

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 )

NOTICE OF PROPOSED RULEMAKING

Adopted: October 16, 2020

Released: October 26, 2020

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission: Commissioners Rosenworcel and Starks issuing separate statements; Commissioner O’Rielly approving in part, concurring in part.

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION.....1
II. BACKGROUND.....4
III. DISCUSSION.....12
A. Entities or Individuals Whose Involvement in the Provision of Programming Triggers a Disclosure .....17
B. Scope of Foreign Programming that Would Require a Disclosure.....30
C. Contents of Required Disclosure of Foreign Sponsorship.....34
D. Reasonable Diligence.....47
E. Time Brokerage Agreements (TBAs)/Local Marketing Agreements (LMAs).....48
F. Section 325(c) Permits.....52
G. The Proposed Disclosure Requirements Satisfy the First Amendment .....55
H. Cost-Benefit Analysis.....61
IV. PROCEDURAL MATTERS.....63
V. ORDERING CLAUSES.....70
APPENDIX A – Proposed Rules
APPENDIX B – Initial Regulatory Flexibility Act Analysis

I. INTRODUCTION

1. The principle that the public has a right to know the identity of those that solicit their support is a fundamental and long-standing tenet of broadcast regulation.<sup>1</sup> To that end, throughout the history of broadcasting, Congress and the Commission have sought to ensure that the public is informed when airtime has been purchased in an effort to persuade audiences, finding it essential to ensure that

<sup>1</sup> The Commission’s words from nearly sixty years ago, in the context of adopting changes to the sponsorship identification rules, remain equally applicable today: “Perhaps to a greater extent today than ever before, the listening and viewing public is being confronted and beseeched by a multitude of diverse, and often conflicting, ideas and ideologies. Paramount to an informed opinion and wisdom of choice in such a climate is the public’s need to know the identity of those persons or groups who solicit the public’s support.” Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules, Report and Order, 34 FCC 829, 849, para. 59 (1963).

audiences can distinguish between paid content and material chosen by the broadcaster itself. This transparency concept is encapsulated in section 317 of the Communications Act of 1934,<sup>2</sup> as amended (the Act), and dates back to the Radio Act of 1927,<sup>3</sup> which precedes the very creation of the Commission. Such transparency remains critically important today. Oftentimes, however, foreign governments pay for the airing of such programming, or provide it to broadcast stations free of charge, and the programming may not contain a clear indication, or sometimes any indication at all, to the listener or viewer that a foreign government has paid for, or provided, the content.<sup>4</sup>

2. While the Commission’s current rules require a sponsorship identification when a station has been compensated for airing particular material, the rules require disclosure of the sponsor’s name and do not, as part of its “reasonable diligence,” require that a station determine whether the source of the programming is in fact a foreign government or mandate that the connection to a foreign government is disclosed to the public at the time of broadcast. We believe, however, that the American people deserve to know when a foreign government has paid for programming, or furnished it for free, so that viewers and listeners can better evaluate the value and accuracy of such programming.

3. Accordingly, by today’s Notice of Proposed Rulemaking (NPRM), we propose to adopt specific disclosure requirements for broadcast programming that is paid for, or provided by a foreign government or its representative,<sup>5</sup> so as to eliminate any possible ambiguity about the source of the programming. In particular, we propose to amend section 73.1212 of the Commission’s rules to require a specific disclosure at the time of broadcast 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.<sup>6</sup> Our proposed rules would provide standardized disclosure language for stations to use in such instances to specifically identify the foreign government involved.

## II. BACKGROUND

4. The obligation that a broadcaster inform its audience when the station’s airtime has been purchased (or the station is otherwise induced to air certain material) is a bedrock principle of broadcasting regulation that pre-dates the creation of the Commission. To ensure that audiences could distinguish between paid material and programming selected independently by the broadcaster, the Radio

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<sup>2</sup> 47 U.S.C. § 317(a)(1) (requiring that any programming “for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person”).

<sup>3</sup> Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, 1170 § 19 (repealed 1934).

<sup>4</sup> See, e.g., Koh Gui Qing and John Shiffman, *Beijing’s Covert Radio Network Airs China-Friendly News Across Washington, and the World* (Nov. 2, 2015), <https://www.reuters.com/investigates/special-report/china-radio/> (describing how the Chinese government radio broadcaster, CRI, was able through a subsidiary to lease almost all of the airtime on a Washington, DC area station and broadcast pro-Chinese government programming on this station without disclosing the linkage to the Chinese government).

<sup>5</sup> In this NPRM, our use of the term “foreign government-provided programming” refers to all programming that is provided by an entity or individual that falls into one of the five categories discussed in Section III.A. below. In turn, the phrase “provided by” when used in relation to “foreign government programming” covers both the broadcast of programming in exchange for consideration and furnishing the programming for free as an inducement to broadcast the programming. See Section III.B. below (discussing sections 317(a)(1) and (2) of the Act, which discuss both programming that is paid for and furnished for free).

<sup>6</sup> 47 CFR § 73.1212(a) (stating “When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of broadcast, shall announce: (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) By whom or on whose behalf such consideration was supplied . . .”).

Act of 1927 required broadcast stations to announce the name of any “person, firm, company, or corporation” that had paid “valuable consideration” either “directly or indirectly” to the station at the time of broadcasting the programming for which consideration had been paid.<sup>7</sup> At the time, Representative Emanuel Celler explained that Congress intended the statute to prohibit stations from disguising advertising as program content.<sup>8</sup> With the creation of the Commission and the adoption of the Act, this disclosure requirement was incorporated almost verbatim into section 317 of the Act.<sup>9</sup> The goal behind this disclosure requirement and the Commission’s subsequent implementing regulations was to ensure that the public knew who had funded particular broadcast programming, without in any way censoring or prohibiting such programming.<sup>10</sup>

5. Over the years, various amendments to the rules, decisions by the Commission, and a 1960 amendment to section 317 of the Act have all continued to underscore the need for transparency and disclosure to the public about the true identity of a program’s sponsor. Beginning in the 1940s, radio news shows grew longer and obtained corporate sponsors, raising concerns about whether radio audiences could recognize who had sponsored broadcast programming.<sup>11</sup> In December 1944, in the wake of increased unattributed political messaging in the run up to the presidential election between Franklin D. Roosevelt and Thomas Dewey, the Commission for the first time promulgated regulations pursuant to section 317, entitled “Sponsored Programs, Announcements Of.”<sup>12</sup> These regulations established the core requirements for sponsorship identification, many of which remain intact today.

6. The 1944 regulations stated that, with regard to all programming, broadcast stations had a duty to “fully and fairly disclose the identity of the person or persons” who had either provided consideration, or on whose behalf consideration had been provided, to the station. The new regulations

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<sup>7</sup> Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, 1170 § 19 (repealed 1934). Section 19 of the Radio Act stated:

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.

<sup>8</sup> See 67 Cong. Rec. 2309 (1926); see also Richard Kielbowicz and Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, Fed. Com. L.J., Vol. 56, Iss. 2, 329, at 334 (*Origins of the Sponsorship Identification Regulations*).

<sup>9</sup> Section 317 provided:

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

48 Stat. at 1089. Compare section 317 with section 19 of the Radio Act of 1927, 44 Stat. at 1170 (showing that the phrase “firm, company, or corporation” was dropped in two places after the word “person”). This change was, however, inconsequential as the definitions section of the 1934 Act stated that “‘Person’ includes an individual, partnership, association, joint-stock company, trust, or corporation.” See *Origins of the Sponsorship Identification Regulations*, at 336, n. 30.

<sup>10</sup> See, e.g., *Origins of the Sponsorship Identification Regulations* at 332 (noting that the Commission’s sponsorship identification rules do not prohibit anything, but rather seek to give audiences contextual information, such as labels or disclosure announcements, to evaluate the messages they consume).

<sup>11</sup> *Id.* at 338.

<sup>12</sup> See *Announcement of Sponsored Programs*, 9 Fed. Reg. 14734 (Dec. 19, 1944) (establishing 47 CFR §3.409 (a)-(e)) (*Announcement of Sponsored Programs*); see also Sushma Raju, *The FCC’s Abandonment of Sponsorship Identification Regulation & Anonymous Special Interest Group Political Advertising*, 93 Wash. U. L. Rev., 1103, 1108 (2016) (describing the Commission’s 1944 regulations).

also stated that “[w]here an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact *is known* to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.”<sup>13</sup> To the extent a corporation, committee, association, or other unincorporated group provided the consideration as an inducement to broadcast the programming, the station not only had to announce the name of the corporation, committee, association, or other unincorporated group, but also had to retain in its public inspection file a list of the executive officers of the organization that provided the consideration.<sup>14</sup>

7. The 1944 regulations also established a new requirement with regard to “any political program or any program involving the discussion of public controversial issues” even though section 317 of the Act at that time made no such distinction among programming.<sup>15</sup> With regard to political programming or programming discussing “public controversial issues,” the Commission’s 1944 regulations stated that the provision of “any records, transcriptions, talent, scripts, or other material or services of any kind” furnished, either directly or indirectly” to the station could qualify as “consideration” to trigger the sponsorship disclosure requirement. Because this was during the radio era, the types of materials that qualified as “consideration” essentially equated to providing the programming itself. The new regulation concerning political programming also dictated how frequently the sponsorship disclosure had to be made. According to then section 3.409(b) of the Commission’s rules, an announcement had to be made both at the beginning and end of the program, but in the case of any program whose duration was five minutes or less only one such announcement had to be made at either the beginning or end of the program.<sup>16</sup>

8. The Commission subsequently expounded on its regulation concerning programming involving political or controversial issues, including a 1958 case involving the transmission of filmed “summaries” of Senate committee hearings by a television station without any disclosure that the costly summary had been packaged and provided by an outside entity.<sup>17</sup> Although the films had been provided for free to the television station by another station, the National Association of Manufacturers (NAM) had actually paid for the initial production of the films and sought their distribution. The Commission found that the furnishing of the films “clearly constituted ‘valuable consideration,’” and that the films constituted “discussion of public controversial issues.”<sup>18</sup> The Commission determined that the television station had not been sufficiently diligent in determining the source of the programming in this situation where a known representative of the NAM had informed the television station that the films would be provided free of charge by another station and the films were subsequently delivered to the broadcasting station postpaid.<sup>19</sup> The Commission emphasized “that in connection with material constituting a ‘discussion of public controversial issues’ or a political discussion, the highest degree of diligence is

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<sup>13</sup> See *Announcement of Sponsored Programs*, at 14734 (providing the text of 47 CFR § 3.409(c)) (emphasis added). The current regulations contain a similar provision and also state that when an agent is acting on behalf of another and such fact is known to the station licensee through the exercise of “reasonable diligence,” the licensee must disclose the identity of the person on whose behalf the agent was acting. See 47 CFR § 73.1212 (e).

<sup>14</sup> See *Announcement of Sponsored Programs* at 14734 (providing the text of 47 CFR § 3.409(d)). The current rules similarly continue to require the disclosure of the “person or persons, or corporation, committee, association or other unincorporated group, other entity” who has provided the consideration. See 47 CFR § 73.1212 (e).

<sup>15</sup> See *Announcement of Sponsored Programs* at 14734 (providing the text of 47 CFR § 3.409(b)).

<sup>16</sup> See *id.*

<sup>17</sup> *Violation of Section 317 of the Communications Act*, 40 FCC 12 (1958). The Senate hearings covered a long-standing and much publicized strike involving the Kohler Company.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.* at 14.

called for in ascertaining, before the presentation thereof, the actual source responsible for furnishing the material.”<sup>20</sup>

9. In 1960, Congress amended section 317 and added a new section to the Act to address the rapid growth of undisclosed program sponsorships.<sup>21</sup> A series of heavily publicized congressional hearings highlighted the quiz show and payola scandals of the 1950s and revealed a widespread practice of undisclosed program sponsorships.<sup>22</sup> The amendments to section 317 and the addition of section 507 to the Act brought about four major changes to the area of sponsorship identification. First, Congress codified almost verbatim the Commission’s regulation concerning the broadcast of political material or material involving the discussion of a controversial issue.<sup>23</sup> Second, Congress added section 507 to the Act, which imposed disclosure requirements on non-licensees,<sup>24</sup> as well as the possibility of a fine or imprisonment for failure to adhere to these requirements.<sup>25</sup> Section 507 (a)-(c) imposed an obligation on employees of the licensee and those involved with either the production or the transmission of the programming to inform their employer, the station licensee, or the next person in the chain of individuals involved with transmitting the programming to the licensee, if any consideration had been paid to induce broadcasting of the program.<sup>26</sup> Third, Congress simultaneously adopted a new section 317(b), which imposed a parallel obligation on the licensee to take note of any information provided pursuant to the new section 507 and to ensure any appropriate disclosures were made during the program.<sup>27</sup> With these

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<sup>20</sup> *Id.*

<sup>21</sup> Amendments to Communications Act of 1934, Pub. L. No. 86-752, sec. 8, §§ 317, 508 (1960) (codified at 47 U.S.C. §§ 317, 508).

<sup>22</sup> A House report issued in 1960 summarized the concerns about undisclosed sponsorships that the hearings highlighted. *See* House Report 1800, 86th Cong., 2d Sess., at 18-19 (June 13, 1960). Testimony revealed that the owner of a department store had paid \$10,000 in cash to get an employee of the store as a contestant on the program “\$64,000 Question” without any announcement of the payment. *Id.* Further testimony revealed numerous payments made to stations to obtain mention of the department store or its products on shows not sponsored by the store. *Id.* The hearings also showed that much of the music heard on the radio was probably influenced by payments of money, gifts, etc. to programming personnel. *Id.* at 19. *See also* *Origins of the Sponsorship Identification Regulations* at 347-56 (describing the payola and quiz show scandals of this era and related congressional hearings).

<sup>23</sup> *See* House Report 1800, 86th Cong., 2d Sess., at 24 (June 13, 1960). In doing so, Congress sought to make

“clear that the instant legislation is not intended to change the Commission’s present requirement that an announcement be made in the case of any political program or any program involving the discussion of any controversial issue even where the program matter is furnished *without charge* or at a nominal charge as an inducement to the broadcast of the program. Thus, an announcement in these circumstances may be required even though, in fact, the matter broadcast is not ‘paid’ matter.”

*Id.* (emphasis added). Notably, the House Report accompanying the legislation stated that the provision of the programming itself, in the case of a political program or a program that discussed a controversial issue, was sufficient to trigger the disclosure requirement.

<sup>24</sup> Amendments to Communications Act of 1934, Pub. L. No. 86-752, sec. 8, § 508, 74 Stat. 889, 896 (1960) (codified at 47 U.S.C. § 508).

<sup>25</sup> *Id.* *See* 47 U.S.C. § 508(g) (stating that “[a]ny person who violates any provision of this section shall, for each such violation, be fined not more than \$10,000 or imprisoned not more than one year, or both.”).

<sup>26</sup> 47 U.S.C. § 508(a)-(c).

<sup>27</sup> With regard to these amendments, the House Report accompanying the legislation stated “[t]he section as it has existed since the Federal Radio Act appears to go only to payments to licensees as such. The fact that licensees now delegate much of their actual programming responsibilities to others makes it imperative that the coverage of section 317 be extended in some appropriate manner to those in fact responsible for the selection and inclusion of broadcast matter.” *See* House Report 1800, 86th Cong., 2d Sess., at 19 (June 13, 1960).

statutory amendments, Congress indicated that it was not just the immediate interactions among the licensee and others that are critical for determining whether any consideration was involved, but also interactions further back in the chain of individuals associated with providing the programming to the licensee. As a further corollary to the requirement that non-licensees disclose their knowledge about any consideration that has been provided, Congress also adopted a new section 317(c) that simultaneously imposed on the licensee the obligation to “exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any programs or program matter for broadcast, information to enable such licensee to make the announcement required by this section.”<sup>28</sup> The fourth significant change that Congress made to the statute was the addition of section 317(e), which directed the Commission to “prescribe rules and regulations to carry out the provisions” of section 317.<sup>29</sup>

10. In 1962, the Commission issued a public notice specifically expressing concern about the lack of sponsorship identification in foreign documentary films and other broadcast matter “containing political propaganda or controversial matter, sponsored and paid for by foreign governments and distributed by their agents.”<sup>30</sup> At that time, the Commission stated that section 317 of the Act and the Commission’s rules require “a sponsorship announcement fully and fairly disclosing the true identity of the person or persons furnishing such material, which would include identification of the foreign principal concerned.”<sup>31</sup> According to the public notice, the “[A]ct further places an obligation on Commission licensees to exercise reasonable diligence to obtain, from those with whom they deal directly in connection with any program, information to enable them to make the required announcement.”<sup>32</sup> In 1963, the Commission adopted rules implementing Congress’s 1960 amendments to the Act. Ultimately contained in section 73.1212 of the Commission’s rules, the sponsorship identification rules largely track the provisions of section 317 of the Act.<sup>33</sup> The rules restate the statutory requirement that all paid programming aired on a station, or programming for which some form of consideration has been provided to the station, must include an identification of the sponsor with the programming.<sup>34</sup> In addition, with regard to “any political broadcast matter or any broadcast matter involving the discussion of a controversial issue,” the rules state that the programming itself (*i.e.*, any “film, record, transcription, talent, script, or other material or service of any kind”) if provided as an inducement for the station to

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<sup>28</sup> Amendments to the Communications Act of 1934, Pub. L. No. 86-752, 74 Stat. 889, 896, Sec. 8, § 317(c) (codified at 47 U.S.C. § 317(c)). The House Report accompanying the amendments described this new section 317(c) “[a]s a further means of insuring that licensees will be in a position to make the announcement referred to in subsection (b), . . .” See House Report 1800, 86th Cong., 2d Sess., at 25 (June 13, 1960).

<sup>29</sup> *Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules*, Report and Order, 34 FCC 829 (1963). The only statutory amendment since 1960 was in 1980 when, due to some renumbering of provisions in the Act, the reference in section 317(b) to section 507 changed from “section 508 of the Act” to “section 507 of this Act.” See *To Repeal Section 506 of the Communications Act*, Pub. L. 96-507, 94 Stat. 2747 (1980).

<sup>30</sup> See *FCC Warns About Broadcast of Controversial Foreign Matter Without Indicating Foreign Sponsorship*, Public Notice, 40 FCC 136 (1962).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See 47 CFR § 73.1212. In 1963, the same sponsorship identification rules for each type of broadcast service were housed with the other rules for that broadcast service. See *Applicability of Sponsorship Identification Rules*, Public Notice, 40 FCC 141, 143-44 (1963) (laying out the separate rule sections for standard broadcast stations, FM broadcast stations, television broadcast stations, and international broadcast stations). In 1975, the rules were consolidated into the one section for broadcast services that we see today at 47 CFR § 73.1212. *Amendment of Sections 73.119, 73.289, 73.654, 73.789 and 76.221 of the Commission’s Rules*, Report and Order, 52 FCC 2d 701, para. 36 and Appendix (1975).

<sup>34</sup> See *id.* § 73.1212(a).

broadcast the programming will trigger the requirement to include sponsorship identification.<sup>35</sup> The rules also implement the statutory requirement that licensees employ “reasonable diligence” to determine whether a sponsorship identification is needed.<sup>36</sup> Where an agent or other person contracts, or makes arrangements, with the station on behalf of another, and this fact is known, or could be known through the exercise of reasonable diligence, the licensee must identify in its announcement the identity of the person on whose behalf the agent acted, rather than the agent.<sup>37</sup> The rules also provide an exception to the disclosure requirement for those instances where the identity of the sponsor and the fact of sponsorship of a commercial product or service is inherently obvious.<sup>38</sup> Finally, the rules also contain certain requirements about the format and frequency of disclosures and about information that must be maintained in a licensee’s public files regarding such disclosures.<sup>39</sup>

11. The evolution of the statutory sponsorship identification requirements in section 317 of the Act and the Commission’s implementing regulations demonstrate the paramount importance that both Congress and the Commission place on broadcast audiences knowing who is trying to persuade them and specifically when airtime has been purchased, or programming furnished for free by, someone other than the broadcast station airing that programming. Indeed, section 317 and its implementing regulations strive to create the transparency essential to a well-functioning marketplace of ideas, and we believe that this need for transparency is particularly acute when programming from foreign governments is involved.<sup>40</sup> Thus, in this item, we focus specifically on how to strengthen our disclosure requirements to make it more apparent when programming provided by foreign governmental entities is being transmitted over the national airwaves.<sup>41</sup>

### III. DISCUSSION

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<sup>35</sup> See *id.* § 73.1212(d).

<sup>36</sup> See *id.* § 73.1212(b).

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* § 73.1212(f) (i.e., in advertising commercial products or services, a statement of 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).

<sup>39</sup> See *id.* § 73.1212(d) (regarding frequency of disclosures for political programming or programming involving the discussion of a controversial issue); *id.* § 73.1212(a)(2)(ii) (regarding format of disclosures for television political advertisements); *id.* § 73.1212(e) (stating what information licensees must maintain in their public inspection files with regard to their sponsorship identifications).

<sup>40</sup> See, e.g., Robert Elliott, *How Russia Spreads Disinformation via RT is More Nuanced Than We Realize* (Jul. 26, 2019), <https://www.theguardian.com/commentisfree/2019/jul/26/russia-disinformation-rt-nuanced-online-ofcom-fine> (noting that there is mounting evidence to suggest that many foreign government controlled media outlets routinely disseminate stories designed to sow division in the West and pursue the foreign policy goals of the governments that back them); Jennifer Rankin, *Russian Media Spreading ‘Covid 19 Disinformation’* (Mar 18, 2020), <https://www.theguardian.com/world/2020/mar/18/russian-media-spreading-covid-19-disinformation> (describing how Pro-Kremlin media have been spreading disinformation about coronavirus with the aim of “aggravating” the public health crisis in the West); see also discussion in Section III.A. below regarding the FARA statute describing how to identify foreign governmental actors who seek persuade U.S. policy or the public.

<sup>41</sup> Our focus in this NPRM on undisclosed foreign government programming is consistent with what appears to be a broader trend in the media sector to provide greater transparency about government funded programming. While we take no position on the adequacy of their approaches, we note that some social media platforms have also adopted policies to identify content provided by governmental entities. See Twitter Support, *New Labels for Government and State-Affiliated Media Accounts* (Aug. 6, 2020), [https://blog.twitter.com/en\\_us/topics/product/2020/new-labels-for-government-and-state-affiliated-media-accounts.html](https://blog.twitter.com/en_us/topics/product/2020/new-labels-for-government-and-state-affiliated-media-accounts.html); Nathaniel Gleicher, *Labeling State-Controlled Media On Facebook* (June 4, 2020), <https://about.fb.com/news/2020/06/labeling-state-controlled-media/>; YouTube Help, *Information Panel Providing Publisher Context*, [https://support.google.com/youtube/answer/7630512?p=publisher\\_transparency](https://support.google.com/youtube/answer/7630512?p=publisher_transparency) (last visited Aug. 17, 2020).

12. As described above, the Commission last implemented a major change to its sponsorship identification rules in 1963. With the passage of nearly sixty years and the growing concerns with foreign government-provided programming, the time is ripe to update our sponsorship identification rules. The instant NPRM seeks to ensure that, consistent with our statutory mandate, foreign government program sponsorship over the airwaves is evident to the American public.

13. To this end, we propose new sponsorship identification rules specifically targeted to situations where a station broadcasts material that has been sponsored and/or provided for free by a foreign government. In many instances, foreign government programming is not provided to licensees by an entity or individual immediately identifiable as a foreign government. For example, it might be a foreign government agency, which for no nefarious reason, simply does not include the name of the foreign country in its title. In other instances, however, the linkage between the foreign government and the entity providing the programming may be more attenuated in an effort to obfuscate the true source of the programming.<sup>42</sup> Although our current rules require the disclosure of the sponsor's name, the relationship of that sponsor to a foreign country is not required as part of the current disclosure. But in the interests of transparency, we believe that such linkage must be clear. For example, if a media outlet controlled by a foreign government that is competing with the United States in the race to establish 5G technology were to distribute programming asserting that 5G services are a health hazard, it is important for the American public to know the true source of such programming so as to make an informed judgement about these assertions.<sup>43</sup>

14. In order to ensure that the American public can best assess the programming that is delivered over the airwaves, we seek to identify the foreign governmental entities that our new rule should be directed toward. To this end, we draw on established lists of foreign governmental actors whose activities already warrant disclosure of their identities, per the determinations of other U.S. agencies that are responsible for U.S. national security and foreign policy. Our proposed 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);<sup>44</sup> 2) a "foreign political party" as defined by FARA;<sup>45</sup> 3) an entity or individual registered as an "agent of a foreign principal" under FARA,<sup>46</sup> 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";<sup>47</sup> 4) an entity designated as a "foreign mission" under the Foreign Missions Act;<sup>48</sup> or 5) any entity meeting the definition of a "U.S.-based foreign media outlet" pursuant to section 722 of the Act that has filed a report with the Commission.<sup>49</sup> As discussed in greater detail below, entities or individuals falling into these categories have already been identified by statute or by a U.S. government agency (*i.e.*, either the U.S. Department

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<sup>42</sup> See, e.g., Anna Massoglia and Karl Evers-Histrom, *Russia Paid Radio Broadcaster \$1.4 Million to Air Kremlin Propaganda in DC*, OpenSecrets.org (July 1, 2019), <https://www.opensecrets.org/news/2019/07/russia-paid-radio-broadcaster-1-4-million-to-air-kremlin-propaganda/> (describing how a Florida-based company, RM Broadcasting LLC, had been acting as a middleman brokering airtime for Russian government-owned Sputnik International).

<sup>43</sup> See, e.g., William J. Broad, *Your 5G Phone Won't Hurt You. But Russia Wants You to Think Otherwise*, New York Times (May 12, 2019), <https://www.nytimes.com/2019/05/12/science/5g-phone-safety-health-russia.html> (describing how even as the Russian network RT America has been transmitting programming that raises fears among American viewers about the safety of 5G, Vladimir Putin is strongly promoting the launch of 5G in Russia).

<sup>44</sup> 22 U.S.C. § 611(e).

<sup>45</sup> *Id.* § 611(f).

<sup>46</sup> *Id.* § 611(c).

<sup>47</sup> *Id.* § 611(b)(1).

<sup>48</sup> *Id.* §§ 4301-16.

<sup>49</sup> 47 U.S.C. § 624.



of Justice or U.S. Department of State) consistent with that agency's national security and foreign policy responsibilities, as being a "foreign government" or its representative whose activities warrant public disclosure of their identities and operations. By relying on these sources, the Commission can rely on existing information and thereby reduce the burdens on broadcasters as they identify which entity qualifies as a "foreign governmental entity." We also discuss below what programming would trigger a standardized disclosure and what this disclosure should contain. We tentatively conclude below that any programming provided by an entity that qualifies as a "foreign governmental entity"—whether in exchange for consideration or furnished for free (or at nominal charge) as an inducement to broadcast the material—would trigger a standardized disclosure requirement under our proposed regulations. To reduce the potential for any ambiguity about the form of the disclosure that a broadcaster must make regarding the foreign government-provided programming, we propose specific disclosure language and rules regarding the frequency of such disclosures. Our proposed standardized disclosure statement will not only simplify the disclosure process for licensees, but also make it easier for the viewing and listening public to discern when programming has been provided by a foreign government. Further, we seek comment on whether this proposed disclosure should be placed in a licensee's online public inspection file (OPIF) and, if so, how this requirement should be implemented.

15. Additionally, as described above, section 317 of the Act and the Commission's rules establish a "reasonable diligence" standard that a licensee must employ to ascertain the true source of any programming. We explore below what could constitute "reasonable diligence" on the part of a licensee in determining whether programming has been provided by a foreign government. We also consider how the "reasonable diligence" standard should apply with regard to disclosures about foreign government-provided programming when the licensee has entered into a time brokerage agreement, and whether the obligations contained in sections 507(b) and (c) of the Act<sup>50</sup> impose any requirements on brokers.

16. Further, this NPRM addresses the applicability of our proposed requirements to those broadcasters transmitting programming pursuant to section 325(c) of the Act,<sup>51</sup> as that provision concerns the broadcast of material for reception in the United States. In considering these various changes to our sponsorship identification rules, we also discuss the interplay between our proposals and the First Amendment. Finally, we seek comment on the benefits and burdens associated with adopting an express foreign government sponsorship disclosure requirement. In particular, we seek comment on how to quantify the widespread benefit of disclosing to the public the identity of foreign government-provided programming.

#### **A. Entities or Individuals Whose Involvement in the Provision of Programming Triggers a Disclosure**

17. We tentatively conclude that if certain foreign entities or individuals have provided programming to a radio or television station—*i.e.*, either paid for programming to be broadcast or furnished the programming free of charge as an inducement that it be broadcast—then a disclosure

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<sup>50</sup> *Id.* § 508(b), (c).

<sup>51</sup> *Id.* § 325(c). Section 325(c) entitled "Broadcast to Foreign Countries for Rebroadcast to United States" states:

"No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor."

*Id.*

regarding foreign government sponsorship is needed.<sup>52</sup> In determining what type of entities or individuals will trigger such a disclosure, we propose to rely on several existing sources that identify foreign governmental actors. As described above, it may not always be apparent from the name of the entity that has provided the programming that the entity is in fact a branch of a foreign government or otherwise working on behalf of a foreign government. Yet, it is important from the perspective of transparency for the American public to know the true source of the programming so they can best evaluate its value and accuracy.

18. Rather than requiring licensees to engage in an unbounded investigation about any possible linkages between entities that provide programming and a foreign government, we propose that licensees look to already established sources of foreign governmental actors maintained by the U.S. government that identify foreign governmental actors or their agents operating in the United States. Specifically, under our proposal, if an entity or individual that fits into any of these categories provides<sup>53</sup> programming to a broadcast radio or television station, then that information must be disclosed to listeners and viewers at the time the material is aired. The proposed categories are:

1. A “government of a foreign country” as defined by FARA;<sup>54</sup>
2. A “foreign political party” as defined by FARA;<sup>55</sup>

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<sup>52</sup> Our focus in this NPRM on foreign government programming comports with historical concerns, both in the Communications Act and in Commission pronouncements, regarding foreign government influence on the nation’s broadcast sector. *See* Section 310(a) of the Communications Act stating that “[t]he station license required under this Act shall not be granted to or held by any foreign government or the representative thereof,” and the Communications Act contains certain heightened restrictions or reviews associated with foreign involvement in the broadcast sector. *See* 47 U.S.C. § 310(a); *see also* 47 U.S.C. § 310(b) (stating that no broadcast station license shall be granted to any alien or the representative of any alien; any corporation organized under the laws of any foreign government; any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof; or by any corporation organized under the laws of a foreign country any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license). In addition, in recent years, Congress has twice amended the Communications Act to add provisions that specifically focus on foreign government programming. In 2017, Congress added a new section 537a to the Act, which states that multichannel video programming distributors (MVPDs) are not required, as a condition of meeting their retransmission consent obligations, to carry programming sponsored by the Government of the Russian Federation. 47 U.S.C. § 537a. And, in 2018, Congress passed the National Defense Authorization Act for Fiscal Year 2019, which added a provision requiring “U.S.-based foreign media outlets” to submit periodic reports to the Commission in an effort to provide greater transparency about foreign government programming transmitted by these media outlets. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §1085(a) (2018) (codified at 47 U.S.C. § 624) (NDAA).

<sup>53</sup> *See supra* note 5 (explaining that phrase “provided by” when used in relation to “foreign government programming” covers both the broadcast of programming in exchange for consideration and furnishing the programming for free as an inducement to broadcast the programming).

<sup>54</sup> 22 U.S.C. § 611(e). FARA defines a “government of a foreign country” as:

“any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.”

*Id.*

3. An individual or entity registered as an “agent of a foreign principal,” under section 611(c) of FARA,<sup>56</sup> 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”;<sup>57</sup>
4. An entity designated as a “foreign mission” under the Foreign Missions Act;<sup>58</sup> or
5. An entity meeting the definition of a “U.S.-based foreign media outlet” pursuant to section 722 of the Act that has filed a report with the Commission.<sup>59</sup>

These five categories rely on existing statutes and determinations by the U.S. government as to when an entity or individual is a foreign government, or is acting on behalf of such an entity or individual. Relying on these categories of actors will draw on the substantial experience and authority in such matters that already exists within the federal government and avoid involving the Commission, or the broadcaster, in subjective determinations regarding who qualifies as a foreign governmental entity. We address each

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<sup>55</sup> *Id.* § 611(f). FARA defines a “foreign political party” as:

“any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof.”

*Id.*

<sup>56</sup> *Id.* § 611(c). Section 611(c) of FARA provides that, except “as provided in subsection (d) of this section, the term ‘agent of a foreign principal’ means—(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—(i) engages within the United States in political activities for or in the interests of such foreign principal; (ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal; (iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or (iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and (2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.” *Id.*

Section 611(d) of FARA states that the “term ‘agent of a foreign principal’ does not include any news or press service or association organized under the laws of the United States or of any State or other place subject to the jurisdiction of the United States, or any newspaper, magazine, periodical, or other publication for which there is on file with the United States Postal Service information in compliance with section 3611 of Title 39, published in the United States, solely by virtue of any bona fide news or journalistic activities, including the solicitation or acceptance of advertisements, subscriptions, or other compensation therefor, so long as it is at least 80 per centum beneficially owned by, and its officers and directors, if any, are citizens of the United States, and such news or press service or association, newspaper, magazine, periodical, or other publication, is not owned, directed, supervised, controlled, subsidized, or financed, and none of its policies are determined by any foreign principal defined in subsection (b) of this section, or by any agent of a foreign principal required to register” under FARA. 22 U.S.C. § 611(d).

<sup>57</sup> *Id.* § 611(b)(1). Section 611(b)(1) of FARA states that “[t]he term ‘foreign principal’ includes a government of a foreign country and a foreign political party.” *Id.* See also, para. 21 (discussing further which FARA definitions of “foreign principal” are incorporated into our proposed disclosure requirement).

<sup>58</sup> *Id.* §§ 4301-16.

<sup>59</sup> 47 U.S.C. § 624.

of these categories in turn below and seek comment on our proposed reliance on these existing categories, both individually and collectively. For example, are there alternative or additional sources of available information that could be used to determine when an entity or individual is acting on behalf of a foreign government?

19. *FARA*. In linking the proposed disclosure requirement to those individuals defined by FARA, we rely on a statute specifically designed to identify those individuals and their activities that Congress has determined should be known to the U.S. government and the American public.<sup>60</sup> As the United States Department of Justice (DOJ) has explained, the government’s “concern is not the content of the speech but providing transparency about the true identity of the speaker.”<sup>61</sup> FARA requires “agents of foreign principals” engaged in certain activities in the United States on behalf of foreign interests to register with the DOJ.<sup>62</sup> Our reliance on FARA narrows the scope of our proposal to only those entities and individuals whose activities have been identified by the DOJ as requiring disclosure because their activities are potentially intended to influence American public opinion, policy, and law.<sup>63</sup> Reliance on FARA also ensures that the scope of our proposal is not broader than necessary as FARA exempts from its registration individuals and entities engaged in activities such as humanitarian fundraising; bona fide commercial activity; religious, scholastic, academic, fine arts, or scientific pursuits; and other activities not serving predominantly a foreign interest.<sup>64</sup>

20. We tentatively conclude to include a “government of a foreign country,” as defined by FARA, within the group of entities and individuals that trigger our proposed disclosure requirement,<sup>65</sup> given that our primary focus in this NPRM is on ensuring that foreign *government*-provided programming is properly disclosed to the public. Thus, instead of seeking to craft our own definition, we find it more appropriate to turn to a definition of “foreign government” contained in a pre-existing statute that was designed to promote transparency about foreign governmental activity in the United States. We also find it appropriate to include “foreign political party” as that term is defined by FARA within our proposed definition of “foreign governmental entity.” The FARA definition of “foreign political party” covers any entity that is in “control” of or engaged in the “administration” of a foreign government, or is seeking to acquire such “control” or “administration.”<sup>66</sup> Given that a “foreign political party” may already be in control of or administering a foreign government, or that the DOJ may have determined that such entity is seeking to acquire such a role, we tentatively conclude that it furthers our goal of providing the American public with greater transparency about foreign government-provided broadcast programming to include

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<sup>60</sup> See *Meese v. Keene*, 481 U.S. 465, 469 (1987) (quoting the legislative history of FARA).

<sup>61</sup> See Department of Justice, *Court Finds RM Broadcasting Must Register as a Foreign Agent* (May 13, 2020), <https://www.justice.gov/opa/pr/court-finds-rm-broadcasting-must-register-foreign-agent>.

<sup>62</sup> 22 U.S.C. § 611-21.

<sup>63</sup> See *Meese v. Keene*, 481 U.S. at 469. See also Department of Justice, *Frequently Asked Questions*, <https://www.justice.gov/nsd-fara/frequently-asked-questions> (last visited Apr. 23, 2020):

FARA is an important tool to identify foreign influence in the United States and address threats to national security. The central purpose of FARA is to promote transparency with respect to foreign influence within the United States by ensuring that the United States government and the public know the source of certain information from foreign agents intended to influence American public opinion, policy, and laws, thereby facilitating informed evaluation of that information. FARA fosters transparency by requiring that persons who engage in specified activities within the United States on behalf of a foreign principal register with and disclose those activities to the Department of Justice. The Department of Justice is required to make such information publicly available.

<sup>64</sup> See 22 U.S.C. § 613; 28 CFR §§ 5.300-07.

<sup>65</sup> 22 U.S.C. § 611(e). See *supra* note 54 (providing the text of section 611(e) of FARA).

<sup>66</sup> 22 U.S.C. § 611(f).

such an entity within the ambit of a “foreign governmental entity.” We seek comment on our tentative conclusions to include both a “government of a foreign country” and “foreign political party,” as those terms are defined by FARA, within our definition of “foreign governmental entity.”

21. FARA generally requires an “agent of foreign principal”<sup>67</sup> undertaking certain activities in the United States (such as, political activities, acting in the role of public relations counsel, publicity agent, or political consultant) on behalf of a foreign principal to register with the DOJ.<sup>68</sup> Section 611(b)(1) of FARA states that the term “foreign principal” includes the “government of a foreign country” and a “foreign political party.”<sup>69</sup> For purposes of our proposed disclosure requirement, we include only those agents whose foreign principal is either a “government of a foreign country” or a “foreign political party” as those terms are defined in sections 611(e) and (f) of FARA respectively.<sup>70</sup> We recognize that a given entity may be registered as an agent for multiple “foreign principals” or for a “foreign principal” other than a “government of a foreign country” or a “foreign political party.”<sup>71</sup> We emphasize, however, that our proposed disclosure requirement applies only when the FARA agent is acting in its capacity as a registered agent of a “government of a foreign country” or a “foreign political party.” We seek comment on this approach.

22. FARA requires that an agent of a foreign principal file copies with the DOJ of informational materials that it distributes for its foreign principal,<sup>72</sup> and maintain records of its activities.<sup>73</sup> In addition, to the extent that the agent of a foreign principal transmits materials in the “United States mails or by any means or instrumentality of interstate or foreign commerce,” it must include “a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal” when the materials are transmitted.<sup>74</sup> We tentatively conclude that it is appropriate to include an “agent of a foreign principal” whose “foreign principal” is either a “government of a foreign country” or a “foreign political party” within the group of entities and individuals that trigger our proposed disclosure requirement, as the intent behind FARA is to reveal to the American public the names and operations of those entities and individuals working in the U.S. on behalf of foreign interests in a way that seeks to influence public opinion. To the extent that an agent of a foreign principal, whose “foreign principal” is

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<sup>67</sup> See *supra* note 56 (stating how FARA defines the term “agent of a foreign principal”).

<sup>68</sup> 22 U.S.C. § 612.

<sup>69</sup> *Id.* § 611(b)(1).

<sup>70</sup> *Id.* §§ 611(e) and (f).

<sup>71</sup> See, e.g., *id.* § 611(b)(3) (stating that the term “foreign principal includes a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country”). For example, a law firm might be listed as a FARA agent for the Government of Country [X] and also as an agent for Corporation [B], where Corporation [B] has no connection to the Government of Country [X]. In fact, Corporation [B] might not even be located in Country [X]. In this situation, it is only when the law firm provides programming acting in its capacity as a FARA agent to the Government of Country [X] that our proposed disclosure requirement will be triggered.

<sup>72</sup> *Id.* § 614.

<sup>73</sup> *Id.* § 615.

<sup>74</sup> *Id.* § 614(b). See also Department of Justice, *Frequently Asked Questions*, <https://www.justice.gov/nsd-fara/frequently-asked-questions> (last visited April 23, 2020) (describing the wording of the FARA disclosure and how to label broadcast transmissions, as well as film and web-based broadcasts). While FARA does have its own labeling requirement, the language of section 317 is categorical in terms of its coverage of all programming broadcast by Commission licensees and does not exclude from its reach programming that may be subject to other federal labeling requirements. This, combined with the statutory directive in section 317(e) to “prescribe appropriate rules and regulations to carry out the provisions of this section,” and the clear need for better, consistent labeling of foreign sponsored content on broadcast stations justifies our proposed regulations to address the increasing frequency of undisclosed foreign government programming. 47 U.S.C. § 317(e).

either a “government of a foreign country” or a “foreign political party,” is providing programming to U.S. broadcast stations in its capacity as an agent to that principal, it is reasonable that the public should be made aware of that fact.<sup>75</sup>

23. The DOJ maintains a database of FARA registrants on its website that is publicly available and easily searchable.<sup>76</sup> In addition, the DOJ provides regular reports to Congress containing the names of, and information about, FARA registrants; such reports are also available on the DOJ website. Consequently, relying on the database of FARA registrants should provide an easy mechanism by which a broadcast station licensee can determine whether an entity or individual that purchases airtime on the station, or provides programming to the station for free, is in fact an “agent of a foreign principal.” We seek comment on this analysis and on the appropriateness of using registration as an “agent of a foreign principal” under FARA as one of the bases for the disclosure we propose herein. Is there any reason that reliance on FARA registration is problematic?

24. We recognize that there could be a lag between the time an individual registers pursuant to FARA and when the individual’s name appears in the public FARA database. We seek comment on whether the disclosure requirement should apply only to those individuals whose names appear on the public FARA list or whether the requirement should apply once the individual has registered under FARA, irrespective of when the individual’s name appears on the public list. While appearance on the public list makes it easier to determine an individual’s status as an “agent of a foreign principal,” pursuant to section 317(c) of the Act, a broadcast licensee must engage in “reasonable diligence” to determine whether a disclosure is required for the programming it transmits, as discussed further below.<sup>77</sup> The Commission’s existing rules incorporate the general “reasonable diligence” requirement of section 317 of the Act,<sup>78</sup> and also state that “[w]here an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent.”<sup>79</sup> In most, if not all instances, can the broadcast licensee simply ask the individuals involved with providing the programming (especially the individual that provides the programming to the station) whether they fall into one of the categories that would trigger a disclosure

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<sup>75</sup> Linking the proposed disclosure requirement with entities and individuals subject to FARA registration is consistent with the DOJ’s view that FARA requires those entities that are involved in the provision of foreign government programming to broadcast stations to register as foreign agents. For example, in 2019, a federal court found, and, thereby upheld the DOJ’s prior determination that, pursuant to FARA, a Florida-based company, RM Broadcasting LLC (RM Broadcasting), was a “foreign agent” of the Federal State Unitary Enterprise Rossiya Segodnya International Information Agency (Rossiya Segodnya), a Russian state-owned media enterprise created to advance Russian interests abroad. See Department of Justice, *Court Finds RM Broadcasting Must Register as a Foreign Agent* (May 13, 2020), <https://www.justice.gov/opa/pr/court-finds-rm-broadcasting-must-register-foreign-agent>; *RM Broadcasting, LLC v. United States Department of Justice*, 379 F. Supp. 3d 1256 (SDFL 2019). In 2017, RM Broadcasting and Rossiya Segodnya had entered into a services agreement pursuant to which RM Broadcasting would provide for the broadcast of Rossiya Segodnya’s “Sputnik” radio programs on AM radio channel 1390 WZHF in the Washington, D.C. region. RM Broadcasting contested the DOJ’s determination that RM was acting as a “foreign agent” and sought a declaratory judgment in federal court that it did not have to register as an agent of a foreign principal pursuant to FARA.

<sup>76</sup> See Department of Justice, *Foreign Agents Registration Act - Browse Filings*, <https://efile.fara.gov/ords/f?p=1381:1:6238817806252:::> (last visited April 14, 2020).

<sup>77</sup> 47 U.S.C. § 317(c).

<sup>78</sup> 47 CFR § 73.1212(b).

<sup>79</sup> *Id.* § 73.1212(d).

under our proposed rules?<sup>80</sup> After all, an individual or entity that has registered, or been directed to do so, pursuant to FARA, is aware of its status as an “agent of a foreign principal” and who its “foreign principal” is. How much added burden would broadcasters bear in adding this inquiry to their longstanding section 317 reasonable diligence inquiry?

25. *Foreign Missions.* We likewise tentatively conclude that those entities designated as “foreign missions” pursuant to the Foreign Missions Act should also be included in our proposed disclosure rule.<sup>81</sup> 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.<sup>82</sup> While 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.” For example, in 2019, the Office of Foreign Missions designated five Chinese media organizations as “foreign missions.”<sup>83</sup> We tentatively conclude that including “foreign missions” among the entities subject to our proposed disclosure requirement furthers our goal of providing the American public with the greatest degree of transparency about the source of programming linked to foreign governments. We seek comment on this tentative conclusion and the appropriateness of relying on this source for identifying foreign governmental actors.

26. We note that, while the U.S. Department of State does not maintain a publicly available list of foreign missions as the DOJ does with respect to FARA registrants, determinations made pursuant to the Foreign Missions Act by the U.S. Department of State are published as public notices in the Federal Register.<sup>84</sup> Accordingly, the licensee’s duty to exercise reasonable diligence to determine whether sponsorship disclosure is required should result in the identification of such entities, and in some instances the status of the entity or individual providing the programming may be readily apparent (for example, if a foreign embassy itself purchases airtime in its own name). We seek comment on this analysis.

27. *U.S.-Based Foreign Media Outlet.* Consistent with our goal of leveraging the U.S. government’s existing identification of foreign governmental actors, we tentatively conclude that our disclosure requirement should also include any entity or individual subject to section 722 of the Act that

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<sup>80</sup> We emphasize here that our focus in this proceeding is only on those FARA “foreign principals” who fall into the categories of “government of a foreign country” or “foreign political party” and their agents even though FARA also designates other types of entities as “foreign principals.” See, e.g., 22 U.S.C. § 611(b)(3) (stating that the term “foreign principal” includes “a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country”).

<sup>81</sup> 22 U.S.C. §§ 4301-16.

<sup>82</sup> *Id.* § 4302. See also U.S. Department of State, *About Us – Office of Foreign Missions*, <https://www.state.gov/about-us-office-of-foreign-missions/> (last visited Apr. 19, 2020) (describing the responsibilities of the Office of Foreign Missions pursuant to the Foreign Missions Act).

<sup>83</sup> See Anna Fifield, Carol Morello and Emily Rauhala, *U.S. Designates Major Chinese Media Outlets as Government Entities* (Feb. 18, 2020), [https://www.washingtonpost.com/world/asia\\_pacific/us-designates-5-major-chinese-media-outlets-as-government-entities/2020/02/18/d82b3ece-5210-11ea-80ce-37a8d4266c09\\_story.html](https://www.washingtonpost.com/world/asia_pacific/us-designates-5-major-chinese-media-outlets-as-government-entities/2020/02/18/d82b3ece-5210-11ea-80ce-37a8d4266c09_story.html); Office of the Spokesperson – Press Correspondents’ Room, *Senior State Department Officials on the Office of Foreign Mission’s Designation of Chinese Media Entities as Foreign Missions* (Feb. 18, 2020), <https://www.state.gov/senior-state-department-officials-on-the-office-of-foreign-missions-designation-of-chinese-media-entities-as-foreign-missions/>; see also Morgan Ortagus, *Designation of Additional Chinese Media Entities as Foreign Missions* (June 22, 2020), <https://www.state.gov/designation-of-additional-chinese-media-entities-as-foreign-missions/>.

<sup>84</sup> See, e.g., U. S. Department of State, *Determination Pursuant to the Foreign Missions Act*, 85 Fed. Reg. 10506 (Feb. 24, 2020) (announcing the designation of five Chinese media outlets as foreign missions).

has filed a report with the Commission.<sup>85</sup> Section 722, which was added to the Act in 2018, applies to a U.S.-based foreign media outlet that: a) produces or distributes 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 an agent of a “foreign principal” for purposes of FARA.<sup>86</sup> These “U.S.-based foreign media outlets” must periodically file reports with the Commission and, in turn, the Commission must provide a report to Congress summarizing those filings.<sup>87</sup> Section 722 provides that the term “foreign principal” has the meaning given such term in section 611(b)(1) of FARA, which limits the scope of the definition of “foreign principal” to “a government of a foreign country and a “foreign political party.”<sup>88</sup> We incorporate this limitation from section 722 of the Act into our proposed rules and note that such a limitation is consistent with our proposal above to include both a “government of a foreign country” and “foreign political party,” as those terms are defined by FARA, within our definition of “foreign governmental entity.” We seek comment on this approach.

28. We recognize that the term “U.S.-based foreign media outlet” refers to an entity whose programming is either transmitted or intended for transmission by an MVPD, rather than a broadcaster. But we note that there is no prohibition on such video programming also being transmitted by a broadcast television station, and it seems likely that an entity that is providing video programming to cable operators or direct broadcast satellite television providers might also seek to air such programming on broadcast stations. Hence, we propose to include “U.S.-based foreign media outlets” within the ambit of our proposal.<sup>89</sup> We also recognize that to qualify as a “U.S.-based foreign media outlet” for purposes of section 722 of the Act, the entity at issue must qualify as a “foreign agent” pursuant to FARA and, hence, may already be covered by our first proposed category. Nevertheless, out of an abundance of caution, we propose to include these entities within the coverage of our proposal and seek comment on their inclusion.

29. We recognize 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, we seek comment on whether there are other identifiable categories of entities or individuals that should be included within the coverage of our proposed rules. We note that the categories listed above are based on existing sources so that broadcasters are not burdened unnecessarily in determining when our proposed disclosures are required and seek comment on whether there are other such sources. Are there indicia of foreign government involvement in the provision of programming that broadcasters could identify more easily and readily than the Commission could? That is, are there other criteria that we should include within our proposed rules to ensure that we implement our obligation under section 317 to uphold the American public’s right to know the source of its programming as comprehensively as possible? Would requiring broadcasters to take more responsibility for determining whose provision of programming triggers disclosure be consistent with the statutory language requiring “reasonable diligence” on the part

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<sup>85</sup> 47 U.S.C. § 624.

<sup>86</sup> *Id.* § 624(a).

<sup>87</sup> See *Media Bureau Announces Fourth Disclosure Deadline for United States-Based Foreign Media Outlets*, Public Notice, 35 FCC Rcd 1908 (MB 2020) (seeking reports from U.S.-based foreign media outlets); see also *Fourth Semi-Annual Report to Congress on United States-Based Foreign Media Outlets*, Report, 35 FCC Rcd 4794 (MB May 8, 2020).

<sup>88</sup> 47 U.S.C. § 624(d)(1); see also 22 U.S.C. § 611(b)(1).

<sup>89</sup> We note that, while drafting section 722, Congress considered imposing a disclosure requirement similar to the one proposed here, but that element was dropped from the final legislation without explanation. See H.R. 5354 at §2(d) (115th Cong., 2d Sess.) (introduced March 20, 2018) (offering draft language that would have required “a conspicuous statement that the programming is produced or distributed by such [U.S.-based foreign media] outlet on behalf of such foreign principal”).



of broadcasters?<sup>90</sup>

### **B. Scope of Foreign Programming that Would Require a Disclosure**

30. We tentatively conclude that, in the interest of greater transparency for the American people, any broadcast programming that has been provided<sup>91</sup> by an entity or individual that fits within one of the five categories described above would trigger the need for a disclosure under our proposed rules. Specifically, we tentatively conclude that a standardized disclosure would be required whenever a “foreign governmental entity,” as defined in our proposal, has paid a station to air the material or furnished the material to a station free of charge (or at nominal cost) as an inducement to broadcast such material. As discussed below, we believe that requiring a disclosure to inform the audience of the source of the programming whenever a foreign governmental entity provides programming to a station for broadcast is wholly consistent with sections 317(a)(1) and (2) of the Act.

31. Pursuant to section 317(a)(1), a licensee must include a disclosure with all programming for which a station has received any form of payment or consideration, either directly or indirectly.<sup>92</sup> Under this section, there is no minimum level of “consideration” required to trigger the disclosure requirement.<sup>93</sup> Thus, consistent with the statute and our current sponsorship identification rules, we tentatively conclude that standardized disclosure requirements would be triggered under the rules proposed in this NPRM if any money, service, or other valuable consideration is directly or indirectly paid or promised to, or charged or accepted by a broadcast station in exchange for the airing of material selected by a foreign governmental entity.<sup>94</sup> In connection with the rules we propose herein, we expect that licensees will be vigilant about whether any form of consideration has been provided in exchange for the lease of airtime or in exchange for the airing of materials, and that an appropriate disclosure will be made about the involvement of a foreign governmental entity.<sup>95</sup> We seek comment on this tentative conclusion.

32. In addition, section 317(a)(2) of the Act establishes that a sponsorship disclosure may be required in some circumstances, even if the only “consideration” being offered to the station in exchange for the airing of the material is the programming itself.<sup>96</sup> Specifically, section 317(a)(2) provides that a disclosure is required at the time of broadcast in the case of any “political program or any program involving the discussion of a controversial issue” if the program itself was furnished free of charge, or at nominal cost, as an inducement for its broadcast. We recognize that to date the Commission’s interpretation of “political program” in the context of section 317(a)(2) has generally involved programming seeking to persuade or dissuade the American public on a given political candidate or policy issue. For example, the Commission and the federal courts have previously treated such things as a program discussing a political candidate’s past record, as well as a proposition on the California ballot,

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<sup>90</sup> See *infra* Section III. D. (discussing “reasonable diligence”).

<sup>91</sup> As noted above in note 5 and discussed further below, “provided by” when used in relation to “foreign government programming” covers both the broadcast of programming in exchange for consideration and the broadcast of programming that has been furnished for free as an inducement to broadcast the material.

<sup>92</sup> 47 U.S.C. § 317(a)(1).

<sup>93</sup> Section 317(a)(1) provides that “any money, service or other valuable consideration [that] is directly or indirectly paid, or promised to or charged or accepted by” will qualify as “consideration.” 47 U.S.C. §317(a)(1).

<sup>94</sup> *Id.*

<sup>95</sup> We note that under section 317(a)(1), there is no minimum level of “consideration” required to trigger the disclosure requirement.

<sup>96</sup> Section 317(a)(2) provides that “any films, records, transcriptions, talent, scripts, or other material or service of any kind [that] have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program” will qualify as “consideration.” 47 U.S.C. § 317(a)(2).

as a “political program” pursuant to section 317(a)(2) of the Act.<sup>97</sup> We tentatively conclude, however, that it is appropriate to interpret “political program” more broadly to cover foreign government-provided programming. Thus, we tentatively conclude that the nature of the entities or individuals that would trigger our proposed new disclosure requirement is such that any and all programming furnished by these entities or individuals falls within the category of a “political program” under section 317(a)(2).

33. As described in greater detail above, all of the entities or individuals that qualify as a “foreign governmental entity” for purposes of our 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”). Our proposed definition of what constitutes a “foreign governmental entity” draws from the FARA definitions of a “government of a foreign country,” a “foreign political party,” or an “agent” of the same under FARA,<sup>98</sup> or else is a “foreign mission.” Consequently, we seek comment on whether any material provided by these specific entities for dissemination on a U.S. broadcast station qualifies as a “political program” pursuant to section 317(a)(2). Most of the activities that trigger designation as the “agent of a foreign principal” under FARA explicitly involve influencing either the U.S. political process or the U.S. government. Moreover, FARA does not require individuals and entities to register as agents of foreign principals if their activities fall within certain exemptions, and, thus, our proposal minimizes the possibility of including more

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<sup>97</sup> See, e.g., *United States v. WHAS, Inc.*, 385 F.2d 784 (6th Cir. 1967); *Amendment of the Commission’s Sponsorship Identification Rules (Sections 73.119, 73.289, 73.654, 73.789, and 76.221)*, 52 FCC 2d 701 (1975) (treating a program discussing a political candidates past record as a “political program” pursuant to section 317(a)(2) of the Act); *Loveday v. Federal Communications Commission*, 707 F.2d 1443 (D.C. Cir. 1983) (treating an advertisement seeking to persuade voters about a proposition on the California ballot as a “political program” for purposes of section 317(a)(2) of the Act).

<sup>98</sup> 22 U.S.C. § 611(c) defines who qualifies as “the agent of a foreign principal.” The definition turns both on the relationship between the “agent” and the “principal” and the activities the agent engages in on behalf of the principal. Section 611(c) of FARA defines which activities engaged in by such “person” will complete the formation of the agency relationship. Specifically, section 611(c) includes any person who directly or through any other person:

- (i) engages within the United States in political activities for or in the interests of such foreign principal;
- (ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;
- (iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or
- (iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States;”

47 U.S.C. §611(c). We note that DOJ recently released letters it had previously sent to certain foreign media outlets explaining why they must register as FARA agents and in these letters DOJ described in detail how the activities undertaken by these entities qualified as “political activities” intended to influence the U.S. public within the meaning of the FARA statute. See, e.g., Letter from Heather H. Hunt, Chief, FARA Registration Unit, DOJ, to China Global Television Network (CGTN) America, at 5-11 (dated Dec. 20, 2018) (on file at <https://www.justice.gov/nsd-fara/page/file/1282146/download>) (explaining why CGTN qualifies as a foreign agent under FARA and how its conduct constitutes “political activities” “intended to ‘influence . . . the public within the United States’ on behalf of the Chinese government and the Chinese Communist Party); Letter from Heather H. Hunt, Chief, FARA Registration Unit, DOJ, to RIA Global LLC, at 5 (dated Jan. 5, 2018) (on file at <https://www.justice.gov/nsd-fara/page/file/1282141/download>) (noting how The “Style Guide” utilized by RIA Global explicitly acknowledges that its mission is to disseminate messaging on behalf of the Russian government).

programming than intended as a “political program.”<sup>99</sup> To the extent the entity involved with providing the programming is a “government of a foreign country,” as defined by FARA, a “foreign political party,” as defined by FARA, or a “foreign mission,” all of these entities are essentially an arm of a foreign government representing that government’s interests in the United States, or with regard to a “foreign political party,” an entity that is administering, is in control of, or seeks to be in control of such foreign government.<sup>100</sup> Thus, we find it reasonable to view the activities of these entities as “political”<sup>101</sup> in nature for purposes of section 317(a)(2), including any provision of programming for broadcast in the United States. Accordingly, we seek comment on whether any programming furnished to a U.S. broadcast station by any “foreign governmental entity,” as we propose to define this term, constitutes a “political program” for purposes of section 317(a)(2) of the Act. To the extent that all of the programming furnished by those entities or individuals is considered to be a “political program” under section 317(a)(2) of the Act, then broadcasters would not need to make a separate determination about whether “consideration” has been provided as the furnishing of the programming itself would trigger our proposed disclosure requirement. We seek comment on this analysis.

### C. Contents of Required Disclosure of Foreign Sponsorship

34. We tentatively conclude that any new regulations regarding foreign government-provided programming should standardize the content, format, and frequency of disclosures. We seek comment on this tentative conclusion. In terms of content, we propose to require disclosure, at the time of broadcast, of the following information: a) the fact that such programming is paid for, or furnished free of charge, either in whole or in part, by a foreign governmental entity as described above;<sup>102</sup> b) the name of the entity or individual that paid for or furnished the programming free of charge to the station; and c) the name of the country that the entity or individual represents. We seek comment on this proposal and on whether the disclosure should contain any additional or alternative information at the time of broadcast. We also seek input from commenters about examples of foreign government-provided programming where the disclosures were or were not sufficient to identify the foreign government involved.

35. We note that, in other contexts, the Commission has adopted a set script for required announcements on television and radio, as well as requirements for the timing of, and the frequency with which, such announcements must be made.<sup>103</sup> Also, the DOJ under FARA currently requires materials televised or broadcast by agents of foreign principals to be labeled with an introductory statement “which is reasonably adapted to convey to the viewers or listeners thereof such information” that the materials are televised or broadcast by an agent of a foreign principal and provides standardized language for such statements.<sup>104</sup> In a similar fashion, we propose that the language for our required disclosure should be

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<sup>99</sup> Foreign agents engaged in activities such as humanitarian fundraising, bona fide commercial activity, religious, scholastic, academic, fine arts, or scientific pursuits are exempted from having to register under FARA. *See* 22 U.S.C. § 613; 28 CFR §§ 5.300-07.

<sup>100</sup> *See supra* paras. 19-22 and 25-26.

<sup>101</sup> *See* Definition of political, <https://www.merriam-webster.com/dictionary/political> (last visited May 11, 2020) (defining “political” as: (i) of or relating to government, a government, or the conduct of government; or (ii) of, relating to, or concerned with the making as distinguished from the administration of governmental policy).

<sup>102</sup> *See* III.B. above (discussing sections 317(a)(1) and (2) of the Act, which discuss both programming that is paid for and furnished for free).

<sup>103</sup> *See Amendment of Section 73.3580 of the Commission’s Rules Regarding Public Notice of the Filing of Applications*, Second Report and Order, 35 FCC Rcd 5094, 5108-14 (2020).

<sup>104</sup> *See* 28 CFR § 5.402(d); Department of Justice, *FARA, Frequently Asked Questions, What Should the Conspicuous Statement Say?*, <https://www.justice.gov/nsd-fara/frequently-asked-questions#46> (last visited June 11, 2020). The DOJ currently requires the following standardized language for FARA disclosures: “This material is distributed by (name of foreign agent) on behalf of (name of foreign principal). Additional information is available at the Department of Justice, Washington, DC.”

standardized to avoid confusion and to ensure that the information is conveyed clearly and concisely to the audience. Accordingly, we propose that at the time a station broadcasts material that was provided by a foreign governmental entity a disclaimer identifying that fact and the origin of the programming be included as follows:

**“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].”**

36. We seek comment on this proposal, including both the specific language we have proposed, and the proposal to mandate standardized language. Is there additional language or information that we should include to ensure that the public is properly informed that the programming content that they are receiving has been provided by a foreign government? Should stations have the discretion to include additional language beyond what is required if the broadcaster thinks such information would be germane to the public’s reception of the broadcast programming?<sup>105</sup> Should the disclaimer be the same for both video and audio programming? Should the disclaimer be in English, in the primary language of the broadcast if other than English, or both? Should the disclaimer use language other than “paid for” or “furnished by,” what terms should be used instead, and would the use of alternative terms be consistent with the requirements of section 317(a)(1)? How, if at all, should the existence of the FARA requirements affect the rules we propose today? That is, how can we ensure that we do not impose duplicative, or potentially inconsistent, requirements on broadcast licensees.

37. We also seek comment on whether our proposed disclosure requirements might duplicate aspects of the labeling requirements imposed by FARA, and, if so, how the Commission might address any overlap or interplay between the two requirements. Notably, the rule we propose herein would apply to broadcast station licensees, whereas the FARA labeling obligation applies to the FARA registrants. Accordingly, we tentatively conclude that, given the Commission’s existing sponsorship identification rules and our statutory mandate to ensure broadcast stations meet their public interest obligation, the existence of FARA labeling requirements does not preclude the Commission from proposing requirements specific to broadcast licensees, especially as the Commission and DOJ share subject matter jurisdiction in other contexts. For example, the Commission has been tasked by Congress per the NDAA, as described above, to provide semi-annual reports on certain foreign media outlets based in the U.S.<sup>106</sup> in addition to the reports to Congress made by DOJ pursuant to FARA.<sup>107</sup> Moreover, the standardized disclosure contemplated by this item is focused specifically on material broadcast on radio and television stations, whereas the DOJ requirements apply more widely to information disseminated via any method.<sup>108</sup>

38. With regard to the format and frequency of the disclosure, we look to our existing rules for guidance. In terms of format, the Commission’s rules currently require that a televised political advertisement concerning a candidate for public office include an identification with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.<sup>109</sup> We propose to adopt that convention and require that the disclosure for foreign government-provided programming aired on television be displayed in letters equal to or greater than four percent of the vertical picture height and be visible for not less than four seconds.<sup>110</sup> We seek comment on this proposal and

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<sup>105</sup> See *Meese v. Keene*, 481 US at 480-81.

<sup>106</sup> NDAA, § 1085(a); 47 U.S.C. § 624(b).

<sup>107</sup> 22 U.S.C. § 621.

<sup>108</sup> See 28 CFR § 5.402.

<sup>109</sup> 47 CFR § 73.1212(a)(2)(ii).

<sup>110</sup> See *id.*

whether there is a similar objective standard that can be put in place to ensure that the disclosure is also made orally in a way that is clear to the broadcast television audience?

39. We note that there is no parallel to the four percent/four second rule applicable to radio programming. We seek comment on whether there should be similar parameters for radio disclosures regarding foreign government-provided programming. The DOJ provides guidance that, for purposes of the FARA labeling requirements, the introductory statement for radio broadcasts “shall be audibly introduced with a recitation of the required conspicuous statement.”<sup>111</sup> We seek comment on whether only requiring a recitation of the proposed disclaimer is sufficient for radio broadcasts or whether there are parameters regarding the radio disclosure that we should adopt to ensure it is sufficiently prominent for listeners to be cognizant of thereof. Are there criteria we could adopt to ensure listeners have an adequate opportunity to hear the disclosure?

40. As previously stated, with regard to the frequency of the disclosure, the Commission’s rules currently require that the sponsorship identification of political broadcast matter, or any broadcast matter involving the discussion of a controversial issue of public importance, include an announcement at the beginning and conclusion of the program.<sup>112</sup> For any broadcast of 5 minutes duration or less, only one such announcement need be made at either the beginning or conclusion of the program.<sup>113</sup> Would a similar frequency requirement be appropriate for the disclosure of programming provided by a foreign government or its representative? Given our interest in ensuring that the American broadcast audience is aware of the source of its programming, particularly programming coming from a foreign government, we seek comment on whether additional disclosures during the foreign government-provided programming should be required if the programming exceeds a certain duration. We tentatively conclude that, at a minimum, the required announcement shall be made at both the beginning and conclusion of the programming broadcast on television or radio. For television and radio programming greater than sixty minutes in duration, we tentatively conclude that an announcement shall be made at regular intervals during the broadcast, but no less frequently than once every hour. We seek comment on these tentative conclusions. On the other hand, for television and radio programs that are of five minutes or less in duration, should we require that an announcement be made at both the beginning and the end of the material broadcast, or is one announcement at either time sufficient?<sup>114</sup>

41. Additionally, in the event that a foreign governmental entity continually broadcasts foreign government-provided programming on a U.S.-licensed broadcast station without an easily identifiable beginning or end, how frequently should a disclosure be made to the listener or viewers?<sup>115</sup> Absent a discrete beginning and end to the foreign government-provided programming, the audience may be unaware, for example, that a foreign governmental entity has leased 100% of a station’s airtime and that the entire content of the station’s broadcast programming has been provided by a foreign

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<sup>111</sup> See Department of Justice, *FARA, Frequently Asked Questions, What Should the Conspicuous Statement Say?*, <https://www.justice.gov/nsd-fara/frequently-asked-questions#51> (last visited June 11, 2020).

<sup>112</sup> 47 CFR § 73.1212(d).

<sup>113</sup> *Id.* § 73.1212(d).

<sup>114</sup> See, e.g., *id.* 73.1212(d).

<sup>115</sup> See, e.g., Koh Gui Qing and John Shiffman, *Beijing’s Covert Radio Network Airs China-friendly News Across Washington, and the World* (Nov. 2, 2015), <https://www.reuters.com/investigates/special-report/china-radio/> (describing how the Chinese government radio broadcaster, CRI, was able through a subsidiary to lease almost all of the airtime on a Washington, DC area station and broadcast pro-Chinese government programming on this station without disclosing the linkage to the Chinese government).

governmental entity.<sup>116</sup> We propose that in such instances a disclosure announcement should be made once per hour – either at the top of the hour or half hour mark – and seek comment on this proposal.

42. Further, we propose that the standardized disclosure requirements (that is, content, format, and frequency of disclosures) would apply equally to any programming transmitted on a radio or television stations' multicast streams.<sup>117</sup> We find no reason to exclude multicast streams from the proposed standardized disclosure requirements.<sup>118</sup> Accordingly, we tentatively conclude that multicast streams should not be distinguished from a station's primary stream for purposes of the proposed rules. We seek comment on this approach.

43. *Public File.* In order to enhance the availability of information to the public, we tentatively conclude that stations that air programming subject to our proposed standardized disclosure requirements should also place copies of the disclosures in their OPIFs and seek comment on what additional information should be included. Consistent with our intent to provide greater transparency about the distribution of foreign government-provided programming over the nation's airwaves, we seek comment on whether to require licensees to place in their OPIFs the same information as is currently required when programming concerns a political or controversial issue.<sup>119</sup> In the case of programming concerning a political or controversial issue, when a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, stations must place 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 in the station's OPIF.<sup>120</sup> Would requiring disclosure of the persons operating the foreign governmental entities that are paying for or furnishing the programming be appropriate here?

44. We also seek comment on what, if any, information in addition to that which has been previously discussed should be contained in the OPIF with respect to the foreign government-provided programming on the station. Should the OPIF disclosure 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? How, if at all, should the OPIF disclosure differ from what foreign government representatives are required to disclose in the context of FARA or the NDAA? For example, FARA requires an extensive list of information for its disclosure requirement.<sup>121</sup> But the NDAA requires only that U. S.-based foreign media outlets report the legal structure between the outlet and its foreign principal.<sup>122</sup>

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<sup>116</sup> See, e.g., Anna Massoglia and Karl Evers-Histrom, *Russia Paid Radio Broadcaster \$1.4 Million to Air Kremlin Propaganda in DC*, OpenSecrets.org (July 1, 2019), <https://www.opensecrets.org/news/2019/07/russia-paid-radio-broadcaster-1-4-million-to-air-kremlin-propaganda/> (stating that RM Broadcasting was airing programming from the Russian government 24 hours a day from November 2017 to June 2019).

<sup>117</sup> For example, as a result of the digital television transition, television stations have the ability to broadcast not only on their main program stream but also, if they choose, over additional program streams—an activity commonly referred to as multicasting. Similarly, radio stations that are broadcasting in digital have the ability to distribute multiple programming streams over the air. Radio multicast streams are known as HD2, HD3, and HD4 channels.

<sup>118</sup> For example, China Global Television Network (CGTN), which the U.S. Department of State designated earlier this year as a “foreign mission” (see *supra* note 83), transmits programming via multicast stream on a television station in the San Francisco Bay area. See <https://www.ktvu.com/whats-on-fox> (providing programming listings for CGTN airing on multicast channel 36.3 of KICU-TV”) (last visited Sept. 14, 2020).

<sup>119</sup> See 47 CFR § 73.1212(e).

<sup>120</sup> *Id.*

<sup>121</sup> See 22 U.S.C. § 612.

<sup>122</sup> NDAA, § 1085(a).

45. To the extent we adopt a public file requirement, we seek comment on how it should be implemented. With regard to the frequency with which licensees must update their OPIFs to include information about the airing of content covered by our proposed rule, we propose to adopt the same standard currently applicable to political advertising. Specifically, our political file rules require that information about the sale of advertising time to a qualified candidate be placed in the political file “as soon as possible.”<sup>123</sup> Given the importance of making information about foreign government-provided programming available to the public in a timely way, we think that prompt updates to the online public file are appropriate. In addition, using the same standard as required for political advertising would harmonize our rules, while drawing on a standard and routine with which broadcast licensees are already familiar. We seek comment on our proposal to adopt the “as soon as possible” disclosure standard contained in section 73.1943 of our rules and interpret this the same way we do in practice for the political file rules, as meaning “within twenty-four hours of the material being broadcast.” To the extent parties propose a different standard, we ask that they provide specific timeframes for such disclosures that balance the public’s need to know with the associated burdens on broadcasters. We also seek comment on whether and how any public file requirement we adopt should apply to broadcast stations that are not required to maintain an OPIF.

46. In addition, should information regarding foreign government-provided programming be placed in a standalone folder of the OPIF so that the material is readily identifiable by the public? We also seek comment on whether a two-year retention period, as is currently specified in section 73.1212(e) of our rules, is sufficient, or whether a shorter, or longer, retention period would be preferable for disclosures about foreign government-provided programming. Further, we note that section 73.1212(e) of our rules permits the retention of certain information about a program concerning a political matter, or discussion of a controversial issue, at the network headquarters if the programming was originated by a network.<sup>124</sup> We tentatively conclude that this option should not apply with regard to foreign government-provided programming, as we believe it will be easier for a member of the public to locate information in the online public file of the licensee that aired the programming rather than trying to find the information in a physical file at the network’s headquarters. We seek comment on this tentative conclusion.

#### **D. Reasonable Diligence**

47. As discussed above, pursuant to section 317(c) of the Act, a licensee must exercise reasonable diligence, including making any necessary inquiries of its employees and other persons with whom it deals directly in connection with any programming, to ensure the programming aired on its

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<sup>123</sup> See section 73.1943(c) of our Political File rule and any Commission interpretations of the “as soon as possible” standard. Section 73.1943(c) provides that:

All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

47 CFR § 73.1943(c).

<sup>124</sup> Section 73.1212(e) provides that:

Where the material broadcast is a political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that 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 shall be made available for public inspection at the location specified under § 73.3526. If the broadcast is originated by a network, the list may, instead, be retained at the headquarters office of the network or at the location where the originating station maintains its public inspection file under § 73.3526. Such lists shall be kept and made available for a period of two years.

47 CFR § 73.1212(e).

station is accompanied by an appropriate sponsorship disclosure if needed.<sup>125</sup> The Commission rules also contain this “reasonable diligence” standard, as well as a requirement that licensees employ “reasonable diligence” to determine whether the individual or entity with whom they are interacting is in fact an agent acting on behalf of someone else.<sup>126</sup> To the extent there is such an agency relationship that “could be known” through “reasonable diligence” the licensee must disclose the name of the individual or entity on whose behalf the agent is acting.<sup>127</sup> Consistent with this approach, we tentatively conclude that a broadcast station licensee must exercise reasonable diligence to determine if an entity or individual that is purchasing airtime on the station, or providing programming free of charge as an inducement to broadcast such material on the station, is a foreign governmental entity, such that a disclosure is required under our proposed rules. Such diligence would include, at a minimum, inquiring of the entity whether it qualifies as: 1) the “government of a foreign country,” as defined by FARA,<sup>128</sup> 2) a “foreign political party,” as defined by FARA;<sup>129</sup> 3) an “agent of a foreign principal,” under section 611(c) of FARA,<sup>130</sup> whose “foreign principal” has the meaning given such term in section 611(b)(1) of FARA,<sup>131</sup> and that is acting in its capacity as an agent of such “foreign principal” ; 4) a “foreign mission,”<sup>132</sup> or 5) a U.S.-based foreign media outlet;<sup>133</sup> as well as independently reviewing the DOJ’s FARA database, and the Commission’s list of U.S.-based foreign media outlets. What other steps, if any, should be required to demonstrate due diligence? Are there any readily available sources of public government information that a broadcaster

<sup>125</sup> See 47 U.S.C. § 317(c) (stating that “[t]he licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section”).

<sup>126</sup> See 47 CFR § 73.1212(b) (stating that “[t]he licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section”); see also 47 CFR § 73.1212(e) (stating that “[w]here an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of the agent”).

<sup>127</sup> 47 CFR § 73.1212(e). In 1975, the Commission modified its rules to include the “could be known” language specifically in response to a federal court decision finding that the Commission’s prior rule did not require a licensee to make reasonable efforts to go beyond a named sponsor to find and announce the real party in interest. *Amendment of the Commission’s Sponsorship Identification Rules (Sections 73.119, 73.289, 73.789, and 76.221)*, Report and Order, 52 FCC 2d 701 (1975). The preceding Commission decision that had been overturned by a federal court concerned a political race between two candidates in Kentucky and a program transmitted by a local station where the named sponsor was “The Committee for Good Government.” *Id.* at 702, para. 4. The Commission found the local station knew that “The Committee for Good Government” was a straw entity fronting for one of the candidates and the program showed the opposing candidate in a negative light and should have identified the true sponsor. *Id.* at para. 4. In modifying its rule after its decision was struck down, the Commission stated:

Broadcasters are licensed to act as trustees for a valuable public resource and, in view of the public’s paramount right to be informed, some administrative burdens must be imposed on the licensee in this area. These burdens simply ‘run with the territory.’

*Id.* at para. 24.

<sup>128</sup> 22 U.S.C. § 611(e).

<sup>129</sup> *Id.* § 611(f).

<sup>130</sup> *Id.* § 611(c).

<sup>131</sup> *Id.* § 611(b)(1).

<sup>132</sup> *Id.* §§ 4301-16.

<sup>133</sup> 47 U.S.C. § 624.



could easily search without significant burden?<sup>134</sup> We seek comment on our tentative conclusion, including any additional or alternative actions that should be articulated as part of a reasonable diligence standard. For example, as discussed above in paragraph 29, are there other indicia or criteria that licensees should review to determine whether a foreign government is the source of the programming?

**E. Time Brokerage Agreements (TBAs)/Local Marketing Agreements (LMAs)**

48. We recognize that the usage of TBAs/LMAs<sup>135</sup> is a common practice in the broadcast industry and that consequently there are instances when the day-to-day operations of a broadcast station, such as the sale of advertising time, are handled by a third-party other than the licensee, *i.e.*, the brokering party. In such situations, the brokering party may sell advertising time or receive compensation to air foreign government-provided programming or receive programming for free from a foreign governmental entity as an inducement to air the programming.<sup>136</sup> Furthermore, the brokering party itself may be a foreign governmental entity, potentially triggering the need for a disclosure. As we seek to provide licensees greater specificity about how to identify and disclose instances of foreign government-provided programming, we also address how our proposed disclosure requirements would apply in the context of TBAs/LMAs. Most fundamentally, we tentatively conclude that our proposed disclosure requirements

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<sup>134</sup> We note that the U.S. Court of Appeals for the Sixth Circuit has stated previously that the Commission is not precluded “from adopting a Regulation calculated to require a station to make reasonable efforts to go beyond a named ‘sponsor’ for a political program in order to ascertain the real party in interest for purposes of announcement.” *United States of America v. WHAS, Inc.*, 385 F.2d 784, 788 (6th Cir. 1967). In a subsequent decision, the U.S. Court of Appeals for the D.C. Circuit found the licensees in that case did not have to look beyond the entity who had provided them the programming to determine the sponsor for purposes of compliance with the Commission’s rules. *Loveday v. Federal Communications Commission*, 707 F.2d 1443 (D.C. Cir. 1983). While the *Loveday* court noted that the Commission had modified its reasonable diligence standard post-*WHAS* to include a “could be known” by the exercise of reasonable diligence standard, the *Loveday* court focused on the fact that the Commission had never “indicated in enforcement proceedings that section 317 or its own regulations require a station to conduct any investigation or to look behind the plausible representations of a sponsor that it is the true party in interest.” *Id.* at 707 F.2d at 1456-57. The *Loveday* court discussed at some length how broad reaching such an investigation could be and how overwhelming for licensees, “who would have to guess in every situation what the Commission would later find to be ‘reasonable diligence.’” *Id.* at 707 F.2d at 1457. We emphasize here that adherence to our proposed “reasonable diligence” standard with regard to foreign government-provided programming requires no guesswork, but rather the posing of certain questions and review of lists of already identified foreign governmental actors.

<sup>135</sup> A “time brokerage agreement,” also known as a “local marketing agreement” or “LMA,” is the sale by a licensee of discrete blocks of time to a “broker” that supplies the programming to fill that time and sells the commercial spot announcements in it. 47 CFR § 73.3555, Note 2(j).

<sup>136</sup> See *supra* note 4 (describing how the Chinese government radio broadcaster, CRI, was able through a subsidiary to lease almost all of the airtime on a Washington, DC area station and broadcast pro-Chinese government programming on this station without disclosing the linkage to the Chinese government).

should apply in the context of TBAs/LMAs.<sup>137</sup>

49. As the licensee of a broadcast station must ultimately remain in control of the station and maintain responsibility for the material transmitted over its airwaves, even in the event of a TBA/LMA

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<sup>137</sup> Application of the disclosure obligation even in the context of TBA/LMAs is consistent with Commission precedent, including the seminal 1963 guidance regarding sponsorship identification provided when the Commission implemented Congress's 1960 amendments to section 317 of the Act. The Commission's 1963 order and an accompanying public notice that laid out the new rules provided an example of the application of sponsorship identification requirements to the time brokerage situation. *See Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules*, Report and Order, 34 FCC 829, 847-48, paras. 54-55 (May 1, 1963); *Amendment of Sections 73.119, 73.289, 73.654, 73.789 and 76.221 of the Commission's Rules, Report and Order*, 52 FCC 2d 701 (1975); *Applicability of Sponsorship Identification Rules*, Public Notice, 40 FCC 141 (1963) (containing thirty-six illustrative examples of how the statutory provisions and new rules were to be applied). Even today the Commission's rules specifically reference these interpretations. *See* 47 CFR § 73.1212(i). Pursuant to that example, a film that required a sponsorship disclosure was not transmitted by the licensee but rather was included within a time slot that had been sold to a sponsor (other than the supplier of the film) and contained proper identification of the advertiser purchasing the program time slot. *Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules*, Report and Order, 34 FCC 829, 847-48, paras. 54-55 (1963). Because of the manner in which the film had been provided (*i.e.*, as an inducement for the broadcasting of the film), the example indicated that a disclosure identifying the supplier of the film was required. *Id.* This example demonstrates that leasing station time does not eliminate the sponsorship identification requirement. *Id.* Examples 35 (a), (b), and (c) in the Commission's 1963 Order read as follows:

(a) A trade association furnishes a television station with kinescope recordings of a Senate committee hearing on labor relations. The subject of the kinescope is a strike being conducted by a labor union. The station broadcasts the kinescope on a "sustaining" basis but does not announce the supplier of the film. The failure to make an appropriate announcement as to the party supplying the film is a violation of the Commission's sponsorship identification rules dealing with the presentation of program matter involving controversial issues of public importance. Moreover, the Commission requires that a licensee exercise due diligence in ascertaining the identity of the supplier of such program matter. An alert licensee should be on notice that expensive kinescope prints dealing with controversial issues are being paid for by someone and must make inquiry to determine the source of the films in order to make the required announcement. (See *KSTP, Inc.*, 17 R.R. 553, and *Storer Broadcasting Co.*, 17 R.R. 556a.) A station which has ascertained the source of kinescopes is under an additional obligation to supply such information to any other station to which it furnishes the program.

(b) Same situation as above, except that the time for the program is sold to a sponsor (not the supplier of the film) and contains proper identification of the advertiser purchasing the program time. An additional announcement as to the supplier of the films is still required, for the reasons set forth above.

(c) Same situation as in (a) or (b), above, except that only excerpts from the film are used by a station in its news programs. An announcement as to the source of the films is required. (See *Westinghouse Broadcasting Co.*, 17 R.R. 556d.)

As to example 35(b), it was contended that an additional identification as to the supplier of the film is not necessary since, in the circumstances set forth in the example, the inducement for the broadcast is the sponsorship of the program and not the furnishing of the film to the station.

To the extent that the sole inducement for the broadcast of the program is its sponsorship, we agree that the only identification announcement that would be required would be an announcement as to sponsorship. However, example 35(b) specifically incorporates the facts set forth in 35(a), and there an inducement for the broadcast was the supplying of the film. Clearly, to the extent that 35(b) contemplates that part of the inducement for the broadcast of the program is the free offer of the film, an announcement would be required identifying the supplier. This interpretation is, we believe, fully consistent with section 317(a) and new subsections 3.654 (d) and (f).

arrangement,<sup>138</sup> we tentatively conclude that final responsibility for ensuring that any necessary disclosure is made in the case of foreign government-provided programming rests with the licensee. We seek comment on this tentative conclusion. Pursuant to section 317(c) of the Act, the licensee bears the responsibility to engage in “reasonable diligence” to determine the true source of the programming. Section 317(c) of the Act states that “[t]he licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.”<sup>139</sup> This statutory provision is categorical and does not provide any exceptions. This approach is consistent with the fact that it is the licensee who has been granted the right to use the public airwaves. We invite comment on this analysis and on how licensees can ensure that they have met their “reasonable diligence” requirement. At a minimum, is it reasonable to require that the licensee will inquire whether the brokering party and any entity from whom the brokering party receives programming qualifies as a “foreign governmental entity” pursuant to our proposed rules? What else might the licensee do to ensure that the brokering party and those from whom this entity receives programming are aware of the disclosure obligation?

50. To the extent that our 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, for example, in situations involving a barter-type arrangement,<sup>140</sup> we tentatively conclude that any such precedent should not apply in the case of foreign government-provided programming. We tentatively conclude that any reasons that may apply for not requiring disclosures about the brokering party are inapposite when it comes to foreign government-provided programming, given the importance of informing the American broadcast public of the source of such programming. We seek comment on this tentative conclusion. In particular, we invite comment on the extent to which foreign governmental entities have entered into barter-type arrangements to provide programming to U.S. broadcast stations, and how such arrangements might differ from barter-type arrangements in other contexts, such as in a traditional network/affiliate relationship. Further, we seek comment generally on TBAs/LMAs involving foreign government sponsored programming, including whether there are differences between such agreements and other TBAs/LMAs, which often involve joint operations with another in-market station to achieve operating efficiencies.

51. While it is clear that the licensee cannot abdicate its responsibilities by virtue of entering

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<sup>138</sup> *Editorializing by Broadcast Licensees*, Report, 13 FCC 1246, 1247-48 (1949) (<https://docs.fcc.gov/public/attachments/DOC-295673A1.pdf>) (stating that the responsibility for the selection of program material “can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments”).

<sup>139</sup> 47 U.S.C. § 317(c).

<sup>140</sup> *Sonshine Family Television, Inc.*, Forfeiture Order, 24 FCC Rcd 14830, 14834-35, para. 14 (2009). In *Sonshine*, the Commission noted that:

In barter-type arrangements, which can include network affiliation agreements, the program supplier provides the station its program, which the station purchases by allowing the program provider to use some or all of the station’s advertising airtime during the program. Thus, in barter arrangements the broadcaster effectively purchases programming in exchange for valuable consideration in the form of advertising time, thereby immunizing the exchange from the sponsorship identification requirement.

into a TBA/LMA, we tentatively conclude that sections 507(b)<sup>141</sup> and (c)<sup>142</sup> of the Act impose a duty on the broker to inform the licensee to the extent it is aware of any payments (or other valuable consideration) associated with the programming. As noted above, in its 1960 amendments to the Act, Congress imposed on non-licensees associated with the transmission or production of programming a requirement to disclose any knowledge of consideration paid as an inducement to air particular material. Specifically, such non-licensees must disclose to their employer, the person for which such program is being produced (*e.g.*, the next individual involved in the chain of transmitting the programming to the licensee), or the licensee itself, their knowledge of any payment or “valuable consideration” provided or accepted.<sup>143</sup> Congress added this provision in recognition that individuals other than the licensee were increasingly involved in programming decisions.<sup>144</sup> Thus, consistent with the statute, we believe that it is incumbent on brokers to disclose to the licensee their knowledge of any payment provided by, or unpaid programming received as an inducement from, one of the entities or individuals that trigger the sponsorship identification requirement laid out in this NPRM. We seek comment on whether we should codify this disclosure requirement by mandating that agreements between brokers and licensees include a provision requiring brokers to disclose any foreign government-provided programming? We also seek comment on whether there are other entities or individuals that fall within the ambit of sections 507(a),<sup>145</sup> (b), or (c) of the Act that we should specifically identify as part of our proposal to provide greater transparency about foreign government-provided programming.

#### **F. Section 325(c) Permits**

52. In addition to U.S.-licensed broadcast stations, we tentatively conclude that the proposed disclosure requirement for foreign government-provided programming should apply expressly to any programming broadcast pursuant to a section 325(c) permit to avoid any uncertainty.<sup>146</sup> A section 325(c) permit is required when an entity produces programming in the United States but, rather than broadcasting the programming from a U.S.-licensed station, transmits or delivers the programming from a

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<sup>141</sup> Section 507(b) of the Act states that “any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast disclose the fact of such acceptance or payment or agreement to the payee’s employer, or to the person for which such program or matter is being produced, or to the licensee of such station over which such program is broadcast.” 47 U.S.C. § 508(b).

<sup>142</sup> Section 507(c) of the Act states that “any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.” 47 U.S.C. § 508(c).

<sup>143</sup> 47 U.S.C. §§ 508(b)-(c).

<sup>144</sup> *See supra* note 27 (quoting 1960 House Report that described the need to extend the coverage of section 317 because “licensees now delegate much of their actual programming responsibilities to others”).

<sup>145</sup> Section 508(a) states that “any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.” 47 U.S.C. § 508(a).

<sup>146</sup> *See* 47 U.S.C. § 325(c). Section 325(c) of the Act states that “No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.”

U.S. studio to a non-U.S. licensed station in a foreign country and broadcasts the programming from the foreign station with a sufficient transmission power or a geographic location that enables the material to be received consistently in the United States.<sup>147</sup> Section 325(c) permit applications are subject to the requirements of section 309 (applicable to applications for U.S. station licenses).<sup>148</sup> Specifically, we apply “the same criteria for meeting the programming standards component of the public interest, convenience, and necessity requirement to both a domestic license proceeding under section 309 and a cross-border broadcast license proceeding under section 325.”<sup>149</sup>

53. Applying the same disclosure requirements proposed in this proceeding to programming broadcast pursuant to a section 325(c) permit would serve the public interest because, like programming from a U.S.-licensed station, programming from a section 325(c) station is received by audiences in the United States. As a result, the same public interest objectives with respect to programming of U.S.-licensed stations also apply here. Treating U.S.-licensed broadcast station licenses and section 325(c) permits in the same manner with respect to foreign government-provided programming also would level the playing field between programming aired by non-U.S. and U.S. broadcasters in the same geographic area within the United States and would eliminate any potential loophole in our regulatory framework with respect to the identification of foreign government-provided programming that may result from this proceeding. We seek comment on this issue and our tentative conclusions.

54. In addition, we seek comment on whether any aspect of our proposed format and frequency of the foreign government-provided programming disclosure, discussed herein, should be modified for section 325(c) permit holders. For example, because section 325(c) permit holders are not participants in OPIF, should we require these permittees to place copies of such broadcasts in a publicly accessible online location? Or would the broadcast of a clear aural or visual disclosure accompanying foreign government-provided programming be sufficient to level the playing field between programming aired by non-U.S. and U.S. broadcasters in the same geographic area within the United States? Commenters suggesting a different format or additional disclosure information with respect to broadcasts pursuant to a section 325(c) permit should discuss how such a format or additional information would best serve the public interest.

#### **G. The Proposed Disclosure Requirements Satisfy the First Amendment**

55. We tentatively conclude that the disclosure requirements proposed in the instant NPRM comport with the First Amendment.<sup>150</sup> We note that with respect to broadcasters, the disclosure requirements in question will be reviewed under intermediate scrutiny, the less rigorous standard applied to content-based restrictions on that medium, and thus will be upheld if narrowly tailored to achieve a

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<sup>147</sup> *Wrather–Alvarez Broadcasting, Inc. v. F.C.C.*, 248 F.2d 646, 651 (D.C. Cir. 1957). See also Remote Control Border Stations: Hearing before the Comm. on Merchant Marine, Radio, and Fisheries at 7, 14, 73d Cong. 2 (1934) (Statement of C. B. Jolliffe, Chief Engineer Federal Radio Commission), [ftp://ftp.fcc.gov/pub/Bureaus/OSEC/library/legislative\\_histories/50.pdf](http://ftp.fcc.gov/pub/Bureaus/OSEC/library/legislative_histories/50.pdf).

<sup>148</sup> 47 U.S.C. § 325(d).

<sup>149</sup> *Application of Fox Television Stations, Inc.*, FCC Docket No. 96-434, Memorandum Opinion and Order, 11 FCC Rcd 14870, 14877, para. 21 (1996) (*Fox II*), *aff'd sub nom. Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078 (D.C. Cir. 1997) (quoting *Channel 51 of San Diego, Inc. v. FCC*, 79 F3d. 1187, 1189 (D.C. Cir. 1996) (*Channel 51*)). See also S. Rep. No. 73-319, at 1085 (1934) (stating that the Commission is authorized to grant permits to those who operate in the public interest).

<sup>150</sup> Section 317(e) of the Act directs the Commission “to prescribe appropriate rules and regulations to carry out the provisions of this section.” 47 U.S.C. §317(e). As discussed in detail above in section II., the Commission has repeatedly used its authority under section 317 to address evolving concerns about undisclosed program sponsorship as they arise. Because the instant rulemaking follows in that same vein, we find we have ample statutory authority for the proposals contained in this NPRM.

substantial government interest.<sup>151</sup> Even assuming, however, that the highest level of First Amendment scrutiny applies, we tentatively conclude that our proposed rules satisfy that review.<sup>152</sup> As set forth below, we tentatively conclude that the government’s interest here is “compelling,” and the rules are both “narrowly tailored” to further that interest and the “least restrictive means” available to serve that goal.<sup>153</sup>

56. *Compelling Government Interest.* The Commission’s application of section 317 for over eighty years, as well as Congress’s 1960 amendments thereto, which further strengthened the statutory provision, demonstrate a compelling governmental interest in accurate sponsorship identification. Indeed, as noted above, the obligation that a broadcaster inform its audiences when the station’s airtime has been purchased (or the station is otherwise induced to air certain material) is a bedrock principle of broadcasting regulation that even pre-dates the creation of the Commission.<sup>154</sup> The need for transparency and disclosure to the public about the true identity of a program’s sponsor is particularly compelling when a foreign government is involved.<sup>155</sup> Congress has recognized the critical importance of accuracy and transparency with regard to foreign government-provided programming in a number of contexts, including by its recent action extending the national security concerns underlying FARA to require the Commission to provide annual reports on U.S.-based foreign media outlets, defined by reference to FARA’s foreign agent definitions, airing programming in the United States.<sup>156</sup> Notably, the Supreme Court has previously recognized the government’s interest in requiring accurate disclosures of foreign political or controversial programming and preventing groups from broadcasting political messages

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<sup>151</sup> See *FCC v. League of Women Voters*, 468 U.S. 364, 380-81 (1984) (invalidating under the First Amendment a statute forbidding any non-commercial educational station that receives a grant from the Corporation for Public Broadcasting to “engage in editorializing”). While a content-based regulation of speech is typically subject to strict scrutiny, the Supreme Court has described First Amendment review of broadcast regulation as “less rigorous” than in other contexts based on the spectrum scarcity rationale. See *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 637 (1984) (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969); see also *League of Women Voters*, 468 U.S. at 377 (“our cases have taught that, given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting ‘those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves’”) (quoting *Red Lion*, 395 U.S. at 389). We note, however, that some judges have questioned the validity of the scarcity doctrine as justification for less rigorous First Amendment scrutiny of content-based regulation of broadcasters. Cf. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532-535 (2009) (Thomas, J., concurring) (questioning the validity of *Red Lion*).

<sup>152</sup> See, e.g., *Sorrell v. IMS Health*, 564 U.S. 552, 563-64 (2011). While our analysis above demonstrates that our proposed disclosure rules satisfy First Amendment speech protections even under strict scrutiny, we find it is likely that our proposed rules are content-neutral and therefore would not be subject to strict scrutiny. The disclosure requirements do not act as a complete ban on foreign government-provided programming nor prohibit participation in public discussion; rather, the proposed rules would merely require a factual statement regarding the sponsor of the programming. See *Virginia Pharmacy Bd v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (defining “content-neutral” speech regulations as “those that are justified without reference to the content of the regulated speech”).

<sup>153</sup> See *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

<sup>154</sup> See *supra* para. 1.

<sup>155</sup> See Alex Johnson, *D.C. Radio Station is a Russian Agent, Federal Judge Rules*, NBC News (May 13, 2019), <https://www.nbcnews.com/news/us-news/d-c-radio-station-russian-agent-federal-judge-rules-n1005236> (reporting that the Justice Department welcomed a federal judge’s ruling that a Washington, D.C., radio station must register as an agent of the Russian government, saying Americans “have a right to know if a foreign flag waives behind speech broadcast in the United States”).

<sup>156</sup> 47 U.S.C. § 624.

intended to persuade the public through hidden identities.<sup>157</sup> Moreover, as discussed above, in 1962 when the Commission learned that “broadcast matter containing political propaganda or controversial matter, sponsored and paid for by foreign governments” had been broadcast “without indication to the public as to the foreign sponsorship involved,” it issued a Public Notice emphasizing to broadcasters the particular importance of full and accurate disclosure for foreign government-supplied programming.<sup>158</sup> Also, as discussed above, foreign governments increasingly are making use of various media, including U.S. airwaves, not only to influence those governments’ expatriate communities, but also to promote their policies and viewpoints to all Americans.<sup>159</sup> This increase makes the government’s interest in accuracy and transparency regarding broadcasts of foreign government-provided programming even more compelling.

57. As set forth in detail above, the proposed disclosure requirements are well within our statutory authority and an extension of our existing sponsorship identification rules that would further the substantial and compelling government interest in transparency and accuracy for listeners and viewers as to the source of the programming being disseminated over the public airwaves. Complete and accurate disclosure regarding the source of programming is critical to allowing audiences to determine the reliability and credibility of the information they receive. We consider such transparency to be a critical part of broadcasters’ public interest obligation to use the airwaves with which they are entrusted to benefit their local communities.<sup>160</sup> Rather than abridging broadcasters’ freedom of speech rights, disclosure would promote First Amendment and Communications Act goals by enhancing viewers’ ability to assess the substance and value of foreign government-provided programming, thus promoting an informed public and improving the quality of public discourse. We seek comment on this analysis.

58. *Narrow Tailoring.* In light of these important and compelling governmental interests, we tentatively conclude that the proposed rules are narrowly tailored to avoid burdening any more speech than necessary to serve the purposes of ensuring transparency and accuracy regarding the source of the programming. In *Meese v. Keene*, for example, the Court reviewed a First Amendment challenge to a provision of FARA that required the labeling of certain information disseminated to the public as

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<sup>157</sup> *Meese v. Keene*, 481 U.S. 465, 467-68 (1987) (upholding FARA’s requirement to label certain foreign materials as “political propaganda” under First Amendment review); *see also McConnell v. Fed. Election Cmm’n*, 540 U.S. 93, 196-197 (2003) (rejecting facial challenges to disclosure requirements in the Bipartisan Campaign Reform Act, citing evidence in the record that independent groups were running election-related advertisements “while hiding behind dubious and misleading names” and thus disclosure requirements would help citizens make informed choices in the political marketplace), *overruled on other grounds, Citizens United v. Fed. Election C’mmn*, 558 U.S. 310, 368-369 (2010) (*Citizens United*).

<sup>158</sup> *FCC Warns About Broadcast of Controversial Foreign Matter Without Indicating Foreign Sponsorship*, Public Notice, 40 FCC 136 (1962). The Public Notice cited sections 317 and 508 of the Communications Act, concluding: “The purpose of these provisions is to assure that in these instances the public will be informed as to the source of sponsored broadcast material . . . which treats with political or controversial subjects.” *Id.*

<sup>159</sup> *See, e.g., Joe Chiodo, Russian Radio Takes to Kansas City Airwaves*, KCTV News 5 (Feb. 13, 2020), [https://www.kctv5.com/news/local\\_news/russian-radio-takes-to-kc-airwaves/article\\_638da88c-4eae-11ea-b931-ef157bacebfb.html](https://www.kctv5.com/news/local_news/russian-radio-takes-to-kc-airwaves/article_638da88c-4eae-11ea-b931-ef157bacebfb.html) (describing how a midwestern station’s “hope” is that the public “stumble[s] upon” Russia radio carried on three Kansas City radio stations during the “morning drive and get[s] hooked” while critics claim the radio show “is an operation run out of Moscow” airing “propaganda and the goal is to convince you America isn’t good” – once it is known there is “a Russian radio station spinning the news in a negative way,” listeners “may greet all media with greater skepticism”); *see also* n. 40 *supra*.

<sup>160</sup> *See, e.g., In the Matter of Broadcast Localism*, Notice of Inquiry, 19 FCC Red 12425, para. 1 (2004) (stating that “[b]roadcasters, who are temporary trustees of the public’s airwaves, must use the medium to serve the public interest, and the Commission has consistently interpreted this to mean that licensees must air programming that is responsive to the interests and needs of their communities of license.”); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (stating that “[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece.”).

“propaganda.”<sup>161</sup> The Court upheld the requirement and found that it did not prohibit or otherwise adversely affect the dissemination of the films at issue, but rather that it simply required the disseminators of the films to make additional disclosures to enable the public to better evaluate the material’s impact, allowed the disseminators to add further disclosures thought to be germane, and thereby actually fostered freedom of speech.<sup>162</sup> In sum, the Court stated: “By compelling some disclosure of information and permitting more, the Act’s approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.”<sup>163</sup> Here, the proposed disclosure requirements are narrowly tailored to promote the government’s interest by requiring a simple, factual statement identifying foreign government-provided programming without limiting the distribution or discussion of such programming, regardless of the information or viewpoint presented. We seek comment on this analysis.

59. *Least Restrictive Means.* Even assuming that the strict scrutiny test applies here, we tentatively conclude that our proposed rules also satisfy the final prong of that level of constitutional analysis. Our proposed disclosure requirements would not prevent or inhibit the airing of any type of foreign government programming, *i.e.*, the requirements do not prevent anyone from speaking. As the Court has previously concluded, “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”<sup>164</sup> In addition, the category of individuals whose programming was covered by the labeling requirement in *Meese v. Keene* (*i.e.*, individuals who must register under FARA) are also among the group of individuals whose programming would trigger our proposed standardized disclosure requirements. Consequently, we have strong reason to conclude that our proposed requirements satisfy heightened scrutiny under the First Amendment. We tentatively conclude that, rather than abridging licensees’ freedom of speech rights, our proposed standardized disclosure requirements would promote the goals of the First Amendment and section 317 of the Act by enhancing the ability of broadcast viewers and listeners to assess the substance and value of foreign government-provided programming, thus promoting an informed public and improving the quality of public discourse. We seek comment on this tentative conclusion.

60. In addition, we tentatively conclude that the analysis provided here applies equally to those operating pursuant to section 325(c) permits, because as described in section III.F. above, there is nothing to differentiate them from other broadcast licensees when it comes to our sponsorship identification requirements. Finally, for the same reasons that we have laid out above regarding the compliance of our proposals with the First Amendment, we also tentatively conclude that our proposals do not violate the prohibition, contained in section 326 of the Act, or any Commission regulation or condition interfering “with the right of free speech by means of radio communication.”<sup>165</sup> We seek comment on these tentative conclusions.

#### **H. Cost-Benefit Analysis.**

61. Finally, we seek comment on the benefits and costs associated with adopting a foreign government sponsorship disclosure requirement. How do we assess the benefit of the proposed disclosures, if any? We seek comment on how to quantify the widespread benefit of identifying for the public that a foreign government has provided certain programming for broadcast against the cost of

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<sup>161</sup> *Meese v. Keene*, 481 U.S. 465, 467-68 (1987). As noted earlier, at that time, FARA required that programming containing material intended to influence U.S. foreign policy be labeled as “political propaganda” when transmitted. *Id.* at 470. The Court ultimately upheld the statute, finding that “[t]he statute itself neither prohibits nor censors the dissemination of advocacy materials by agents of foreign principals.” *Id.* at 478.

<sup>162</sup> *Id.* at 480-81, 484.

<sup>163</sup> *Id.* at 481 (citing *Whitney v. California*, 274 U.S. 357 (1927)).

<sup>164</sup> *Citizens United*, 558 U.S. at 369.

<sup>165</sup> 47 U.S.C. § 326.



compliance incurred by the providers of such programming. If the benefit cannot be quantified, how should we weigh it against the more concrete costs of compliance? In addition to any benefits to the public at large, are there also benefits that might accrue to industry in the form of greater trust from viewers and listeners that should be quantified? Will the proposed disclosures provide the public and the Commission a clearer view of foreign governmental entities' activities in the U.S. broadcast market? If not, what type of disclosures would? Are there other benefits to disclosures that should also be considered?

62. We also seek comment on any potential costs that would be imposed on broadcasters or others if we adopt the proposals contained in this NPRM. Is there a possibility that these costs would outweigh the substantial public benefits we have identified regarding transparency of the source of programming heard or viewed by the American public? How much will it cost broadcasters to comply with the proposed on-air disclosures and public file record keeping requirements? Finally, if the proposals contained in this NPRM would impose significant costs, could the proposals be modified to reduce these costs, and if so, how? Comments should be accompanied by specific data and analysis supporting claimed costs and benefits.

#### IV. PROCEDURAL MATTERS

63. *Ex Parte Rules - Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>166</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

64. *Filing Requirements—Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the

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<sup>166</sup> 47 CFR §§ 1.1200 *et seq.*

Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.U.S.
- Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington DC 20554
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.<sup>167</sup>
- During the time the Commission’s building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

65. *Initial Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>168</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>169</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>170</sup>

66. With respect to this Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in the Appendix. Written public comments are requested on the IRFA and must be filed in accordance with the same filing deadlines as comments on this Notice of Proposed Rulemaking, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this Notice of Proposed Rulemaking and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the Federal Register.

67. *Paperwork Reduction Act.* This document seeks comment on whether the Commission should adopt new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

68. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call

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<sup>167</sup> *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

<sup>168</sup> 5 U.S.C. § 603.

<sup>169</sup> *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>170</sup> 15 U.S.C. § 632.

the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

69. *Additional Information.* For additional information on this proceeding, please contact Radhika Karmarkar of the Media Bureau, Industry Analysis Division, [Radhika.Karmarkar@fcc.gov](mailto:Radhika.Karmarkar@fcc.gov), (202) 418-1523.

#### V. ORDERING CLAUSES

70. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 303(r), 307, 317, 325(c), 403, and 507 of the Communications Act, 47 U.S.C §§ 151, 152, 154(i), 154(j), 303(r), 307, 317, 325(c), 403, and 508 this Notice of Proposed Rulemaking **IS ADOPTED**.

71. **IT IS FURTHER ORDERED** that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking in MB Docket No. 20-299 on or before thirty (30) days after publication in the Federal Register and reply comments on or before sixty (60) days after publication in the Federal Register.

72. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A****Proposed Rules**

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

**PART 73 – RADIO BROADCAST SERVICE**

1. The Authority citation for Part 73 continues to read as follows: AUTHORITY: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.
2. In § 73.1212, add paragraph (j) to read as follows:
  - (j) Where the material broadcast consistent with section (a) or (d) above has been provided by a foreign governmental entity, the station, at the time of the broadcast, shall include the following disclaimer:

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].

    - 1) The term “foreign governmental entity” shall include governments of foreign countries, foreign political parties, agents of foreign principals, foreign missions, and United States-based foreign media outlets.
      - i. The term “government of a foreign country” has the meaning given such term in the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(e)).
      - ii. The term “foreign political party” has the meaning given such term in the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(f)).
      - iii. The term “agent of a foreign principal” has the meaning given such term in the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(c)), whose “foreign principal” has the meaning given such term in section 611(b)(1) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(b)(1));
      - iv. The term “foreign mission” has the meaning given such term in the Foreign Missions Act (22 U.S.C. § 4302).
      - v. The term “United States-based foreign media outlet” has the meaning given such term in Section 722(a) of the Communications Act of 1934 (47 U.S.C. § 624(a)).
    - 2) In the case of any video programming, the foreign governmental entity and the country represented shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.
    - 3) At a minimum, the required announcement shall be made at both the beginning and conclusion of the programming. For programming of greater than sixty minutes in duration, an announcement shall be made at regular intervals during the broadcast, but no less frequently than once every sixty minutes.
    - 4) A station shall place a copy of the announcement required by paragraph (j) in its online public inspection file within twenty-four hours of the material being broadcast. Where an aural announcement was made, its contents will be reduced to writing and placed in the online public inspection file. Where a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall comply with the requirements of paragraph (e) of this section as it relates to material that is a political matter or matter involving the discussion of a controversial issue of public importance.

(k) The requirements in paragraph (j) of this section shall apply to programs permitted to be delivered to foreign broadcast stations under an authorization pursuant to the section 325(c) of the Communications Act of 1934 (47 U.S.C. § 325(c)).

**APPENDIX B****Initial Regulatory Flexibility Act Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this NPRM. The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. This NPRM proposes to adopt specific disclosure requirements for broadcast radio and television in the event that they air programming that is paid for, or furnished for free, by a foreign government or its representative. Pursuant to the authority granted in section 317(e) of the Communications Act of 1934, as amended, (the Act),<sup>4</sup> the NPRM proposes to amend section 73.1212 of the Commission's rules to require the addition of a standard aural or visual disclaimer (or both) if a foreign governmental entity has paid a radio or television station, directly or indirectly, to air material, or if the programming was furnished free of charge to the station by such an entity as an inducement to broadcast the material.<sup>5</sup> The proposed standard disclaimer would state: "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]." Based on existing statutory or regulatory definitions, the NPRM specifies five categories of individuals or entities whose programming would trigger a disclosure requirement: 1) a "government of a foreign country" as defined by the Foreign Agents Registration Act (FARA);<sup>6</sup> 2) a "foreign political party" as defined by FARA;<sup>7</sup> 3) an individual or an entity registered as an "agent of a foreign principal" under FARA;<sup>8</sup> whose "foreign principal" has the meaning given such term in section 611(b)(1) of FARA,<sup>9</sup> 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;<sup>10</sup> or 5) an entity meeting the definition of a "U.S.-based foreign media outlet" pursuant to section 722 of the Communications Act that has filed a report with the Commission.<sup>11</sup> The NPRM also clarifies for foreign government-provided programming the "reasonable diligence" required of broadcasters, tentatively

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>2</sup> 5 U.S.C. § 603(a).

<sup>3</sup> *Id.*

<sup>4</sup> Section 317(e) states that "[t]he Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section." 47 U.S.C. § 317(e).

<sup>5</sup> 47 CFR § 73.1212.

<sup>6</sup> 22 U.S.C. § 611(e).

<sup>7</sup> *Id.* § 611(f).

<sup>8</sup> *Id.* § 611(c).

<sup>9</sup> *Id.* § 611(b)(1).

<sup>10</sup> *Id.* §§ 4301-16.

<sup>11</sup> 47 U.S.C. § 624.

concluding that such diligence would include, at a minimum, inquiring of the entity providing the programming whether it qualifies as one of the entities that would trigger the proposed disclosure, as well as independently reviewing the U.S. Department of Justice's (DOJ) FARA database, the Commission's list of U.S.-based foreign media outlets, and any other readily available sources of public government information. The NPRM proposes that stations that air foreign government-provided programming place copies of the disclosures in their on-line public inspection files (OPIFs). The NPRM also proposes that these enhanced sponsorship requirements apply to programs permitted to be delivered to foreign broadcast stations under an authorization pursuant to section 325(c) of the Communications Act of 1934.<sup>12</sup>

3. We believe that the American people deserve to know when a foreign government has paid for programming, or furnished it for free, so that viewers and listeners can better evaluate the value and accuracy of such programming. Establishing a requirement to identify foreign government-provided programming to enable the American people to know when a foreign government has paid for programming, or furnished it for free, so that viewers and listeners can better evaluate the value and accuracy of such programming. Broadcast stations are entrusted with using the public airwaves to benefit their local communities and this obligation includes ensuring that any foreign government-provided programming is clearly identified. The proposed rules update our sponsorship identification rules to provide specific guidance on the language and frequency of the necessary disclosures and greater clarity about how to identify foreign governmental entities.

#### **B. Legal Basis**

4. The proposed action is authorized under Sections §§ 151, 152, 154(i), 154(j), 303(r), 307, 317, 325(c), 403, and 507 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 303(r), 307, 317, 325(c), 403, and 508.

#### **C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted.<sup>13</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>14</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act (SBA).<sup>15</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field

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<sup>12</sup> 47 U.S.C. § 325(c).

<sup>13</sup> 5 U.S.C. § 603(b)(3).

<sup>14</sup> 5 U.S.C. § 601(6); *see infra* note 15 (explaining the definition of "small business" under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register"); 5 U.S.C. § 601(5) (defining "small governmental jurisdiction" as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register").

<sup>15</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.*

of operation; and (3) satisfies any additional criteria established by the SBA.<sup>16</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Television Broadcasting.* This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”<sup>17</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>18</sup> These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.<sup>19</sup> According to the 2012 Economic Census (when the SBA’s size standard was set at \$38.5 million or less in annual receipts), 751 firms in the small business size category operated in that year. Of that number, 656 had annual receipts of \$25 million or less, 25 had annual receipts between \$25 million and \$49,999,999 and 70 had annual receipts of \$50 million or more.<sup>20</sup> Based on this data, we estimate that the majority of commercial television broadcast stations are small entities under the applicable size standard.

7. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1368.<sup>21</sup> Of this total, 1263 stations (or 92%) had revenues of \$41.5 million or less in 2019, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 30, 2020, and therefore these stations qualify as small entities under the SBA definition. In addition, the Commission estimates the number of noncommercial educational television stations to be 390.<sup>22</sup> The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 386 Class A stations.<sup>23</sup> Given the nature of this service, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard.

8. *Radio Broadcasting.* This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”<sup>24</sup> Programming may originate in the establishment’s own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.<sup>25</sup> According to Economic Census data for 2012 (when the SBA’s size standard was set

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<sup>16</sup> 15 U.S.C. § 632(a)(1)-(2)(A).

<sup>17</sup> U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>18</sup> *Id.*

<sup>19</sup> 13 C.F.R. § 121.201; 2012 NAICS code 515120.

<sup>20</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>21</sup> Broadcast Station Totals as of June 30, 2020, News Release (MB July 1, 2020) (June 30, 2020 Broadcast Station Totals), available at <https://www.fcc.gov/document/broadcast-station-totals-june-30-2020>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>25</sup> 13 C.F.R. § 121.201; 2017 NAICS code 515112.



at \$38.5 million or less in annual receipts), 2,849 firms in this category operated in that year.<sup>26</sup> Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.<sup>27</sup> Based on this data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

9. The Commission has estimated the number of licensed commercial AM radio stations to be 4,570 and the number of commercial FM radio stations to be 6706 for a total of 11,276 commercial stations.<sup>28</sup> Of this total, 11,266 stations (or 99%) had revenues of \$41.5 million or less in 2019, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 30, 2020, and therefore these stations qualify as small entities under the SBA definition. In addition, there were 4197 noncommercial, educational (NCE) FM stations. The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

10. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>29</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the rules may apply does not exclude any radio or television station from the definition of a small business on this basis and is therefore possibly over-inclusive. An additional element of the definition of “small business” is that the entity must be independently owned and operated. Because it is difficult to assess these criteria in the context of media entities, the estimate of small businesses to which the rules may apply does not exclude any radio or television station from the definition of a small business on this basis and similarly may be over-inclusive.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

11. The NPRM seeks comment on a proposed requirement that broadcast television and radio stations airing programming either paid for, or provided for free, by a foreign governmental entity disclose, at the time of the broadcast, the name of the foreign governmental entity, the name of the foreign country associated with that governmental entity, and that the programming is paid for, or furnished for free, either in whole or in part, by that foreign governmental entity. Specifically, the NPRM proposes that stations use the following standard disclosure:

**“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].”**

12. The NPRM also clarifies for foreign government-provided programming the “reasonable diligence” required of broadcasters, tentatively concluding that such diligence would include, at a

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<sup>26</sup> U.S. Census Bureau, U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112 Radio Stations) [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ4//naics~515112](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112).

<sup>27</sup> *Id.*

<sup>28</sup> June 30, 2020 Broadcast Station Totals.

<sup>29</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 C.F.R. § 21.103(a)(1).

minimum, inquiring of the entity providing the programming whether it qualifies as the “government of a foreign country” under FARA, a “foreign political party” under FARA, a registered “agent of a foreign principal” under FARA, whose “foreign principal” has the meaning given such term in section 611(b)(1) of FARA,<sup>30</sup> a “foreign mission,” or a U.S.-based foreign media outlet, as well as independently reviewing the DOJ’s FARA database, the Commission’s list of U.S.-based foreign media outlets, and any other readily available sources of public government information. The NPRM proposes that stations that air foreign government-provided programming place copies of the disclosures in their OPIFs. The NPRM also proposes that these enhanced sponsorship requirements apply to programs permitted to be delivered to foreign broadcast stations under an authorization pursuant to the section 325(c) of the Communications Act of 1934.<sup>31</sup>

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>32</sup>

14. In proposing disclosure requirements for programming provided by foreign governmental entities, the Commission has carefully considered the resources available to television and radio broadcast stations, many of which are small entities. The proposed requirements provide an update to the Commission’s existing sponsorship identification rules, which broadcasters have followed for decades, to specifically cover foreign governmental programming. To avoid any possible confusion, the NPRM specifies the wording and timing of the required announcement. The NPRM limits the reporting requirements to placing a single electronic copy of the required announcement in a broadcaster’s online public file, which it must maintain pursuant to existing Commission rules. In defining covered programming, the Commission has tied its definition of foreign governmental entities to existing definitions contained in FARA,<sup>33</sup> the Foreign Missions Act<sup>34</sup> and the Communications Act, as amended,<sup>35</sup> so as to minimize the burden on broadcasters to identify what qualifies as a foreign governmental entity. The NPRM specifies the minimal steps that broadcasters using agents or time brokerage agreements must take to satisfy the statutory “reasonable diligence” standard. These efforts to narrowly tailor the proposed rule to create the least burden on broadcaster rights to free speech also reduce its burden on small businesses. The NPRM specifically seeks further comment on alternative requirements or other ways the Commission could minimize the impact of its proposed requirements on small entities.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

15. The NPRM contains requirements that may overlap with DOJ rules for labelling of broadcast programming provided by an “agent of a foreign principal,” as that term is defined in the Foreign Agents Registration Act and the NPRM seeks comment on the possibility.

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<sup>30</sup> 22 U.S.C. § 611(b)(1).

<sup>31</sup> 47 U.S.C. § 325(c).

<sup>32</sup> See 5 U.S.C. § 603(c).

<sup>33</sup> 22 U.S.C. § 611.

<sup>34</sup> *Id.* §§ 4301-16.

<sup>35</sup> 47 U.S.C. § 624.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, MB Docket No. 20-299.

Today the Federal Communications Commission begins a rulemaking to develop requirements to disclose when foreign governments and foreign agents buy time to broadcast content on our airwaves. This is the right thing to do.

For decades, it has been a bedrock principle in the United States that the public has a right to know the identity of those behind broadcasting. To this end, Section 317 of the Communications Act requires that programming “for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.”

Right now, we are awash in reports that foreign actors are attempting to influence our political process and democratic elections in the United States. We also know that foreign entities are purchasing time on broadcast stations in markets across the country, including Russian government-sponsored programming right here our nation’s capital. But it’s mindboggling that the FCC has yet to update its policies under Section 317 to ensure that the public knows when foreign actors who may wish to do us harm are paying to access our airwaves and influence our citizens.

Today we begin to fix this situation. We propose to adopt specific disclosure requirements for broadcast programming that is paid for or provided by a foreign government or its representative. This is about basic transparency and it frankly shouldn’t have taken us so long. Over the course of three years, Congresswoman Anna Eshoo wrote this agency eight times to demand that the FCC do something to address the increased use of our airwaves by foreign actors. Some letters she wrote on her own; on others she was joined by her colleagues in the House of Representatives. This rulemaking is a testament to her perseverance on a matter of national security. It is also an appropriate response under the law. It has my full support.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS**

Re: *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, MB Docket No. 20-299.

It's not a lot to ask that broadcasters and programmers disclose when the source of on-air content originates from, or is funded by, a foreign source. So when I heard earlier this year about a deal to broadcast programming provided by a Russian state-owned entity for six hours a day during prime morning and evening drivetime in the Kansas City market,<sup>1</sup> alarm bells went off.

Capitol Hill was paying attention as well. Representative Anna Eshoo and six other members of Congress sent a letter to the Chairman inquiring about the lack of FCC enforcement action against a broadcaster for airing "Russian propaganda in our nation's Capital" without informing listeners that the broadcasts were sponsored by the Russian government.<sup>2</sup> The Chairman subsequently did direct the Media Bureau to explore the need to modify our sponsorship ID rules as they apply to programming provided by a foreign entity.

That was the right call, and I am therefore pleased to support this notice that recognizes the need for transparency so broadcast viewers and listeners know the source of content they see and hear, and proposes to establish specific disclosure requirements for broadcast programming that is paid for or provided by a foreign government or its representative.

Notably, we take this action in the midst of known attacks on our political processes by foreign governments and their representatives. Although free speech remains a bedrock of our democracy, we as Americans have a right to know when there is a foreign voice behind speech broadcast in the United States. The public must have the full context in order to be informed and make their own decisions in separating truth from disinformation. Because content created by or on behalf of foreign governments and aired on American stations has the potential to leave listeners unwittingly vulnerable to manipulation by a foreign adversary, we must close any existing loopholes by requiring full sponsorship disclosure.

I appreciate the work of Commission staff, especially in the Media and Enforcement Bureaus, for their work on this item.

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<sup>1</sup> Steve Vockrodt, "Kansas City radio station agrees to broadcast Russian-owned 'propaganda' program," The Kansas City Star (Jan. 17, 2020), at <https://www.kansascity.com/news/local/article239359868.html>.

<sup>2</sup> Letter from Anna G. Eshoo, U.S. House of Representatives, et al. to The Honorable Ajit Pai, Chairman, FCC (Feb. 13, 2020), at [https://eshoo.house.gov/sites/eshoo.house.gov/files/wysiwyg\\_uploaded/Letter%20to%20FCC%20re%20Russian%20propaganda%20led%20by%20Reps.%20Eshoo%2C%20Doyle%20-%20202.13.2020.pdf](https://eshoo.house.gov/sites/eshoo.house.gov/files/wysiwyg_uploaded/Letter%20to%20FCC%20re%20Russian%20propaganda%20led%20by%20Reps.%20Eshoo%2C%20Doyle%20-%20202.13.2020.pdf).