

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Sponsorship Identification Requirements for) MB Docket No. 20-299
Foreign Government-Provided Programming)
)
)

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ replies to comments on the Commission’s proposal to require broadcasters to provide on-air and public inspection file disclosures when they air programming sourced from certain foreign governmental entities or their representatives.² Commenters overwhelmingly agree with the Commission that American viewers and listeners should be aware if they are being subjected to foreign

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Notice of Proposed Rulemaking, 35 FCC Rcd 12099 (2020) (Notice). The Commission proposes to modify its sponsorship identification rules to require broadcast stations to make a specific on-air disclosure using standardized language identifying the foreign government involved. *Id.* at ¶¶ 3, 35. The rule would be triggered if the sponsor of the content falls into one of the following categories: 1) a “government of a foreign country” as defined by the Foreign Agents Registration Act (FARA); 2) a “foreign political party” as defined by FARA; 3) an entity or individual registered as an “agent of a foreign principal” under FARA, whose “foreign principal” has the meaning given such term in section 611(b)(1) of FARA and that is acting in its capacity as an agent of such “foreign principal”; 4) an entity designated as a “foreign mission” under the Foreign Missions Act; or 5) any entity meeting the definition of a “U.S.-based foreign media outlet” pursuant to section 722 of the Communications Act of 1934 (Act) that has filed a report with the Commission. *Id.* at ¶ 14.

propaganda.³ They caution, however, that the approach proposed in the Notice would duplicate existing laws and rules and sweep in a much broader swath of content than the intended target of foreign propaganda. Commenters discuss multiple ways that proposals in the Notice would exceed the Commission’s statutory authority, infringe broadcasters’ First Amendment rights and create undue compliance burdens. Ultimately, these effects also may potentially harm broadcast viewers and listeners by impeding their access to diverse programming.

NAB believes that proposals in our initial comments will avoid these harms while addressing the Commission’s underlying concern. Accordingly, we renew our request that the Commission rely primarily on the existing FARA disclosure requirements to ensure public awareness of foreign propaganda.⁴ If any additional safeguards are needed, the FCC also could require all entities to pass through the requisite FARA disclosures.⁵

Should the Commission determine that a new sponsorship identification rule is necessary, NAB urges the Commission to modify its proposals to narrowly tailor the rule to the potential harm at issue. Specifically, if the Commission proceeds in this direction, it should: (i) require disclosures only for programming that discusses controversial issues of

³ Notice at ¶ 2.

⁴ Comments of NAB, MB Docket 20-299 (Dec. 28, 2020) (NAB Comments) at 5-7. FARA and its implementing regulations require disclosures for registrants’ dissemination of “informational materials.” 22 U.S.C. § 614(a)-(b); 28 C.F.R. § 5.400 and § 5.402. Any physical or electronic items that an agent disseminates in interstate commerce on behalf of the foreign principal must be labeled with a “conspicuous statement” that identifies the registrant and its foreign principal and instructs audiences that they can obtain more information from the DOJ, using specific language prescribed by DOJ regulations. *Id.* Copies of informational materials must be filed with the DOJ within 48 hours of dissemination. *Id.*

⁵ The rules also should apply to informational materials shared on any platform, including broadcast, cable, print, or social media. NAB Comments at 3.

public importance;⁶ (ii) explicitly exempt advertising for products and services, B-roll, sound effects and archival material used as part of a program;⁷ (iii) implement the “reasonable diligence” requirement in a manner consistent with the sponsorship identification statute by allowing stations to make inquiries of those with whom they “deal directly” and that are likely to be foreign entities, rather than consulting governmental lists;⁸ and (iv) modify its approach to both public file and on-air disclosures to be consistent with the existing issue advertising rules.⁹

In addition to these proposed reforms, NAB supports several proposals advanced by NPR and PTV, including relying on the existing sponsorship identification rules rather than adopting new requirements;¹⁰ applying the rule only where an entire program is supplied by the foreign entity;¹¹ and modifying the definition of foreign governmental entities to focus on those recognized as having interests adverse to the United States.¹² Below, NAB discusses concerns raised in the record by other broadcasters and their proposed solutions.

⁶ NAB Comments at 8-13.

⁷ NAB Comments at 4, 14.

⁸ NAB Comments at 14-17.

⁹ NAB Comments at 17-22.

¹⁰ Comments of National Public Radio, Inc. (NPR), MB Docket No. 20-299 (Dec. 28, 2020) (NPR Comments) at 12-14.

¹¹ Comments of America’s Public Television Stations (APTS) and the Public Broadcasting Service (PBS) (collectively, PTV), MB Docket No. 20-299 (Dec. 23, 2020) (PTV Comments) at 16-17.

¹² PTV Comments at 15-16.

II. COMMENTERS AGREE WITH NAB THAT THE PROPOSED RULE WOULD INFRINGE BROADCASTERS' FIRST AMENDMENT RIGHTS, CREATE UNDUE BURDENS AND POTENTIALLY HARM BROADCAST VIEWERS AND LISTENERS

As multiple commenters make clear, the Commission's proposed rule would mandate disclosures for a broad range of programming, rather than targeting harmful foreign propaganda as intended. In several ways, the proposed rule is inconsistent with the Communications Act, the Administrative Procedure Act (APA), and the First Amendment. The proposal infringes broadcasters' First Amendment rights both by requiring a specific message and by potentially chilling beneficial speech. Significantly, the First Amendment and compliance burdens arising from the proposed rule have the potential to reduce the quantity, quality and diversity of programming broadcasters deliver to their audiences.

Commenters agree with NAB that the Notice's proposal to automatically categorize programming provided by foreign governmental entities as "political" is unfounded and would be arbitrary and capricious.¹³ Rather than broadening its interpretation of "political program" under Section 317(a)(2) to include "any and all programming" furnished by a foreign governmental entity, the Commission should limit any additional disclosure requirements to programming that both comes from a foreign governmental entity and that a broadcaster determines in good faith addresses a controversial issue of public importance.¹⁴ As PTV explains, without modifications, the proposed rule would "mistakenly assume[] that content funded in part by entities affiliated with foreign governments or that was produced in part with something of value provided by such an entity is always a form of

¹³ NAB Comments at 8-13; NPR Comments at 8-9 ("... there is no logical basis for characterizing programming as a 'political program' without regard for the actual content of the programming."); PTV Comments at 17-18 (like NAB, PTV proposes that the FCC require disclosures only for programming that discusses controversial issues of public importance).

¹⁴ NAB Comments at 8-13; PTV Comments at 17-18.

propaganda.”¹⁵ As a result, the rule could mandate disclosures even for news programming, murder mysteries, educational cartoons, science programs and historical documentaries that have been developed and curated by broadcasters for their viewers and listeners simply because “modest funding, location access, film footage, or other valuable consideration” was provided by a FARA registrant.¹⁶ Labeling such content as foreign propaganda, when the entity affiliated with a foreign government has no editorial control over the content whatsoever, and the content provided in no way seeks to influence viewers’ or listeners’ opinions about politics or policy, would confuse and profoundly disserve broadcast audiences.¹⁷ Importantly, NPR observes that the Notice’s proposed treatment of material with little or no monetary value as consideration would be a significant departure from the statute, FCC rules and Commission precedent.¹⁸

Commenters also agree with NAB that significant compliance burdens would arise from the proposed rule unless the Commission modifies or clarifies its expectations.¹⁹ NPR observes that by placing such a heavy burden on broadcasters, the Notice’s proposed

¹⁵ PTV Comments at 8.

¹⁶ PTV Comments at 8; NPR Comments at 12. See also PTV Comments at 3-9 (discussing several specific examples of content that is not foreign propaganda but would be captured by the proposed rule).

¹⁷ PTV Comments at 8; NAB Comments at 10-12; NPR Comments at 12 (“For news organizations and program producers like NPR and its Members, the task to satisfy the proposed new regulatory obligations could be truly daunting, completely unnecessary, and likely to confuse and mislead the public.”).

¹⁸ NPR Comments at 9-12 (“. . . merely licensing programming from a source traceable to a foreign government is not enough to require sponsor identification based on the underlying statute and the Commission’s current rules. Rather, there must be an inducement to broadcast, even in the case of a ‘political program or any program involving the discussion of a controversial issue’ . . . Absent such inducement, the broadcast represents the broadcaster’s editorial decision, not the putative sponsor’s.”).

¹⁹ NAB Comments at 8-13; NPR Comments at 5-8; PTV Comments at 18-19.

reasonable diligence standard would exceed the Commission's statutory authority.²⁰ NPR explains that the FARA database's user interface does not facilitate relevant searches, that its contents frequently change and that broadcasters continually hire and replace staff. As a result, the proposed diligence standard would encumber broadcasters with "an ongoing responsibility of consulting the database and researching other sources while training an evolving workforce on the intricacies of searching for relevant information."²¹ NPR also cautions that the proposed diligence standard could affect multiple parties beyond broadcast stations who are involved in the chain of program production, acquisition or distribution.²² PTV correctly observes that some sources of content that did not meet the Commission's definition of foreign governmental entities at the start of a program's production, or even between a first airing and a rebroadcast, might have a change in status.²³

²⁰ NPR Comments at 5-8, *citing Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983) (*Loveday*). In *Loveday*, the Commission determined that broadcast stations did not fail to exercise "reasonable diligence" by identifying a group as the sponsor of advertising opposing a ballot initiative concerning smoking, even though the group's funds came from tobacco companies. The court agreed, holding that "a licensee confronted with undocumented allegations and an undocumented rebuttal may safely accept the apparent sponsor's representations that he is the real party in interest." *Loveday*, 707 F.2d at 1449. The court reached its decision in part because of "grave doubts that the Commission could, in circumstances like these, require more of the licensees than it did in this case." *Id.*

²¹ NPR Comments at 7.

²² NPR Comments at 7; Notice at ¶ 9, *citing* 47 U.S.C. §§ 317(b), 508(a)-(c) (the Act imposes reciprocal obligations on a station licensee and "those involved with either the production or the transmission" of a program to disclose relevant payment information to ensure appropriate on-air sponsor identification).

²³ PTV Comments at 18-19 (urging FCC to create certain safe harbors for timing of review of the FARA list).

Given the unique challenges posed by the proposed rule, it is not difficult to imagine that some of the programming produced and aired by broadcasters would be modified to exclude certain footage or other program elements to avoid a new disclosure requirement.²⁴ To the extent that any rule the Commission adopts chills speech and results in broadcasters avoiding airing programs or excluding certain material from their programming, this harms broadcasters and the exercise of their First Amendment rights.²⁵ More importantly, however, the chilling effect would impede the public's access to the quantity, quality and diversity of programming they enjoy today. As discussed below, commenters propose various modifications to the proposed rule to avoid these public interest harms.

III. BROADCASTERS' PROPOSED MODIFICATIONS WOULD RESULT IN A MORE NARROWLY TAILORED RULE FOCUSED ON DISCLOSURE OF FOREIGN PROPAGANDA

In addition to proposals advanced in our initial comments, NAB believes that several proposals made by PTV and NPR could more narrowly tailor the rule to focus on the content of real concern to the Commission. If the Commission adopts rules beyond the existing FARA requirements, NAB urges the Commission also to adopt these proposed modifications to reduce burdens on broadcasters' protected speech, compliance burdens and potential harms to broadcast viewers and listeners.

NPR urges the Commission to rely on its existing sponsorship identification rules instead of adopting new disclosure requirements.²⁶ NAB agrees that compliance with the

²⁴ NAB Comments at 11.

²⁵ NPR Comments at 12 ("A targeted approach is essential to avoid unnecessarily intruding upon obvious and important newsgathering and other First Amendment protected activities."); NAB Comments at 6-8 (explaining that the FCC's proposals would fail to satisfy either intermediate or strict First Amendment scrutiny because of their overbreadth and lack of narrow tailoring).

²⁶ NPR Comments at 3-5.

existing standards would prevent audiences from hearing or seeing foreign propaganda without their knowledge.

If the Commission chooses to adopt new sponsorship identification rules, rather than relying on existing sponsorship identification rules or FARA disclosure requirements, several proposals in the record would appropriately narrow the rule's application to target concerns raised in the Notice. PTV urges the Commission to require enhanced sponsorship ID disclosures only where an entire program is supplied by a foreign governmental entity, rather than the "in whole or in part" standard proposed in the Notice.²⁷ NAB agrees that this proposal would more effectively target the content of real concern, rather than capturing all programs with any material, however limited in amount, from a foreign governmental source.

PTV also proposes that the Commission modify its proposed definition of foreign governmental entities for purposes of its heightened disclosure requirements.²⁸ The Office of Foreign Assets Control (OFAC) within the Department of the Treasury maintains and publishes a list of active U.S. sanctions programs in foreign countries to protect national interests and priorities.²⁹ Filtering the list of foreign government entities through the OFAC list would narrow the scope of the requirement while still capturing the specific examples of foreign propaganda discussed in the Notice.³⁰ NAB supports this modification because it would burden less content while focusing on programming suppliers that raise national

²⁷ PTV Comments at 16-17. PTV states that if the Commission chooses to adopt a rule where the heightened disclosure obligation applies even to programs that are supplied only in part by a foreign governmental entity, the Commission should limit the rule's application to situations where the programming is supplied primarily by that entity (i.e., more than 50 percent of the content or funding for the program).

²⁸ PTV Comments at 15-16.

²⁹ PTV Comments at 15.

³⁰ PTV Comments at 16.

security and/or foreign policy concerns. As PTV observes, since the Commission’s stated goal is to “label content from countries ‘who may wish to do us harm,’” the definition of foreign governmental entity should be focused on nations whose interests are at odds with those of the United States.³¹

Finally, NAB supports PTV’s proposal that the Commission expressly exclude tax credits and tax incentives from the types of consideration encompassed by its proposed rules. As PTV observed, such tax structures are very commonly used to support filming and production in many countries, and the credits cannot influence content.³²

IV. CONCLUSION

NAB and other commenters urge the Commission to narrowly tailor its proposed sponsorship identification rules for foreign government-provided programming to achieve its goal of ensuring Americans are aware of foreign propaganda. To address First Amendment concerns and reduce unnecessary burdens on broadcast stations, the Commission could instead require that all outlets pass through the disclosures mandated by FARA or focus on compliance with its existing sponsorship identification rules. Should the Commission choose to adopt additional disclosure requirements, NAB and PTV urge the FCC to require disclosures only where the content provided by a foreign governmental entity addresses a controversial issue of public importance. To comport with its obligations under the Communications Act and the APA, the Commission’s reasonable diligence standard must permit stations to obtain information on the foreign governmental status of programmers or advertisers from those entities, rather than consulting the moving target of the DOJ’s FARA

³¹ PTV Comments at 16, *citing* Notice at n. 4, 40, and 42.

³² PTV Comments at 4, FTN 11.

lists, and the OPIF and on-air disclosure requirements should not be stricter than those for issue advertising. In addition to these reforms, NAB supports several proposals advanced by other commenters for a more narrowly tailored rule, including applying the rule only where an entire program, rather than minor portions, is supplied by the foreign entity, and modifying the definition of foreign governmental entities to focus on those recognized as having interests adverse to the United States.

Respectfully submitted,

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