controversial issue of public importance" in the section to be construed in the same manner as the same phrase was construed in its more famous setting, the now-deleted Fairness Doctrine. See Amendment of the Commission's "Sponsorship Identification" Rules, 52 F.C.C.2d 701, 710 (1975) (citing The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 11-12 (1974) ("Fairness Report")).

A "controversial issue of public importance," the Commission repeatedly held, is not merely a newsworthy matter or a matter of some debate, but rather a matter that is

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[5] Even if this construction were permissible under the statute, it represents such a sweeping change in the Commission's own interpretation of the rules that imposition of a penalty without a full rulemaking proceeding would violate the ABC Stations' due process rights. See, e.g., Trinity Broadcasting v. FCC, 211 F.3d 618, 632 (D.C. Cir. 2000), citing General Elec. Co. v. EPA, 53 F.2d 1324, 1333-34 (D.C. Cir. 1995). The proper venue for implementing a new, broader and significantly more onerous interpretation of a rule that carries with it significant potential penalties is not an inquiry into a particular licensee's conduct but rather a rulemaking proceeding carrying with it notice to all potential affected broadcasters and the opportunity to be heard. The Commission's April 2005 Public Notice did not accomplish this purpose as it neither initiated a more formal proceeding nor articulated clear guidelines as to what sponsor identification was expected of stations that receive video press releases and use excerpts from them in their news reports but do not receive any consideration for airing and for promising to air that material.

"the subject of vigorous debate within substantial elements of the community in opposition to one another." See, e.g., Fairness Report, 48 F.C.C.2d 1, at ¶ 31. Moreover, for material to trigger obligations under the Fairness Doctrine, the Commission and the courts repeatedly held that it must be not merely concern the issue, or address it in some fashion, but must in so "obvious and meaningful [a] fashion present[] a position on the ultimate controversial issue" and be "so obviously and substantially related" to that issue "as to amount to advocacy of a position on that question." Id. at ¶ 34. See also, e.g., American Security Council Education Foundation v. FCC, 607 F.2d 438, 450 n. 39 (D.C. Cir. 1979) ("national security" not "meaningfully discussed" in news reports, citing FCC precedents to same effect). The Commission and the courts have repeatedly held that to impose fairness doctrine obligations or penalties on broadcasters for material involving anything less than "advocacy of a position" on a highly controversial issue, the subject of largescale continuing debate, "'would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, wide open" (New York Times Co. v. Sullivan, 376 U.S. 254, 270.'" Fairness Report, 48 F.C.C.2d 1, at ¶ 35 (quoting NBC, 25 F.C.C.2d 735, 736-37 (1970)). See also, e.g., Complaint of Brent Buell against WCBS-TV, 97 F.C.C.2d 55 (1984) (same); WRC-TV License Renewal, 52 F.C.C.2d 273, 286 (1975) (same).

The video press release material included in the KGO report on consumer driving tips plainly did not involve any highly controversial issues roiling the San Francisco community or engaging substantial elements of the community in pitched debate. Rather, it involved such mundane and completely uncontroversial matters as using a navigational GPS advice to avoid getting lost, contacting your insurance agent promptly to ensure you get whatever coverage you deserve after an accident, and bringing along a lot of sources of entertainment for your children on long car rides.

The question of whether the FDA should make the Plan B pill available over the counter, and, specifically, the FDA's long postponing of a decision on the issue even after an FDA panel recommended such an action, can reasonably be said to have involved a significant and newsworthy controversy. Whether the issue constituted such a "controversial issue of public importance" sufficient to have triggered Fairness Doctrine obligations is debatable. Cf. Avery D. Post, 97 F.C.C.2d 433 (1984) (expenditure of church funds not a controversial issue of public importance); Barry G. Silverman, 63 F.C.C.2d 507 (1977) (no controversial issue over whether commercial television adequately served the public); National Welfare Rights Organization, 41 F.C.C.2d 187 (1973) (no controversial issue over whether medication can help treat hyperactive children); John H. Detar, 32 F.C.C.2d 933 (1972) (family planning as a means of controlling overpopulation not a controversial issue). Moreover, the FDA's action to a great extent marked the resolution of the issue, and a consequent diminishing – if not complete closure – of the debate on the question. Cf. Ward & Mendelsohn, 78 F.C.C.2d 1191, 1194 n. 3 (1980) ("Depending on the circumstances and the precise nature of the issue or issues alleged to be controversial and of public importance, passage of legislation may so transform the nature of the controversy and the issues so that Fairness Doctrine concerns are eliminated.").

In any event, the footage from the Barr video press release that was included in the reports distributed by ABC NewsOne and aired by ABC News and the Station news reports did not constitute the kind of advocacy on one side of a controversial issue of public importance that has been deemed necessary to trigger the requirements of the Fairness Doctrine or this section. The Barr material b-roll used in the ABC NewsOne, ABC News, and Station reports merely depicted pills and facilities without expressing anything of any substance about them. The soundbites from the Barr video press release that were included in some of those reports merely and very briefly described the nature of the FDA's decision without any substantive "advocacy." For example, the comments of Professor Kathleen Hill-Besinque that the FDA decision was "historic," that Plan B is "safe and effective," and that it was now available to women 18 and over without prescription were merely factual and did not address in any substantive fashion any of the debated issues surrounding the FDA decision. (Neither the safety nor the efficacy of the pills when properly used was substantially in dispute; the key issue in the debate was whether the availability of the pill might increase promiscuity, sexually transmitted disease, and unwanted pregnancies among those who did not use the pill correctly.) Professor Jasper's comments – expressing the importance of taking the Plan B pill within 72 hours in order for it to be effective – were similarly limited.

In analogous situations under the Fairness Doctrine, the FCC repeatedly held that broadcast materials explaining a new or changed law to the public did not in themselves constitute "advocacy" on a controversial issue of public importance, even if the legislation had been controversial or the general subject matter involved a controversial issue. See, e.g., Nonsectarian Committee for Life, 27 F.C.C.2d 612, 613 (1971) (announcements advising public of changes in New York State law on abortion "did not constitute the presentation of one side of a controversial issue of public importance"); Leading Families of America, 31 F.C.C.2d 594 (1971) (editorials on ways to implement recently enacted Connecticut law relating to abortion not a discussion of a "controversial issue of public importance"); Evan Foreman, 24 F.C.C.2d 303 (1969) (official's statements about federal benefits available under Social Security did not constitute advocacy on controversial issue of pubic importance). See also Fairness Report, 48 F.C.C.2d 1, at ¶ 74 (quoting Complaint of Alan F. Neckritz, 29 F.C.C.2d 807, 812 (1971), aff'd 502 F.2d 411 (D.C. Cir. 1974)) (mere "claims of a product's efficacy or social utility" are not advocacy on a controversial issue, even if the product is itself the subject of controversy).

Over the years, in interpreting the Fairness Doctrine, the Commission and the courts repeatedly emphasized that the First Amendment and the editorial rights of broadcasters required broad deference to broadcasters' determinations whether a particular broadcast presented such advocacy on a controversial issue of public importance as to impose Fairness Doctrine obligations. See National Organization for Women v. FCC, 555 F.2d 1002, 1011 (D.C. Cir. 1977) ("the Commission limits its determination to whether licensees acted reasonably or in good faith"); Complaint of National Organization for Women against WPVI-TV, 57 F.C.C.2d 670, 671 (1975) ("The issue is not one of substitution of our judgment for that of the licensee on these issues of

broadcast journalism, but rather whether the licensee has acted in an arbitrary fashion."); Fairness Report, 48 F.C.C.2d 1, at ¶ 29 ("our role must and should be limited to one of review, [and] we will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area."). The need for such deference is certainly equally applicable here.

Historically, the Commission has applied and has found violations of 73.1212(d) outside of political broadcast matters highly infrequently and in circumstances quite different than those found here. Most involved the airing of program-length, sponsored programs or material provided to a station that was much lengthier and related more directly to a public controversy than that presented here. See, e.g., Oscar B. White, 87 F.C.C.2d 954 (1981) (30-minute documentary related to jail bond issue); Gaylord Broadcasting Co., 67 F.C.C.2d 25 (1977) (film on U.S.-U.S.S.R. military relations); Midwest Radio-Television Inc., 40 F.C.C. 163 (1963) (program on Sunday closing ordinance sponsored by local organization).

Moreover, the leading precedent for applying section 73.1212(d) requirements to hand-out material included within newscasts is more than forty-five years old and far predates the recognition by the Commission and by the courts of the broad editorial freedoms guaranteed broadcasters by the First Amendment. See, e.g., Storer Broadcasting Co., 40 F.C.C. 24 (1958) (kinescope summaries of congressional committee hearings dealing with the Kohler Company strike); KSTP-TV, 40 F.C.C. 12 (1958) (same); Southwest Kansas Television Co., 40 F.C.C. 51 (1959) (same); Midcontinent Broadcasting Co., 40 F.C.C. 82 (1960) (same). Those cases predate, for example, the U.S. Supreme Court's declaration in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 124-25 (1973) that:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors -- newspaper and broadcast -- can and do abuse this power is beyond doubt but . . . the presence of these risks of abuse are taken in order to preserve higher values.

They also predate by more than a quarter century the Commission's decision to eliminate the Fairness Doctrine after concluding that the Doctrine had intruded too deeply into journalistic freedom, had functioned to chill broadcast journalists in their coverage of controversial issues, and violated the First Amendment, both as enforced and on its face. Syracuse Peace Council, 2 F.C.C. Rcd. 5043 (1987), aff'd 867 F.2d 654 (1989). In other contexts, too, the Commission and the courts have increasingly recognized that broadcast journalists are entitled to broad protection under the First Amendment. See, e.g., Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C. Rcd. 13299, 13327 (2006):

> [W]e recognize[] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press

> guarantee.... [I]n light of the important First Amendment interests at stake... it is imperative that we proceed with the utmost restraint when it comes to news programming.

And see KGO-TV, San Francisco, California, 83 F.C.C.2d 302, 305 (1980) ("[t]he choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion" and "the Commission will not review the licensee's news judgments"); Dr. Paul Klite, 12 Comm. Reg. (P&F) 79, 1998 FCC LEXIS 2089 (1998) ("Because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment's Free Press guarantee, licensees are entitled to the widest latitude of journalistic discretion in this regard").

Any effort to apply section 73.1212(d) or any of the other sponsorship identification rules to circumstances such as these would raise a multitude of constitutional issues. For example, the Commission has acknowledged that a broadcast journalist's receipt of *written* press releases and the journalist's use of material from those *written* press releases in news reports does not require a sponsorship identification, even if the material constitutes advocacy on a controversial issue of public importance. See Amendment of the Commission's Sponsorship Identification Rules, 52 F.C.C.2d 701, 711 n.9 (1975); Handling of Public Issues Under the Fairness Doctrine, 48 F.C.C.2d 34, 48 n.19 (1972). There is no simply no persuasive justification – and those prior orders provide none – for treating differently a broadcast journalist's receipt and use of material from a *written* press release and a broadcast journalist's receipt and use of material from a *video* press release. No conceivable justification, in other words, could support a situation in which a fine could be assessed if a broadcast journalist included a soundbite in a news report and failed to disclose that it had been taken from a company's *video* press release, but no such fine could be assessed if the same broadcast journalist included the *very same quote* in a news report and failed to disclose that it had been taken from a *written* press release from the *very same company*. Such completely arbitrary discrimination in the treatment of news reports based entirely on whether the press release was in printed or video form would violate both the free speech rights of the person or entity providing the materials and the free speech and press rights of the broadcaster.[6] Similarly, governmental discrimination in the treatment of broadcast journalists and print journalists in this area would have no compelling or even reasonably persuasive basis and would therefore be unconstitutional.[7] The different treatment of

[6] Absent a "special characteristic" that would justify differential treatment, "[r]egulations that discriminate among media . . . often present serious First Amendment concerns" and are generally subject to strict scrutiny. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 659-60 (1994). See also, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

[7] Neither of the circumstances which have been found to justify disparate government treatment of broadcast and print in other contexts – spectrum scarcity, see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), or broadcasting's assertedly "unique accessibility to children," see FCC v. Pacifica Foundation, 438 U.S. 726 (1978) – provide any support for different treatment of broadcast and print journalists when it comes to the identification of news material and news sources. Red Lion held, at most, that spectrum

written and video press releases would also render the rules fatally under-inclusive and ineffectual and thus undermine any possible rationale for the rule that the government might seek to offer and doom their validity under the First Amendment. Cf. Fox Television Stations v. FCC, --- F.3d ---, No. 06-1760, slip op. at 24 (2d Cir. June 4, 2007) (ability of children to hear fleeting expletives in programming deemed permissible by the FCC undermined rationale for barring the expletives in other contexts).

But the constitutional problems facing any such enforcement of these rules go beyond these arbitrary and unjustifiable distinctions between written and video promotional materials and between broadcast and print journalists. Consider, for example, the common situation of a whistle-blower or a victim of crime or mistreatment who provides documents, other materials or an interview to a journalist for possible use in an investigative report, but who wishes to remain anonymous for fear of reprisal or to protect his or her privacy. Would the sponsorship identification rules be deemed to *require* the broadcaster to disclose the sources name? Would section 73.1212(d) be deemed to require disclosure if the material constituted advocacy on a controversial issue of public importance? Would the station face sanction if it chose to honor its promise of confidentiality? Such a result would present a clearly intolerable intrusion into journalistic activities, constrict the flow of valuable information to the public and, we submit, be flatly and clearly unconstitutional.

And the impact on broadcast journalism is not limited to confidential sources. Journalists – broadcast and non-broadcast – every day receive materials and information from many sources in a wide range of circumstances and interview sources with a wide variety of perspectives and affiliations every day. In addition to video press releases of all different types and from all different sources (government agencies, corporations, industry associations, not-for-profit organizations, individuals and other media), journalists regularly receive written statements and press releases, movie clips, product samples, publicity photos, personal photos and videos, and other source material from equally varied sources for possible reference or inclusion in news. Journalists continually interview people affiliated with particular organizations or entities who have their own reasons and agendas for sharing their information or their views with the press.

For the Commission to make broadcast journalists strictly responsible for the motives and connections of their sources, and to closely regulate the way in which broadcast journalists use and identify source material and information, would inject the agency into protected newsgathering and editorial activities to an unprecedented and inappropriate degree in clear conflict with those journalists' First Amendment rights. The Commission should proceed with great caution in this area of protected journalistic activity and assert itself only in those situations that present a clear violation of Section 317 or 507 that goes go its central purpose – requiring disclosure when a broadcaster has accepted payment in exchange for a promise of promotional mention.

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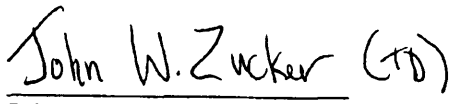
scarcity justified government regulations aimed at promoting the airing of a diversity of viewpoints on the limited broadcast airwaves. Pacifica upheld an indecency fine entirely because of a concern for the protection for children. Neither rationale is at all applicable here.

All of the ABC Stations, ABC News, and ABC NewsOne are committed to preparing news reports of the highest journalistic standards and integrity. All are committed to presenting clear and accurate information to our viewers. The pieces in question here did not meet our own high standards. However, for all the reasons discussed above, they should not be held to have violated any federal law or rule.[8]

Respectfully submitted,



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[8] Should the Commission determine that any violation of the sponsorship identification rules has occurred, we believe that this should not be considered a willful violation, but rather an isolated incident that, when considered against the background of the licensees' record, is not appropriate for sanction. See, e.g., Gaylord, 67 F.C.C.2d at 26 (no sanction beyond warning for omission of sponsorship ID).