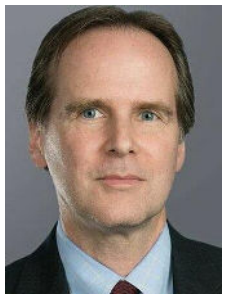
How FCC's Proposed Foreign Program Rules Affect Licensees

By **David Burns and Carmel Amero** (November 10, 2022)



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The Federal Communications Commission recently took the next step in its proceeding to require TV and radio broadcasters to disclose information regarding programming supplied by foreign governments.

In a second notice of proposed rulemaking **released on Oct. 6**, following the U.S. Court of Appeals for the D.C. Circuit's decision to strike down certain elements of the rules initially adopted by the FCC in July in National Association of Broadcasters v. FCC, the FCC proposed an alternative approach to foreign programming disclosure, and requested public comment on that and other aspects of the proceeding.

Comments on the second notice will be due 30 days after Federal Register publication, which is expected sometime later this year.

Background

The First Notice

While the Communications Act generally prohibits the foreign ownership of more than 25% of a U.S. broadcaster without specific FCC approval, there are no such restrictions on a foreign entity or government leasing blocks of airtime on a broadcast station and providing programming for broadcast during that leased period.

The Communications Act does require that broadcasters announce on air the identification of person(s) that pay for or furnish matter that is broadcast by the station.[1]

However, the FCC expressed concern that existing sponsorship disclosure rules were not sufficient to identify to viewers and listeners the source of programming supplied to U.S. broadcast stations by foreign governments and their representatives.[2]

To address that situation, on Oct. 26, 2020, the commission released a notice of proposed rulemaking seeking public comment on proposals to broaden the scope of the sponsorship identification rules and impose enhanced diligence requirements on broadcasters.[3]

The first notice cited specific examples of the Chinese and Russian governments providing programming to U.S. broadcast stations, and noted that there is evidence to suggest that foreign-controlled media outlets routinely disseminate stories that are designed to divide the West and pursue the foreign policy goals of the governments backing them.[4]

Also cited in the first notice is an article that underscores how connections between media outlets and the programming it airs may be attenuated in an effort to obfuscate the true source of the programming.[5]

In order to assure that foreign government supplied programming is being adequately disclosed to the U.S. public, the FCC proposed that broadcasters take a number of steps, including:

- Inquiring as to whether the program supplier is a foreign governmental entity; and
- Independently reviewing the U.S. Department of Justice's Foreign Agents Registration Act database and the FCC's list of U.S.-based foreign media outlets to investigate whether the program supplier is listed as a foreign entity.

First Notice Comments

Interested stakeholders and various entities across the broadcast industry submitted comments on the FCC's proposed modification of its rules in the first notice.

While all commenters agreed that American viewers and listeners should be aware if they are being subjected to foreign propaganda, some commenters expressed concern that the proposed rules were overbroad in that they would require disclosure of benign programming sponsored by friendly foreign governments, such as tourism advertisements and entertainment programming, and would unjustly burden a specific segment of the media industry — over-the-air broadcast stations.[6]

Some commenters also objected to the proposed requirement that broadcasters review the DOJ's Foreign Agents Registration Act database and the FCC's list of U.S.-based foreign media outlets as part of the diligence required to determine the identity of program suppliers.

The National Association of Broadcasters and others argued that the FCC's proposed investigation requirements constituted more than the "reasonable diligence" required by Section 317(c) of the Communications Act.[7]

FCC Report and Order

On April 22, 2021, the FCC released its report and order adopting rules requiring broadcasters to disclose whether leased programming aired on their stations is directly or indirectly sponsored, paid for, or is furnished by a foreign governmental entity.[8]

The rules adopted in the report and order placed the responsibility for foreign sponsorship identification disclosures on the broadcast station licensee.

Broadcast licensees were required to take at a minimum the following steps to satisfy the obligation that they exercise "reasonable diligence" to determine if an entity or individual purchasing airtime, or providing programming free of charge as an inducement to broadcast material, is a foreign governmental entity. Such steps were to be taken at the time the airtime leasing agreement was entered into and upon any renewal.

1. Inform the lessee of the foreign sponsorship disclosure requirement.

2. Inquire whether the lessee falls into any of the categories that qualify it as a "foreign governmental entity."

3. Inquire whether the lessee knows if anyone further back in the chain of producing/distributing the programming qualifies as a foreign governmental entity and has provided some form of inducement to air the programming.

4. If a foreign governmental entity has not already been identified in steps 1-3,

independently confirm the lessee's status by consulting the DOJ's Foreign Agents Registration Act website, and the FCC's semiannual U.S. based foreign media outlets reports.

5. Memorialize the listed inquiries and investigations to track compliance in the event documentation is required in response to a commission inquiry.

The NAB, the Multicultural Media, Telecom and Internet Council and the National Association of Black Owned Broadcasters filed a petition for the review of the report and order with the D.C. Circuit.[9]

The petitioners objected to the FCC's fourth requirement that radio and television broadcasters be required to independently confirm a sponsor's status, arguing the requirement exceeds the scope of the FCC's statutory authority under Section 317(c) of the Communications Act.

The D.C. Circuit agreed with the petitioners, finding that the "reasonable diligence" standard in Section 317(c) authorizes a "narrow duty of inquiry" for broadcasters, and that the FCC's additional requirement that broadcasters "seek information from two federal sources ... is not the law that Congress wrote."[10]

The court struck down the fourth requirement listed above and did not remand its decision to the FCC to revise. While the fourth requirement is no longer enforceable by the FCC, the others are still in effect; and broadcasters must still comply with those remaining requirements.[11]

The Second Notice

On Oct. 6, the FCC released a second notice of proposed rulemaking to propose an alternative diligence approach to fill in what the FCC perceived to be a regulatory gap created by the D.C. Circuit's ruling.[12]

The second notice requests comment on, inter alia, the following matters:

- A proposal that broadcasters certify they have informed lessees of airtime of the foreign sponsorship identification rules and have obtained, or sought to obtain, certifications from their lessees stating whether the lessee is or is not a foreign governmental entity. Such certifications would then be uploaded to the station's online public inspection file, which is publicly available on the FCC website.

- A proposal to incorporate into the FCC's rules standard certification language for broadcasters and lessees to use in their certifications.

- The appropriate process if a lessee fails to provide such a certification.

- As an alternative to the certification requirement, a process under which lessees would be required to produce documentation — e.g., database screenshots — to demonstrate that the lessee's name does not appear in either of the two federal government websites the FCC previously mandated be checked in its April 2021 order.

- A pending petition for clarification regarding how to distinguish between traditional advertising broadcast by a station in the ordinary course, which is not subject to the

new disclosure and diligence requirements, and programming arrangements for the lease of airtime, which are subject to those requirements.

While the adoption of the new foreign sponsorship identification rules will continue to impose additional regulatory burdens on broadcasters, the proposals put forward by the FCC in the second notice would at least provide broadcasters with greater flexibility in complying with those rules.

A key question will be what happens if a lessee simply refuses to provide a certification, which may frequently be the case with smaller and less sophisticated lessees.

In such situations, if the FCC decides to allow broadcasters to check governmental databases as an alternative to obtaining certifications, that database check, struck down by the D.C. Circuit when it was a required element of the process, may provide broadcasters with a useful safety valve.

Interested parties will have until 30 days after the second notice is published in the Federal Register to file comments on those matters, and until 45 days after publication to file reply comments. As noted above, Federal Register publication is expected later this year.

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[1] See 47 U.S.C. 317. Section 317(c) of the Communications Act specifically provides that broadcast station licensees will exercise reasonable diligence to obtain information required to make such announcements. 47 U.S.C. 317(c).

[2] See, e.g., First NPRM at ¶2.

[3] Sponsorship Identification Requirements for Foreign Government-Provided Programming, Notice of Proposed Rulemaking, 35 FCC Rcd 12099 (2020).

[4] See First NPRM, 35 FCC Rcd 12099 at n.4 (describing how the radio broadcaster CRI, which is owned by the Chinese government, was able to lease airtime through a subsidiary on a Washington, DC station to broadcast pro-Chinese government programming without disclosing the linkage to the Chinese government); see also nn.25, 40, 42, 43, 52, 75, 83, 84, 115, 116, 136, 155, 159.

[5] See First NPRM, ¶13, n.42 citing Anna Massoglia & Karl Evers-Hillstrom, Russia paid radio broadcaster $1.4 million to air Kremlin propaganda in DC, Open Secrets, July 1, 2019, https://www.opensecrets.org/news/2019/07/russia-paid-radio-broadcaster-1-4-million-to-air-kremlin-propaganda/.

[6] See Comments of the National Association of Broadcasters, MB Docket No. 20-299, at 2-

3 and at 10-13 (filed Dec. 28, 2020) ("NAB Comments"); see also Comments of National Public Radio, Inc., MB Dkt. No. 20-299, at ii, 6-7 (filed Dec. 28, 2020) ("NPR Comments").

[7] See NAB Comments at 4 and NPR Comments at 5.

[8] Sponsorship Identification Requirements for Foreign Government-Provided Programming, Report and Order, 36 FCC Rcd 7702 (2021).

[9] Petition for Review, the National Association of Broadcasters, et al v. FCC, No. 21-1171 (D.C. Cir. filed Aug. 13, 2021).

[10] National Association of Broadcasters, et al. v. FCC, 39 F.4th 817 (D.C. Cir. July 12, 2022) (NAB v. FCC).

[11] Several days following the release of the FCC's Second NPRM, a bipartisan bill, the Identifying Propaganda on Our Airwaves Act, was introduced in the Senate, with companion legislation introduced in the House of Representatives. This bill would amend the Communications Act to allow the FCC to require stations to check the two federal databases as part of their diligence; i.e., to authorize those provisions which the DC Circuit has struck down. The legislation also proposes taking the FCC's Order one step further – to permit the FCC to include additional outside sources for stations to check as the Commission sees fit.

[12] Sponsorship Identification Requirements for Foreign Government-Provided Programming, Second Notice of Proposed Rulemaking, MB Dkt. No. 20-299 (Oct. 6, 2022).