wiley

ALERT

FCC Amends and Clarifies Foreign Sponsorship ID Rules

June 12, 2024

On June 10, 2024, the Federal Communications Commission (FCC or Commission) released a Second Report and Order (Second R&O) that amends the Commission's foreign sponsorship identification rules (FSID Rules). As explained in more detail below, the new rules impose upon broadcasters diligence, certification, and recordkeeping requirements with respect to certain leases of programming time as well as political issue advertisements and paid public service announcements (PSAs). The rules take effect 30 days after publication in the Federal Register.

With the Second R&O, the Commission seeks to address a ruling by the U.S. Court of Appeals for the District of Columbia Circuit that vacated a portion of the FSID Rules that the Commission originally adopted in 2021.

Background

The FCC first issued the FSID Rules in April 2021 (the 2021 Order) to require that licensees disclose the identity of any foreign governmental entities that lease time on their stations. The rules were meant to address bipartisan concerns that U.S. broadcast stations were transmitting undisclosed foreign governmental programming, particularly from countries of concern.

In July 2022, the D.C. Circuit partially vacated the FSID Rules, striking down a requirement that broadcasters independently consult the U.S. Department of Justice's Foreign Agent Registration Act (FARA) website and the Commission's semi-annual U.S.-based foreign media outlets reports to check whether lessees qualified as foreign entities under the rules. In reaching this conclusion, the D.C. Circuit explained that

Authors

Kathleen A. Kirby
Partner
202.719.3360
kkirby@wiley.law

Eve Klindera Reed
Partner
202.719.7404
ereed@wiley.law

Ari Meltzer
Partner
202.719.7467
ameltzer@wiley.law

Kyle M. Gutierrez
Associate
202.719.3453
kgutierrez@wiley.law

Practice Areas

Media

Telecom, Media & Technology

the Communications Act imposes on licensees only a duty of inquiry, not a duty of investigation. In an October 2022 Notice of Proposed Rulemaking (the 2022 NPRM), the FCC pledged to "fortify the rules in the wake of the court's decision."

In addition, after release of the initial FSID Rules in 2021, a coalition of affiliates associations (the Affiliates Associations) filed a Petition for Clarification (Petition) asserting that the 2021 Order's exemption of "traditional, short-form advertising" from the FSID Rules created confusion, as the term was undefined in the industry. The Affiliates argued that the Commission should clarify that the FSID Rules do not apply when a licensee "sells time to advertisers in the normal course of business, no matter the length of the advertisement."

The Second R&O aims to both replace the vacated independent verification requirement and address certain input from broadcasters about the Rules' burdens and ambiguities.

The Second R&O

New Inquiry Regime

The Commission adopted a two-option regime for licensees to satisfy their duty of inquiry in obtaining information about whether programming is sponsored by a foreign governmental entity.

The first (and what strikes us as the most practical of the two) involves a certification process, where both the licensee and lessee complete written certifications documenting the diligence required by the FSID Rules. The Second R&O provides standardized certification templates for use by licensees and lessees (see Appendices C and D of the Second R&O, linked above), while making clear that parties remain free to craft their own certification language as long as the language fully covers the information required under Section 73.1212(j)(3)(i)-(iii) of the current FSID Rules. Specifically, a licensee's certification should confirm that the licensee:

- Informed the lessee of the foreign sponsorship disclosure requirement;
- Asked the lessee whether it falls into any of the categories that would qualify it as a "foreign governmental entity";
- Asked the lessee whether it knows if any individual/entity further back in the chain of producing and/or distributing the programming to be aired qualifies as a foreign governmental entity and has provided some type of inducement to air the programming;
- Sought a written certification in response from the lessee; and
- Obtained the necessary information for a disclosure if one is required.

A lessee's certification should convey the information needed to determine whether a broadcast disclosure is required and, if so, the information needed for such disclosure.

Alternatively, licensees may ask their lessees for screenshots of lessees' search results of the two federal government websites that the FSID Rules rely upon. Under this option, a licensee would ask a lessee whether the lessee is a registered FARA agent or is listed in the Commission's U.S.-based foreign media outlet report. If the lessee responds "no," the licensee would then ask the lessee to provide screenshots showing the results of the lessee's searches of the relevant government websites.

The Commission also encouraged licensees to include in their lease agreements a requirement for lessees to provide notice of any change in status that would trigger the need for a foreign sponsorship disclosure.

Under both options, licensees must memorialize and preserve all communications required under the FSID Rules and retain any certifications and any screenshots provided by the lessee for the length of a station's broadcast license term or one year, whichever is longer. Significantly, licensees may retain documentation *either* in their own Online Public Inspection Files or in their internal files, provided that licensees make such documents available to the Commission promptly upon request.

Agreements Subject to the FSID Rules

The FSID Rules will apply to any agreement, whether written or not, where a licensee grants to another party the right to program on its station in exchange for some form of consideration. The rules apply irrespective of the terms or duration of the agreement, and regardless of whether the parties label or view the agreement as a time brokerage agreement, a local marketing agreement, or something else. Thus, an agreement is not excluded from the definition of "lease" for purposes of the FSID Rules merely because it is an informal, short-term, and/or week-to-week type of agreement, and the applicability of the rules is not determined by the title, terms, or duration of an agreement.

Nevertheless, the Second R&O concludes that, where a licensee and the same lessee enter into recurring leases for the same programming within a one-year period, the licensee need only exercise its reasonable diligence obligations once per year.

Lack of Adequate Response from Lessee

The Second R&O also clarifies that if a lessee does not provide a response or provides an inadequate response to a licensee's reasonable diligence inquiries, the licensee *may* continue to air the lessee's programming and will not, as originally proposed, be required to report such non-responses to the Commission. If, however, it is determined at a later date that the programming should have included a foreign sponsorship disclosure, the Commission may conduct a fact-specific inquiry to determine whether the licensee met its diligence obligation, for example, by not making further inquiry of the lessee.

Advertisements for Commercial Goods and Political Advertisements

In addition to the changes discussed above, the Second R&O makes two key clarifications with respect to the application of the FSID Rules to certain types of programming.

First, the Commission exempts advertisements for commercial goods and services from the FSID Rules. Specifically, recognizing that the use of the term "traditional, short-form advertising" in the 2021 Order created confusion about the application of the FSID Rules, the FCC concludes that if broadcast matter for a commercial product or service meets the requirements for a disclosure exemption under Section 73.1212(f) of the Commission's rules – which calls for the advertisement to include the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification – then the licensee need not make the inquiries nor air the disclosure required under the FSID Rules.

Second, the Second R&O exempts from the FSID Rules the purchase of broadcast time by or on behalf of legally qualified candidates or their authorized committees (i.e., political candidate advertisements). However, the Second R&O makes clear that political issue advertisements and paid PSAs will be subject to the FSID Rules. For purposes of the FSID Rules, the FCC clarifies that issue advertisements are defined as any paid political matter or matter involving the discussion of a controversial issue of public importance, regardless of the length of the programming.

The FCC bases its decision to exempt political candidate advertisements from the FSID Rules largely on the facts that Federal Election Commission rules prohibit foreign nationals from making contributions to political candidates, and Section 315 of the Communications Act provides a level of transparency regarding the source of funding for political candidate advertising that is not available with issue advertising and paid PSAs.

Programming on Noncommercial and Educational Stations and Local Religious Programming

The Commission also confirms that the FSID Rules do not apply to noncommercial and educational stations (NCEs) because NCEs are prohibited from receiving compensation in exchange for broadcasting programs (which would include leased programs). Therefore, it concludes, NCEs will rarely, if ever, face the need to address the FSID Rules.

The FCC declined to exempt religious programming and locally produced and/or locally distributed programming from the FSID Rules, despite pleas from broadcasters that it do so. The Commission explains that such an exemption for religious programming would not be content-neutral, and that the mere fact that programming is locally produced and/or locally distributed does not signify that the programming lacks material provided by a foreign governmental entity.

Programming on Stations with Section 325(c) Permits

The Commission also added language to the FSID Rules making clear that the FSID Rules' disclosure requirements apply to *any programming* permitted to be delivered to foreign broadcast stations under a permit pursuant to Section 325(c) of the Act if the material has been: (i) sponsored by a foreign governmental entity; (ii) paid for by a foreign governmental entity; (iii) furnished for free by a foreign governmental entity to the Section 325(c) permit holder as an inducement to air the material on the foreign station; or (iv) provided by the Section 325(c) permit holder to the foreign station where the Section 325(c) permit holder is a foreign governmental entity. Where the Section 325(c) permit holder itself is a foreign governmental entity, the

disclosure requirements apply to all programming provided by the permit holder to a foreign station.

The Commission further explains that it is the responsibility of the Section 325(c) permit holder to ensure that the foreign station broadcasts the disclosure where required along with the programming provided by the permit holder.

Existing Leases

Finally, the Second R&O grandfathers existing lease agreements, while explaining that any lease agreements that are entered into, or that are renewed, on or after the effective date of the Second R&O's modifications must comply with those new requirements.

Looking Ahead

The new rules adopted in the Second R&O will take effect 30 days after the date of publication in the Federal Register, except for those aspects which create new or revised information collection requirements which will be subject to review under the Paperwork Reduction Act before taking effect.

In light of the FCC's history of strictly enforcing its sponsorship identification requirements in general and increased scrutiny regarding foreign governmental involvement in U.S. discourse – particularly in light of the upcoming U.S. Presidential election – 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 20-plus year old FARA Practice. If you have any questions or would like more information, please contact one of the attorneys listed on the alert.

Anthony Paranzino, a Wiley 2024 Summer Associate, contributed to this alert.