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ALERT

FCC Proposes Disclosure Rules for Certain Programming Provided by Foreign Governments

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On October 26, 2020, the Federal Communications Commission (FCC or Commission) released a Notice of Proposed Rulemaking (NPRM) in which the Commission proposes to amend its sponsorship identification rules to require disclosure when certain foreign programming is broadcast. This NPRM makes good on a promise by Chairman Pai in September to start a rulemaking aimed at ensuring transparency of foreign government-sponsored broadcast content. The Chairman made that promise in the wake of mounting concerns from both sides of the political aisle regarding the broadcast on television and radio stations of programming—including foreign government propaganda—originating from Chinese and Russian government sources.

The FCC's sponsorship identification rules already require disclosures in connection with paid programming, including paid political programming. Those rules do not, however, specify with particularity when and how broadcasters should disclose situations in which *foreign governments* pay for or provide programming for free. The NPRM seeks to fill this gap by amending the FCC's sponsorship identification rules to require disclosure "if a foreign governmental entity has paid a radio or television station, directly or indirectly, to air material, or if the programming was provided to the station free of charge by such an entity as an inducement to broadcast the material." As with many new regulatory proposals, there may be devils lurking in the details, as highlighted below.

Authors

Kathleen A. Kirby
Partner
202.719.3360
kkirby@wiley.law

Eve Klindera Reed
Partner
202.719.7404
ereed@wiley.law

Kathryne C. Dickerson
Partner
202.719.7279
kdickerson@wiley.law

Practice Areas

Media

Telecom, Media & Technology

Foreign Government Entities Subject to Disclosure

In determining which program sources will trigger a disclosure under the new rules, the FCC proposes to rely on existing identifications of foreign governmental actors. These include the Foreign Agents Registration Act (FARA), the Foreign Missions Act, and U.S.-based foreign media outlets required to report under Section 722 of the Communications Act. As explained further below, the FCC seeks comment on various ways in which broadcasters would be expected to determine whether an entity would trigger disclosures under the new rules, including as part of their obligation to conduct "reasonable diligence" regarding the identity of program sponsors or suppliers.

FARA. FARA is a disclosure statute designed to promote transparency in the American political, media, and public relations arenas, among others, with respect to foreign influence. It requires certain categories of entities and individuals acting on behalf of foreign governments that are engaged in political or quasi-political activities in the United States to register with the U.S. Department of Justice (DOJ), and to periodically—and publicly—disclose certain information.

The FCC's new disclosure requirement would apply if the entity paying for or providing the programming falls into any of the following categories under FARA:

- A "government of a foreign country;"
- A "foreign political party;" or
- 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."

Foreign Missions. The Office of Foreign Missions, located within the U.S. Department of State, has the authority to designate as a "foreign mission" an entity that is substantially owned or effectively controlled by a foreign government. Although "most 'foreign missions' are entities and individuals traditionally viewed as foreign embassies or consular offices, the Office of Foreign Missions has determined on occasion that certain foreign media outlets also qualify as 'foreign missions,'" including five Chinese media organizations designated in 2019.

U.S.-Based Foreign Media Outlets. Section 722 of the Communications Act, which was added to the Act in 2018, 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 agents of a 'foreign principal' for purposes of FARA but for an exemption for certain media outlets contained in that statute. Such outlets must report to the FCC every six months, and the FCC is required to make their reports available on its website and to report to Congress.

Additional Entities. The FCC recognizes that the proposed categories discussed above may not cover all of the foreign governmental entities or individuals that provide programming to U.S. broadcasters. Thus, the NPRM seeks comment on whether the new rules should include other identifiable categories of entities or individuals.

Reasonable Diligence

Under the existing sponsorship identification requirements, broadcasters must exercise "reasonable diligence" to assess whether programming has been paid for and the identity of the program sponsor or supplier. In the NPRM, the FCC seeks comment on how this obligation should apply under its proposed rules. The NPRM states that "at a minimum," broadcasters will have to specifically "inquir[e] of [an] entity whether it qualifies as" a foreign governmental entity covered by the new rules. The FCC also suggests that broadcasters may have to consult several disparate sources (some of which they have no current reason to be familiar with).

For example, under the FARA-based categories of foreign government entities, while the DOJ maintains a public database of FARA registrants, that database does not include foreign governments or foreign political parties. Moreover, registrants may not accurately or clearly indicate whether their agency relationship is with a "government of a foreign country" or a "foreign political party." (Indeed, the registration for one well-known Chinese state-run media organization indicates that its foreign principal is a "State-Owned Public Institution" rather than a "government of a foreign country.") Furthermore, the FCC recognizes that there may be a lag between FARA registration and when materials become public. The NPRM asks whether the disclosure requirement should apply only after a program sponsor or supplier's name appears in the public FARA database or immediately upon registration, and whether broadcast licensees can "simply ask the individuals involved with providing the programming . . . whether they fall into one of the" FARA categories that would trigger a disclosure requirement.

Unlike foreign agents subject to FARA registration, foreign missions are not included in any publicly available database, but are identified in notices published in the Federal Register. The FCC suggests that the exercise of "reasonable diligence" should allow for the identification of foreign missions, stating that in some cases they should be obvious (such as a foreign embassy purchasing airtime) and seeks comment on this analysis.

The NPRM notes that entities or individuals falling into the categories that it proposes to cover in the new rules have already been identified by statute or by the State Department or DOJ. Accordingly, it posits that licensees would not have to "engage in an unbounded investigation about any possible linkages between entities that provide programming and a foreign government" to know when a disclosure is required. In addition, the FCC states an intention that "adherence to [the] proposed 'reasonable diligence' standard with regard to foreign government-provided programming [should] require[] no guesswork, but rather the posing of certain questions and review of lists of already identified foreign governmental actors."

Programming Requiring a Disclosure

In the NPRM, the FCC tentatively concludes that a standardized disclosure should be required whenever a "foreign governmental entity," as defined in its proposal, has paid a station to air the material or furnished program material to a station free of charge (or at nominal cost) as an inducement to broadcast such material. The FCC notes that this proposal is based upon an assumption that all of the entities or individuals that qualify as a "foreign governmental entity" for purposes of the proposed rules either explicitly or implicitly are seeking to influence U.S. public policy or opinion on behalf of a foreign government or an entity that

seeks to be in control of a foreign government (i.e., a "foreign political party"). Thus, the FCC suggests that all such programming should be subject to disclosure requirements provided that (a) the broadcaster received consideration in exchange for its broadcast, or (b) the program was furnished free of charge, or at nominal cost, as an inducement for its broadcast.

Content and Frequency of Proposed On-Air Disclosure

If a disclosure is required, the Commission proposes that the following standardized disclosure accompany the program at the time of broadcast: "The [following/preceding] programming was paid for, or furnished, either in whole or in part, by [name of foreign governmental entity] on behalf of [name of foreign country]." The Commission tentatively concludes that the disclosure be announced at the beginning and conclusion of the program. For television and radio programming greater than sixty minutes, the disclosure would be announced "at regular intervals during the broadcast, but no less frequently than once every hour." Although FARA requires registrants to include certain disclosures within their programming, the FCC tentatively concludes that it has authority to impose additional disclosure requirements on broadcasters. The FCC seeks comment on these proposals, whether different or additional language should be required, and whether broadcasters should have discretion to include supplemental language if they feel that doing so would be appropriate.

Online Public Inspection File Obligations

To further enhance the availability of information to the public, the FCC tentatively concludes that it should require stations that air programming subject to the new rules to place copies of on-air disclosures in their online public inspection files (OPIFs) and seeks comment on what additional information should be included. In particular, the FCC proposes to require stations to place in their OPIFs the same information as is currently required when programming concerns a political or controversial issue (*i.e.*, a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity). The FCC also asks whether the OPIF disclosure should contain more detailed information about the relationship between the government of a foreign country, foreign political party, agent of a government of a foreign country or foreign political party, foreign mission, or U.S.-based foreign media outlet and the foreign country that these entities or individuals represent. To the extent the FCC imposes OPIF requirements related to foreign government programming, the FCC proposes to adopt the same standards that apply to political advertising disclosures—most significantly, the requirement to upload material "as soon as possible," which it generally interprets as "within twenty-four hours of the material being broadcast."

Local Marketing Agreements (LMAs) and Time Brokerage Agreements (TBAs)

The FCC tentatively concludes that the new disclosure requirements should apply to stations that operate subject to LMAs and TBAs. The Commission notes that its prior precedent may not require a sponsorship announcement to identify the broker's involvement in programming the station pursuant to an LMA or a TBA in situations involving a barter-type arrangement, but proposes that such precedent should not apply to foreign

government-provided programming broadcast on stations subject to LMAs or TBAs.

Section 325(c) Permits

Under Section 325(c) of the Communications Act, 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 requires an application to and permit granted by the Commission. The NPRM proposes that its proposed new rules apply expressly to any programming broadcast pursuant to a Section 325(c) permit.

The First Amendment and Cost-Benefit Analysis

The NPRM sets forth the FCC's analysis as to the First Amendment implications of its proposed new rules and concludes that the proposals fall within constitutional bounds. The FCC also concludes that the benefits of ensuring transparency outweigh any costs that its new rules may impose.

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Comments and reply comments will be due 30 and 60 days, respectively, from the date of publication of the NPRM in the Federal Register.

Given the FCC's practice of strictly enforcing its sponsorship identification requirements in general and the increased scrutiny being given to foreign governmental involvement in U.S. discourse more recently, those with concerns about the scope or clarity of the proposed rules would be well-served to voice those concerns in response to the NPRM. Wiley is at the forefront of issues related to foreign involvement in U.S. communications businesses. Our Telecom, Media & Technology (TMT), International Trade, and National Security Practices, including our twenty-year old FARA practice, help companies and industries work with the government to shape regulatory policy and anticipate and respond to federal scrutiny and regulation.