

ALERT

FCC Adopts Broadcast Sponsorship Identification Requirements for Leased Programming Provided by Foreign Governments

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On April 22, 2021, the Federal Communications Commission (FCC or Commission) released a Report and Order amending the Commission's broadcast sponsorship identification rules to require disclosure of leased programming sponsored by foreign governmental entities. As we noted in our summary of the October 2020 Notice of Proposed Rulemaking (the NPRM), the item relates to then-Chairman Pai's pledge to "further the critical goal of transparency and apply it to foreign governments and political parties as well as their agents." The Report and Order approved by the Commission, now led by Acting Chairwoman Rosenworcel, addresses bipartisan concerns regarding the broadcasting of foreign government content on broadcast television and radio stations.

The FCC's Current Sponsorship Identification Rules

The FCC's sponsorship identification rules currently require that broadcast stations provide the name of any individual or entity in connection with paid programming, including paid political programming. The current rules, however, do not specifically address when and how broadcasters must disclose affiliations with foreign governments, registered foreign agents, or foreign political parties (collectively, foreign governmental entities) that have paid for or provided programming for free.

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Foreign Agents Registration Act (FARA)
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The Report and Order's New Foreign Sponsorship Identification Rules

The new rules adopted in the Report and Order "seek to eliminate any potential ambiguity to the viewer or listener regarding the source of programming provided from foreign governmental entities." The rules primarily address the following issues:

- Foreign governmental entities requiring disclosure, which include defined categories of foreign entities or individuals registered with the U.S. Department of Justice (DOJ) under the Foreign Agents Registration Act (FARA) and "U.S.-based foreign media outlets" as defined in Section 722 of the Communications Act that have filed a report with the Commission.
- Programming requiring disclosure, which includes:
 - All broadcast material aired pursuant to a lease of time that has been sponsored or paid for by a foreign governmental entity; and
 - In the case of political program or any program involving the discussion of a controversial issue, all material that has been furnished for free as an inducement to air by a foreign governmental entity.
- A "reasonable diligence" requirement for broadcasters, which will generally require broadcasters to:
 - Make specific inquiries of and disclosures to program lessees;
 - Independently consult the DOJ's FARA website and the Commission's semi-annual U.S.- based foreign media outlets report; and
 - Memorialize their inquiries in order to track compliance in the event of an FCC investigation.
- The actual disclosures required, including standardized language, formatting requirements, frequency, and public file placement.

A more detailed discussion of the new rules follows.

Foreign Governmental Entities Subject to Disclosure

The new rules adopted in the Report and Order require that "programming aired on a station pursuant to a lease of airtime have a foreign sponsorship identification if the entity who has directly or indirectly provided the programming qualifies as a foreign governmental entity." Consistent with the NPRM, the Report and Order adopts the Commission's proposal to rely on existing definitions of foreign governmental actors under FARA and reports generated pursuant to Section 722 of the Communications Act. The Report and Order, however, declines to include the Foreign Missions Act's definition of "foreign mission" recognizing that there is no single source that identifies all foreign missions.

FARA. FARA is a longstanding statute designed to identify certain foreign entities or individuals that Congress has determined should be known by both the U.S. government and the public. FARA also requires such entities and individuals to register with the DOJ, and to publicly disclose certain information on a regular basis.

As proposed in the NPRM, the new foreign sponsorship identification requirements apply to entities paying for or providing leased programming if the entity:

- Qualifies as a “government of a foreign country” under FARA;
- Constitutes a “foreign political party” under FARA; or
- Meets the definition of an “agent of a foreign principal” that is acting as a registered agent of a “government of a foreign country” or a “foreign political party” under FARA.

The Report and Order also clarifies that disclosures are required not only when programming is provided by an “agent of a foreign principal” whose foreign principal is a “government of a foreign country” or a “foreign political party,” but also when the foreign principal is either directly or indirectly “operated, supervised, directed, owned, controlled, financed, or subsidized by a government of a foreign country or by a foreign political party.”

U.S.-Based Foreign Media Outlets. The foreign governmental entity definition also includes entities and individuals subject to Section 722 of the Communications Act that have filed a report with the Commission. Section 722 applies to certain U.S.-based foreign media outlets that (a) produce or distribute video programming that is transmitted or intended for transmission, by a multichannel video programming distributor (MVPD) to consumers in the United States; and (b) would be an agent of a “foreign principal” but for an exemption under FARA.

Leased Programming Covered by Disclosure Requirements

The Report and Order narrows the focus of the sponsorship identification requirement proposed in the NPRM to circumstances in which a foreign governmental entity is providing programming pursuant to a lease agreement. The Report and Order clarifies that leasing arrangements subject to its new rules include “any arrangement in which a licensee makes a block of broadcast time on its station available to another party in return for some form of compensation.” The Report and Order notes that this covers time brokerage agreements and local marketing agreements, as well as other agreements made either for discrete blocks of time or for a station’s entire daily capacity. Additionally, it includes agreements made either for a term of a single day or a term of years.

Consideration Required for Disclosure. The Report and Order explains that its foreign sponsorship identification rules will be triggered (a) if a money, services, or other valuable consideration is directly or indirectly paid or promised to, or charged or accepted by a station in the context of an agreement to lease broadcast time; or (b) if the only consideration under the lease agreement for the airing of a “political program or any program involving the discussion of a controversial issue” under Section 317(a)(2) of the Communications Act is the program itself. The Report and Order rejects the NPRM’s tentative conclusion to expand the definition of “political program” to include any programming provided by a foreign governmental entity.

Section 507 of the Communications Act. The Report and Order also notes that Section 507 of the Communications Act requires parties involved in the “production, preparation, or supply” of program material intended to be aired on a broadcast station to disclose to their employer, the party for whom the program is being produced, or the broadcast licensee if they have accepted consideration for programming material. This includes money, services, or other valuable consideration (or nominal consideration in the case of a political program or a program involving the discussion of a controversial issue). Consideration provided by a foreign governmental entity to parties producing, preparing, or supplying covered content under the Report and Order will require a foreign sponsorship identification.

Reasonable Diligence

Licensee’s Obligations. The Report and Order adopts the NPRM’s tentative conclusion that a broadcast station licensee must exercise “reasonable diligence” to ascertain whether a lessee of airtime qualifies as a foreign governmental entity such that a sponsorship disclosure is required under the FCC’s rules. To meet the “reasonable diligence” requirement, a licensee must:

- Inform the lessee of the foreign sponsorship disclosure requirement at the time of agreement and at renewal;
- Inquire of the lessee whether it qualifies as a “foreign governmental entity” at the time of agreement and at renewal;
- Inquire of the lessee whether it knows if anyone in the chain of program production or distribution pursuant to the lease agreement (or a sublessor) qualifies as a foreign governmental entity and has provided an inducement to air the programming at the time of agreement and at renewal;
- If the lessee states that neither it nor anyone further back in the production or distribution chain is a “foreign governmental entity,” independently verify the lessee’s status at the time of agreement and at renewal by consulting (a) the DOJ’s FARA website and (b) the Commission’s U.S.-based foreign media outlets reports; and
- Keep documentation of the above-listed inquiries and investigations.

The Report and Order also strongly encourages licensees to include a provision in all lease agreements that requires a lessee to provide notification about any change in its status that would trigger the foreign sponsorship identification rules.

Lessee’s Obligations. Pursuant to Section 507 of the Communications Act, the Report and Order requires lessees to notify broadcast licensees about transactions that may require disclosures under the new foreign sponsorship identification rules. The Report and Order also clarifies that the jurisdictional reach of Section 507 is not limited to lessees, but also includes *any individual or entity* “in connection with the production or preparation of any program . . .” or “who supplies to any other person any program.” Specifically, non-licensees or employees of non-licensees must disclose to their employer, the entity or individual for which the program is being produced, or the licensee their knowledge of any consideration that would trigger the

Report and Order's disclosure requirements.

Applicability of Requirements. The Report and Order specifies that the new reasonable diligence requirements will apply on a prospective basis, including to existing lease agreements. Therefore, current lease agreements must be amended within six months of the effective date of the rules.

Content and Frequency of Disclosures

Consistent with the NPRM, the Report and Order adopts the following standardized language that broadcasters must use when a disclosure is required:

The [following/preceding] programming was [sponsored, paid for, or furnished,] either in whole or in part, by [name of foreign governmental entity] on behalf of [name of foreign country].

The Report and Order deviates from the NPRM slightly by allowing broadcasters to use any of three terms (sponsored, paid for, or furnished) in the disclosure statement. Moreover, for those entities subject to FARA's labeling requirement, broadcasters may use the applicable FARA label instead of adding the standardized language.

Format of On-Air Disclosure. For televised programming, the new rules require that the disclosure be in letters "equal to or greater than four (4) percent of the vertical picture height" and be visible for at least four seconds. For radio broadcasts, the disclosure must be audible. The Report and Order also obligates broadcasters to transmit disclosures for programming provided on station multicast streams.

Frequency of On-Air Disclosure. Under the new rules, the specified disclosure must be made at both the beginning and the end of the programming. For programming with a duration of five (5) minutes or less however, only one announcement – made either at the beginning or the end of the program – is required. Additionally, the Report and Order adopts the NPRM's tentative conclusion that, for programming of greater than one (1) hour in duration, an announcement must be made during regular intervals, and at least once every 60 minutes.

Public File Disclosure. As proposed by the NPRM, the Report and Order requires that broadcasters place the disclosures in their station online public inspection files (OPIFs) in a folder titled "Foreign Government-Provided Programming Disclosures."¹ Specifically, the Report and Order requires licensees to place in their OPIFs (1) the actual disclosure; and (2) a document indicating the name of the program and the time and date of the program airing. Importantly, the Report and Order rejects the NPRM's proposal that stations upload this information "as soon as possible" or "within [24] hours" of the programming being broadcast. Instead, the Report and Order aligns such uploads with the Issues/Programs list updates, requiring that such information be submitted on a quarterly basis. Moreover, the Report and Order requires that broadcasters retain disclosures for two years.

List of Persons Operating the Entity. The Report and Order also requires that, to the extent that foreign programming includes either “a political matter or matter involving the discussion of a controversial issue of public importance,” licensees must upload to their OPIFs a list of persons operating the foreign governmental entity supplying the programming (which may consist of a list of officers and directors of the lessee). The Report and Order clarifies that licensees may upload one list per licensee, and the list may be included with regular foreign sponsorship identification filings.

Section 325(c) Permits

The Report and Order adopts the NPRM’s tentative conclusion that its foreign sponsorship identification rules should apply to any programming broadcast under a Section 325(c) permit. Section 325(c) of the Communications Act regulates the transmission or delivery of broadcast programming from a facility in the United States to a foreign broadcast station which will be received in the United States. Such broadcast programming requires an application and permit granted by the Commission. The Report and Order applies the same foreign sponsorship identification requirements to stations operating under a Section 325(c) permit. Although such permit holders are not required to maintain an OPIF, the Report and Order requires them to make their disclosures in the International Bureau’s public filing System (IBFS) under their Section 325(c) permit file.

First Amendment Considerations and Cost-Benefit Analysis

The Report and Order adopts the NPRM’s tentative conclusion that its new foreign sponsorship identification rules comport with the First Amendment of the U.S. Constitution. Specifically, the Report and Order concludes that the government “has a compelling interest in ensuring that the public is aware of when a party has sponsored content on a broadcast station,” and that the interest is particularly compelling when a foreign governmental entity is involved in sponsoring that programming. Thus, the Report and Order concludes that the new foreign sponsorship identification rules would meet either an intermediate or strict scrutiny First Amendment constitutional bar. Finally, the Report and Order concludes that “the costs . . . do not outweigh the public benefits” in promulgating the foreign sponsorship identification rules.

The new rules adopted in the Report and Order will take effect 30 days after the date of publication in the Federal Register. Certain portions of the rules, including those that require broadcasters to check the FARA and FCC databases and to place materials in their OPIFs, are likely to have their effective dates delayed due to the need for separate approval by the Office of Management and Budget.

In light of the FCC’s history of strictly enforcing its sponsorship identification requirements in general and recent increased scrutiny regarding foreign governmental involvement in U.S. discourse, we expect rigorous enforcement of the new rules. Wiley is at the forefront of issues related to foreign involvement in U.S. communications businesses through our Telecom, Media & Technology (TMT), International Trade, and National Security Practices, including our twenty-year old FARA Practice. If you have any questions or would

like more information, please contact one of the attorneys listed on the alert.

1 The Report and Order recommends that stations not required to maintain an OPIF retain a record of their disclosures in their station files.