

ALERT

FCC Seeks Comment on Additional Foreign Government-Sponsored Programming Rules

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On October 6, 2022, the Federal Communications Commission (FCC or Commission) released a Second Notice of Proposed Rulemaking (Second NPRM) in which the Commission proposed to amend its rules for the identification of foreign government-sponsored programming in response to the DC Circuit's partial vacatur of a prior version of the rules.

History of the FCC's Foreign Government-Sponsored Programming Rules

In April 2021, the FCC adopted a Report and Order that imposed certain obligations on radio and television broadcasters regarding the vetting and identification of foreign government-sponsored programming. The rules, which took effect in March 2022, required broadcasters to take the following steps when leasing airtime to a third party (or "lessee"):

- Tell the lessee about the FCC's foreign government-sponsored programming rule;
- Ask the lessee whether it is a foreign governmental entity or an agent of one;
- Ask the lessee whether anyone further back in the production or distribution chain is a foreign governmental entity or an agent of one;
- Check two federal sources to verify whether the lessee is a "foreign governmental entity," as defined in the rules; and
- Document those inquiries and investigations.

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In response to a legal challenge brought by the National Association of Broadcasters, the DC Circuit vacated the requirement that broadcasters independently verify whether parties leasing time on their stations are “foreign governmental entities” by searching two federal sources – the Foreign Agents Registration Act (FARA) database maintained by the Department of Justice, and the FCC’s reports on U.S.-based foreign media outlets.

The Second NPRM includes proposals to address the purported regulatory gap that exists following the DC Circuit ruling.

In particular, the Second NPRM considers the following changes:

- Requiring licensees to certify that they have properly complied with foreign sponsorship identification rules;
- Requiring lessees to submit certifications in response to requests from licensees to provide foreign sponsorship identification information;
- Creating standardized language to be used in the certifications; and
- As an alternative to the certification process, requiring licensees to obtain verification from lessees that they are not foreign governmental entities.

Proposal 1: Certification Requirements for Foreign Sponsorship Identification Rules

As a substitute for the vacated independent verification requirement, the FCC is proposing to strengthen the rules for certifications by licensees and lessees alike. Under the Commission’s proposal:

- The licensee must certify that it has (1) notified each lessee about the disclosure requirements pertaining to foreign government-provided programming at the beginning or renewal of lease agreements; and (2) sought a certification from the lessee.
- The lessee must certify (1) whether it is or is not a foreign government entity; and (2) whether it knows of any entity or individual further back in the programming production or distribution chain that qualifies as a foreign government entity.

Licensees that maintain an online public inspection file (OPIF) would be required to upload the required certifications to their public file. Licensees that do not maintain an OPIF would be required to maintain a record of the certifications.

Logistics of Certifications

Scope of Agreements Covered: The FCC assumes that all “leases” falling within the scope of its foreign government-sponsored programming rules constitute Time Brokerage Agreements or Local Marketing Agreements and, thus, must already be contained in station OPIFs.

Timing: The FCC suggests that the licensees should complete and obtain the certifications when the parties either enter or renew lease agreements.

Non-Compliance by Lessees: The Second NPRM contemplates that some lessees may decline to provide certifications in accordance with the Commission's new requirements. Among other things, it seeks comment on whether the licensee's own certification is sufficient to demonstrate that the licensee has complied with its obligations under the foreign sponsorship identification requirements. It also seeks comment on the possibility of requiring licensees to notify the Media Bureau about a lessee's failure to certify and suggests that the FCC might then investigate whether the lessee has violated its own obligations.

Filing Requirements: The Commission tentatively concludes that licensees will need to upload both their own and the lessees' certifications to the same OPIF subfolder where lease agreements are normally placed within 30 days of the execution or renewal of the lease agreement. It further proposes requiring licensees to retain certifications in their public file for the same amount of time as leases (i.e., for so long as the lease is in effect).

Implementation: The Commission tentatively concludes that these requirements should be adopted on a prospective basis and that licensees with existing lease agreements will be given a six-month grace period to come into compliance with the new rules.

Proposal 2: Standardized Certification Language

In response to concerns about the undue burdens that certification requirements would create for licensees, the FCC is proposing to create standardized certification language for licensees and lessees to use in filings. The Second NPRM contemplates a "plug and play" process where licensees and lessees input information into a form or cut and paste language into a filing.

Proposal 3: Alternative Proposal

The Second NPRM also raises the possibility of requiring licensees, as an alternative to the dual-certification process, to seek or obtain from lessees' screenshots showing that a lessee's name does not appear in either the FARA database or the Commission's U.S.-based foreign media outlet reports. Although the DC Circuit struck down the requirement that licensees themselves check the two federal databases, the FCC, based on questioning at oral argument, asks whether it can instead require licensees to obtain this information from lessees. Given that this proposal was limited to a paragraph in the Second NPRM and not included in the proposed rule, it does not appear to be the Commission's preferred approach.

Current Compliance Requirements

While the FCC considers the proposals in the Second NPRM, broadcasters are still required to take the following steps whenever they lease airtime to a third party:

- Tell the lessee about the FCC's foreign government-sponsored programming rules;

- Ask the lessee whether it is a foreign governmental entity or an agent of one;
- Ask the lessee whether anyone further back in the production or distribution chain is a foreign governmental entity or an agent of one;
- Document those inquiries and investigations.

These requirements are summarized in greater detail [here](#).

If you have any questions about the new foreign sponsorship identification rules or if you would like to file comments in response to the Second NPRM, please contact any of the authors on this alert or the Wiley attorney handling your station matters.

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