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

In the Matter of	)	
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Sponsorship Identification Requirements for Foreign Government-Provided Programming	)	MB Docket No. 20-299
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COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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TABLE OF CONTENTS

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	)	
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	)	
	)	
	)	
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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)[1] comments on the Commission's proposal to require broadcasters to provide on-air and public inspection file disclosures when they air programming sourced from certain foreign governmental entities or their representatives.[2] The Commission proposes to modify its sponsorship identification rules to require broadcast stations to make a specific on-air disclosure using standardized language identifying the foreign government involved.[3] The rule would be triggered if the sponsor of the content falls into one of the following categories: 1) a "government of a foreign country" as defined by the Foreign Agents Registration Act (FARA); 2) a "foreign political party" as defined by FARA; 3) an entity or individual registered as an "agent of a foreign principal" under FARA, whose "foreign principal" has the meaning given such term in section 611(b)(1)

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

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

[3] Notice at ¶ 3. The proposed standardized disclosure states: "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]." *Id.* at ¶ 35.

of FARA and that is acting in its capacity as an agent of such "foreign principal"; 4) an entity designated as a "foreign mission" under the Foreign Missions Act; or 5) any entity meeting the definition of a "U.S.-based foreign media outlet" pursuant to section 722 of the Communications Act of 1934 (Act) that has filed a report with the Commission.[4]

NAB agrees with the Commission that American viewers and listeners should be aware if they are being subjected to foreign propaganda.[5] The approach proposed in the Notice, however, is duplicative of other federal government requirements, and it unintentionally would sweep in a much broader swath of programming and advertising. Far from capturing only content – like the examples cited in the Notice[6] -- that attempts to sway American opinions on public or political issues or sow discontent, the proposed rule changes could trigger disclosures even for entirely benign advertisements encouraging audiences to vacation in Ireland or Aruba, or for B-roll footage not intended to influence anyone. This overbreadth, along with the fact that the proposals are directed only at over-the-air broadcasters, would likely chill protected speech and fail to balance First Amendment interests. The proposed rules also would deter advertisers from relying on broadcast media

[4] Notice at ¶ 14.

[5] Notice at ¶ 2.

[6] Notice at n.40, 42, 43, 75, 116, 155 and 159 (discussing deployment of propaganda by Russia Today and Sputnik via broadcast outlets and/or social media); *id.* at n.4, 115 (discussing Chinese government outlet China Radio International (CRI), which aired programming on a U.S. broadcast station); *id.* at n.118 (discussing availability of China Global Television Network (CGTN) programming on a multicast stream of a U.S. television broadcast station).

and encourage them to redirect advertising dollars to myriad other platforms not subject to comparable requirements.[7]

It would be far more effective, efficient and consistent with our nation's constitutional values for the Commission to look to the disclosures already mandated under FARA.[8] These disclosures already achieve the goals identified in the Notice. If, however, the Commission believes that its rules should specifically address foreign sponsorship identification, instead of enacting a sweeping new set of rules, it should instead amend its sponsorship identification rules to make clear that all entities subject to the rules, including cable operators engaged in origination cablecasting, must pass through the disclosures already required to be made by FARA-regulated entities in all "informational materials" must be passed through by broadcasters as well as other entities subject to the rules, including cable operators engaged in origination cablecasting. The rules also should apply to informational materials shared on any platform, including broadcast, cable, print, or social media.

Even for stations that rarely, if ever, engage in direct relationships with foreign governmental entities as defined in the Notice, the proposed rule changes would add a layer of regulation that could affect broadcasters' relationships with advertisers and program suppliers and add countless hours of unnecessary compliance work. The Commission proposes that stations ask whether an entity meets any of the foreign government criterion

[7] Although cable outlets also are subject to sponsorship identification requirements for "origination cablecasting," the proposed changes would not apply to programming on pay TV platforms. *See* 47 C.F.R. § 76.1615.

[8] As discussed further below in Section III, FARA itself is quite sweeping and requires entities to register whenever their activity could promote the public interests of another country. A single meeting with public officials at the request of a foreign principal could result in an agent having to register, even if the bulk of the principal's activities fall within one of FARA's exemptions.

and consult multiple lists of foreign entities. But it is not clear from the Notice whether stations could narrow their inquiries and research to only those entities most likely to be foreign. Without additional compliance guidance or a more narrowly tailored rule, the proposed rule changes could create an extensive new regulatory regime beyond that currently in place for issue advertising and political advertising. Stations already devote substantial resources to complying with these laws and rules and have developed expertise and systems for compliance. Finding the needle of a foreign government-affiliated entity in the haystack of hundreds of other advertisers and programming suppliers would place an undue burden on stations.

Alternatively, if the Commission ultimately adopts its own disclosure requirements in addition to the existing FARA disclosure regime, NAB urges the Commission to: (i) require disclosures only for programming that discusses controversial issues of public importance; (ii) explicitly exempt advertising for products and services, B-roll, sound effects, and archival material used as part of a program; (iii) implement the "reasonable diligence" requirement in a manner consistent with the sponsorship identification statute by allowing stations to make inquiries of those with whom they "deal directly" and that are likely to be foreign entities, rather than consulting governmental lists; and (iv) modify its approach to both public file and on-air disclosures to be consistent with the existing issue advertising rules. These actions will more closely align the proposed rules with First Amendment principles and the Commission's obligations under Section 317 of the Act and the Administrative Procedure Act (APA).

NAB also notes that, yet again, the Commission proposes to apply rules only to over-the-air stations. While the Notice identifies a handful of instances of foreign propaganda aired on broadcast stations, there is nothing distinct about broadcast outlets that should

limit the Commission's rules only to them. The Commission should not only consider extending the rules to cable providers, but it should also acknowledge that its proposed rules do absolutely nothing to address online platforms, which undoubtedly present the greatest foreign propaganda threat to our democracy.

II. THE PROPOSED DISCLOSURES ARE DUPLICATIVE OF FARA, WHICH ALREADY MANDATES DISCLOSURES OF INFORMATIONAL MATERIAL DISTRIBUTED BY COVERED FOREIGN GOVERNMENTAL ENTITIES ACROSS ALL PLATFORMS

At the outset, it should be clear that the proposed disclosure regulations for foreign government-sponsored programming duplicate an existing disclosure regime that regulates the exact same content equally across all media platforms. Despite this parallel mechanism already in place, the Notice does not demonstrate that the disclosures foreign governmental entities already make under FARA and related regulations are somehow inadequate to ensure that the public is aware of the source of foreign government-sponsored programming. Especially in light of the First Amendment concerns that arise anytime the federal government abridges or requires speech, the Commission should first determine whether requiring a duplicative identification regime serves a compelling governmental interest.[9]

FARA, which has been in effect for many decades, is designed to promote transparency so that Americans are aware of foreign governmental attempts to sway their opinions and enable them to make informed decisions about the information they see and

[9] Just as the Courts follow a "fundamental and long-standing principle" of restraint requiring avoidance of constitutional questions prior to the necessity of deciding them, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988), prudence similarly counsels the Commission against thrusting itself here into a "thicket of constitutional issues it [is] not necessary to enter." *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 511 (1st Cir. 2011).

hear.[10] The statute requires certain agents of foreign principals who are engaged in political activities or other activities specified under the statute to make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities. In enacting FARA, Congress hoped "that the spotlight of pitiless publicity [would] serve as a deterrent to the spread of pernicious propaganda."[11] FARA and related regulations also include disclosure requirements affecting registrants' dissemination of "informational materials."[12] Any physical or electronic items that an agent disseminates in interstate commerce on behalf of the foreign principal must be labeled with a "conspicuous statement" that identifies the registrant and its foreign principal and instructs audiences that they can obtain more information from the DOJ, using specific language prescribed by DOJ regulations.[13] Copies of these informational materials must also be filed with the DOJ within 48 hours of dissemination.[14]

Given their impact on speech, the FCC's proposed additional regulations raise obvious constitutional questions. The Commission's First Amendment analysis is based on

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[10] As the Department of Justice (DOJ) explains: "Disclosure of the required information facilitates evaluation by the government and the American people of the activities of such persons in light of their function as foreign agents." DOJ FARA Homepage, available at: https://www.justice.gov/nsd-fara.

[11] H.R. Rep. No. 1381, 75th Cong., 1st Sess. (1951).

[12] 22 U.S.C. § 614(a)-(b); 28 C.F.R. § 5.400 and § 5.402.

[13] *Id*. The conspicuous statement required is as follows: "This material is distributed by (name of registrant) on behalf of (name of foreign principal). Additional information is available at the Department of Justice, Washington, DC."

[14] *Id. See also* DOJ, FARA Frequently Asked Questions, available at: https://www.justice.gov/nsd-fara/frequently-asked-questions (discussing how to file copies of informational materials shared via radio and television broadcasts, other video, the web, and social media).

the premise that its proposed rules serve a compelling governmental interest.[15] While there is "a need for transparency and disclosure to the public about the true identity of a program's sponsor," especially "when a foreign government is involved," that need is met by the existing FARA requirements.[16] For the Commission's additional rules to satisfy even intermediate First Amendment scrutiny, they must be narrowly tailored to avoid burdening more speech than necessary.[17] Mandating a second set of disclosures affecting the exact same programming on the same platform to reach the same audiences does not meet this standard, let alone a strict scrutiny standard requiring the "least restrictive means" to achieve the government's interest.[18]

To the extent that the Notice identifies gaps in the existing regime, they would not be filled by the proposed regulations. The Commission does not directly specify whether the foreign propaganda mentioned in the Notice is/was accompanied by the requisite FARA disclosures.[19] It appears that at least some foreign government programming discussed in the Notice would not have complied with FARA disclosure standards because the entities selling the programming were not FARA registrants at the time the programming aired. Disclosure gaps like these would not be remedied by the rules proposed in the Notice because the requirements would be triggered by FARA registration or designation as a

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[15] Notice at ¶¶ 55-57.

[16] Notice at ¶ 56.

[17] *See, e.g., Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

[18] *McCullen v. Coakley,* 573 U.S. 464, 478 (2014) (stating that, to satisfy strict First Amendment scrutiny, a law or regulation "must be the least restrictive means of achieving a compelling state interest").

[19] *See* Notice at n. 42, 75, 116, 155, 159 (discussing Radio Sputnik, which is tied to the Russian government); id. at n. 4, 114 (discussing CRI); *id*. at n. 118 (discussing CGTN).

foreign mission.[20] If the foreign governmental entities were not FARA registrants or foreign missions at the time the programming was supplied, no additional sponsorship identification would have been triggered beyond the Commission's standard requirements.

Given these legal infirmities, NAB urges the Commission to rework its proposals to instead primarily rely on FARA. For example, the Commission could require broadcasters and other distribution platforms to pass through the disclosures already mandated by FARA. This type of targeted regulatory approach supplementing FARA would be more appropriate, given existing federal disclosure obligations and the constitutional issues presented by redundant regulation.

III. ADDITIONAL DISCLOSURES SHOULD APPLY ONLY TO CONTENT FROM FOREIGN GOVERNMENTAL SOURCES THAT DISCUSSES CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE

Although it should primarily rely on the existing FARA-mandated disclosures to inform the public about foreign-entity sponsored content, if the Commission determines it should adopt additional, new disclosure requirements, it should apply those requirements only to foreign governmental programming addressing controversial issues of public importance. As discussed below, this narrower approach is more consistent with the Commission's stated goals in this proceeding, Section 317 of the Act and long-standing FCC sponsorship identification rules.

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[20] NAB recognizes that the Commission's proposed rules also would apply to entities on its U.S.-based foreign media outlets list and foreign missions. As the Notice observes, to qualify as such a U.S.-based foreign media outlet, an entity also would be a FARA registrant. Notice at ¶ 28. Similarly, there is significant overlap among entities designated as foreign missions and FARA registrants. Several of the foreign missions mentioned in the Notice already have registered or been directed by DOJ to register (i.e., CGTN (f/k/a CCTV), China Daily Distribution Corporation and Hai Tan Development USA are registered; Xinhua News Agency was directed by DOJ to register).

The Notice, taking a very broad approach, tentatively concludes 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"[21] both before and after the programming is aired.[22] To support this conclusion, the Notice proposes to expand the Commission's interpretation of "political program" in Section 317(a)(2) of the Act beyond "programming seeking to persuade or dissuade the American public on a given candidate or policy issue" to include "any and all programming" furnished by a foreign governmental entity.[23]

Although NAB supports the Notice's goal of ensuring that the public can readily identify foreign government propaganda that seeks to influence "American public opinion, policy, and law,"[24] the proposed rule is overbroad and could sweep in programming that does not attempt to persuade the public without their knowledge and/or that cannot reasonably be construed as "political" pursuant to Section 317(a)(2).[25] To avoid this result, the Commission should not broaden its interpretation of "political program" under Section

[21] Notice at ¶14.

[22] *Id.* at ¶ 40.

[23] *Id.* at ¶ 32.

[24] Notice at ¶ 19 (explaining the proposal applies to those to individuals and entities "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").

[25] Section 317(a)(2) permits, but does not require, the FCC to mandate sponsorship identification announcements "at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program." 47 U.S.C. § 317(a)(2).

317(a)(2) to include "any and all programming" furnished by a foreign governmental entity[26] and should instead limit the additional disclosure requirements to programming that both comes from a foreign governmental entity *and* that a broadcaster determines in good faith addresses a controversial issue of public importance.[27]

A. Absent Further Limitations, the Commission's Proposal Will Arbitrarily and Capriciously Label Innocuous Programming as Foreign Government Propaganda and Chill Beneficial Speech

Because the Commission does not qualify the type of programming provided by foreign governmental entities that would be subject to its proposed rule, even benign, non-political content provided by foreign governmental entities would be treated as a "political program." As a result, content such as vacation advertisements, B-roll footage, or any other programming, including entertainment, for which a foreign governmental entity may have provided video, audio or other support, would be subject to the specified additional disclosure obligation.[28] The new disclosure requirements as proposed would apply even to programming in which the foreign governmental entity has no editorial control, the involvement of the foreign governmental entity is minimal and/or there is no attempt whatsoever to influence American politics or policy.[29]

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[26] Notice at ¶ 32.

[27] *See* 47 C.F.R. § 73.1212(d).

[28] *See* Notice at ¶ 32 ([W]e 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).") (emphasis added).

[29] For example, an hour-long program about architectural landmarks of the 20th century containing brief footage of the Sydney Opera House provided by Tourism Australia (a FARA registrant) would be subject to the proposed disclosure requirements.

This result is problematic for myriad reasons. Not only would it be misleading (as well as arbitrary and capricious) to construe a tourism advertisement or B-roll footage of the Croatian coast as a "political program," but including this type of content within the proposed rule also could undermine the Commission's goal of helping audiences identify foreign propaganda intended to influence American public opinion, law or policy. Indeed, tacking a foreign-government sponsored label onto a lengthy program containing only a brief piece of video from a foreign-affiliated entity would likely confuse, rather than enlighten, the public.

The proposed rule could also chill beneficial speech. For instance, broadcasters may not use highly relevant archival or B-roll footage provided by foreign government-affiliated entities to enhance news stories or other programming if it results in the entire program being (mis)labeled as "paid for, or furnished," by a foreign government.[30]

These problems are not remedied by the Commission's reliance on the FARA exemptions to narrow the scope of programming to which the additional disclosure requirements apply.[31] The Commission explains that "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."[32] However, advisory opinions recently released by the Department of Justice make clear that an agent cannot take

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[30] Notice at ¶ 35.

[31] *See id*. at ¶ 33 ("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 programming than intended as a 'political program.'").

[32] Notice at ¶ 19.

advantage of these exemptions and must register if it engages in *any* political activity.[33] FARA's definition of "political activity" also is extremely broad, including not only activities intended to influence U.S. domestic or foreign policy, but also encompassing anything that could promote the "public interests of a country."[34] And, because there is no *de minimis* threshold for political activity, a single meeting with public officials at the request of a foreign principal could result in an agent having to register, despite the bulk of its activities falling into one of the exemptions.[35]

Relying on these expansive definitions, the DOJ has required entities such as foreign tourism boards to register under FARA.[36] Consequently, even if an entity is providing programming that clearly falls within one of the FARA exemptions, it may still be required to register under FARA. Because the Notice concludes that "any and all programming" furnished by such entities should be interpreted as "political," the programming itself still

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[33] *See, e.g.,* DOJ Advisory Opinions on 613(e) (July 12, 2016) (requiring a foundation to register for its activities in connection with the restoration and operation of a museum because "[a]lthough the Foundation's activities, especially with respect to the museum, could implicate a possible exemption pursuant to Section 3(e) of the Act, 22 U.S.C. § 613(e), the Foundation's activities do not appear to be limited to the activities described in the exemption, and therefore, the Foundation is not exempt from registration under FARA."). Available at: https://www.justice.gov/nsd-fara/page/file/1038211/download

[34] 22 U.S.C. § 611(o).

[35] *See* DOJ Advisory Opinions on 613(e) (Jan. 31, 2020) (even if the focus of an agent's activities are cultural, religions and/or scientific, an agent must register if *any* political activities are undertaken). Available at: https://www.justice.gov/nsd-fara/page/file/1287606/download.

[36] *See* DOJ Advisory Opinion Summaries (commercial exemption does not apply to government-owned tourism companies because "tourism creates an influx of capital and additional jobs for the indigenous population, both of which are in the political or public interest of the foreign country."). Available at: https://www.justice.gov/archives/nsd-fara/advisory-opinion-summaries.

will be subject to the additional disclosure requirements under the Commission's proposed rules.

B. Limiting the Additional Disclosure Requirements to Programming that Addresses Controversial Issues of Public Concern Will Minimize the Possibility of Applying the Proposed Rule to More Programming than Necessary and Imposing Unnecessary Burdens on Broadcasters

The Commission can better tailor its approach to target the problematic types of programming cited in the Notice by limiting the additional disclosure requirements to programming that comes from a foreign governmental entity and that broadcasters determine in good faith discusses a "controversial issue of public importance."[37] Historically, the FCC has interpreted "controversial issue of public importance" to include content that discusses social or political issues that impact the community at large and are the subject of debate.[38] NAB's suggested approach therefore would ensure that foreign programming intended to influence Americans about political candidates and elections or other important public issues would be subject to the additional disclosure requirements, while excluding content that does not intend to influence the American public on important policy issues without their knowledge. In short, this narrower approach is more consistent with the terms

[37] 47 C.F.R. § 73.1212(d).

[38] *See Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC 2d 1, 11-12 (1974) ("The principal test of public importance, however, is not the extent of media or governmental attention, but rather a subjective evaluation of the impact that the issue is likely to have on the community at large. If the issue involves a social or political choice, the licensee might well ask himself whether the outcome of that choice will have a significant impact on society or its institutions"); *Sonshine Family TV, Inc. & Sinclair Broad. Group, Inc.,* 22 FCC Rcd 18686, 18689 (2007) ("The Commission applies the same standard for determining whether a broadcast matter involves 'a controversial issue of public importance' [for purposes of Section 73.1212(d) of the FCC's rules] as it applied under the fairness doctrine.").

of Section 317(a)(2), the FCC's sponsorship identification rules, and First Amendment requirements to narrowly tailor regulations impacting speech.[39]

In the event it chooses not to adopt NAB's suggested narrower approach, the Commission should still expressly exempt B-roll/sound effects and archival footage from any rule ultimately approved. The new disclosure requirements serve little purpose when it comes to such programming and therefore do not justify imposing the associated additional burdens on speech and compliance costs on broadcasters. The Commission should also clarify that commercial advertisements for goods and services provided by foreign governmental entities are not subject to the additional disclosure requirements when the identity of the sponsor is obvious in the advertisement itself, consistent with long-standing FCC rules.[40]

IV. IF THE COMMISSION ADOPTS NEW DISCLOSURE REQUIREMENTS BEYOND THOSE REQUIRED BY FARA, IT SHOULD MODIFY ITS PROPOSED IMPLEMENTATION OF THE REASONABLE DILIGENCE STANDARD AND OPIF REQUIREMENTS TO ENSURE ACCURATE INFORMATION AND AVOID UNDUE BURDENS

A. The Commission Should Modify its Proposed Implementation of the Reasonable Diligence Standard

Section 317(c) of the Act requires a licensee to "exercise reasonable diligence" to obtain from its employees and from "other persons with whom it deals directly" in connection with any program information necessary to provide an appropriate sponsorship

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[39] *See, e.g., Packingham*, 137 S.Ct. at 1736; *McCullen*, 573 U.S. at 478, 486.

[40] *See* 47 C.F.R. § 73.1212(f) ("In the case of broadcast matter advertising commercial products or services, an announcement stating 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, shall be deemed sufficient for the purpose of this section . . ."); *see also* 47 U.S.C. § 317(d) ("The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.").

disclosure.[41] The Commission tentatively concludes that it will implement the reasonable diligence standard by requiring broadcasters to make an inquiry of the program provider and consult the list of FARA registrants on the DOJ website and the list of U.S.-based foreign media outlets on the FCC's website.[42] As discussed below, the FCC should interpret the reasonable diligence standard to allow broadcasters to request information solely from the program supplier or advertiser, rather than requiring them to consult multiple lists. The list mandate would be contrary to Section 317(c), may result in erroneous disclosures and could, depending on the Commission's compliance expectations and the scope of the disclosure requirement, be unduly burdensome for broadcasters.

First, requiring stations to obtain the necessary information from any source other than the provider of the programming would be inconsistent with the statute, which states that licensees must 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."[43] Licensees only have "direct dealings" with programming and advertising suppliers (not the DOJ or FCC) in connection with obtaining advertising or programming for broadcast. Had Congress intended for licensees to consult anyone other than the programming providers, it could have specified that licensees must consult available sources of public information. Congress did not do so, and the FCC does not have the authority to amend the reasonable diligence standard in the statute. For this reason alone, the Commission should implement the reasonable diligence standard by allowing licensees

[41] 47 U.S.C. § 317(c).

[42] Notice at ¶ 47.

[43] 47 U.S.C. § 317(c).

to make an inquiry of a program supplier and jettison the proposal to require licensees to consult governmental lists.

Searching the lists also could place a significant burden on stations. A single station can have relationships with dozens of programming suppliers and hundreds of advertisers over the course of a year. Few, if any, of the entities that stations deal with will have an affiliation with any foreign government. If the Commission adopts its proposal to require stations to consult the DOJ/FCC lists, it should clarify that such research is not required where the licensee has a reasonable basis for believing that the entity has no foreign governmental affiliation. This will avoid the prospect of licensees searching for the foreign government entity "needle" in the "haystack" of hundreds of entities the station deals with. If the Commission narrows the scope of the programming covered by the proposed rule to issue-oriented programming as NAB proposes, that also will limit the universe of entities a licensee must search for and significantly reduce the burden.

Reliance on the lists also raises other practical implementation issues, primarily because the FARA list frequently changes.[44] If a station employee checks the list on a Thursday for a program airing on Friday and the entity that sponsored the program is added to the database overnight, would this constitute a good faith effort to comply? How can station personnel document what was (or was not) in the database at the time they did their research? Since entities are sometimes removed from the list, a licensee also could

[44] For example, on November 25, 2020, the list had 486 active registrants, 685 active foreign principals and 2280 short form registrants. On December 7, there were 489 active registrants, 679 active foreign principals, and 2,258 active short form registrants. The database allows users to narrow a search by date. While this seems as though it would provide a snapshot of the registrant list as of that date, on December 7, when NAB staff attempted to look back at the database as of November 25, the database yielded a different number of active registrants (487 rather than 486).

incorrectly identify programming as being sponsored by a foreign governmental entity if the entity is removed from the list after research is done and before a program airs, resulting in an inaccurate disclosure to station audiences.

For these reasons, NAB urges the Commission to allow broadcasters to request any required information about the identity of a program's sponsor directly from the sponsor or distributor, or a third-party buyer of airtime. Stations could comport with the requirement by, for example, adding a provision to their contracts requiring all advertisers and programmers to disclose this information, or providing content suppliers with a notice that the station requires this information.[45] Stations that prefer to rely upon the DOJ and FCC lists should be permitted, but not required, to choose that option, but stations should not be required to do both.

B. The Commission's Foreign Government-Provided Programming Disclosure Standards Should Be No More Stringent than Those for Issue Advertising

The Notice tentatively concludes that a station that airs foreign government-provided programming subject to the new disclosure requirement should also place copies of these disclosures in its online public inspection file (OPIF) and seeks comment on how to implement this proposal, including whether additional information should be included in the file and the timing of placement of such material in the file.[46] NAB urges the Commission to ensure that OPIF requirements associated with foreign government-provided programming

[45] Compliance with this standard could be similar to compliance with the Commission's advertising non-discrimination requirements. *See Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5922, 5940 ¶ 40 (2008).

[46] Notice at ¶¶ 43-46.

are rational, have a legal basis and are no more stringent than the existing standards for issue advertising.

The Notice seeks comment on whether to require licensees to obtain and disclose in OPIF a list of the persons operating the foreign governmental entity providing programming.[47] While NAB understands the utility of this inquiry in the issue advertising context, it does not seem useful for disclosures about foreign government-sponsored programming. Both the on-air and OPIF disclosures will identify the entity that supplied the programming and the foreign country it is affiliated with, so the ultimate source of the programming already is fully disclosed. It is unclear how a disclosure of the individuals that operate the programming provider could advance the goals articulated in the Notice, or what public purpose this regulation would serve. Accordingly, NAB urges the Commission not to require licensee to obtain and file a list of the persons operating the entity providing the programming.[48]

NAB also does not believe it would be necessary or appropriate for licensees to obtain or provide additional information in their OPIF disclosures, such as specific details about the relationship between the provider of the programming and the foreign country at issue.[49] Station employees do not have unique expertise concerning the programming

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[47] Notice at ¶ 43.

[48] Should the Commission opt to do so, NAB urges the Commission to apply standards no more stringent than those currently applicable to issue advertising. The Commission expects broadcasters to obtain the lists from either the organization sponsoring the program or the third-party buyer of ad time on behalf of the organization. If the list provided appears incomplete (e.g., only a single name is provided), station personnel need only make a single inquiry whether there are any other officers or members of the executive committee or board of directors of the entity sponsoring the ad. *In the Matter of Complaints Involving the Political Files of WCNC-TV, Inc., et al*, FCC 19-100 (Oct. 16, 2019) at ¶¶ 21-26.

[49] Notice at ¶ 44.

providers' relationships with foreign governments and would be ill-equipped to ascertain or describe the precise nature of these relationships.

The OPIF disclosures associated with foreign government-provided programming should not be subject to the same stringent timing requirements that apply to placement of material in the political file, as proposed in the Notice.[50] A licensee's obligation to place political advertising material in the public file "as soon as possible" arises from the political advertising requirements in Section 315(e) of the Act, not Section 317, the source of statutory authority cited for the proposed new disclosure requirement.[51] The immediacy requirement in the political advertising context stems from the need to ensure candidates can exercise their statutory rights to equal opportunities at statutorily mandated rates,[52] and the time-sensitive need to reach potential voters before an election. The immediacy standard does not apply to any other advertising governed by the sponsorship identification statute or regulations, and the Notice provides no rationale or legal authority for the requirement to be exported to the sponsorship identification context. Nor does the Notice identify any impending deadline for any next steps a member of the public might wish to

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[50] Notice at ¶ 45.

[51] Under 47 U.S.C. § 315(e)(3), stations must place materials in the political file "as soon as possible," a requirement defined in FCC rules to mean "immediately absent unusual circumstances."47 C.F.R. § 73.1943(c).

[52] *See, e.g.*, *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 698 (". . . we will continue the policy requiring a station to file information showing the schedule of the time provided or purchased, when spots actually aired, the rates charged and the classes of time purchased. This vital information is necessary to determine whether a station is affording equal opportunities and whether the candidate is getting favorable or unfavorable treatment in the placement of spots, especially in light of the wide rotations offered by most stations. We will also continue to interpret "as soon as possible" as meaning immediately, under normal circumstances."); 47 C.F.R. § 73.1941(c) ("A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred . . .").

take upon review of the written disclosure. Accordingly, NAB strongly urges the Commission not to adopt an immediacy standard for placement of foreign government-provided programming disclosures in a station's public file. Additionally, NAB sees no need for these sponsorship identification disclosures to be retained in the public file for a different length of time than other sponsorship disclosure material.[53] Imposing differing lengths of time to retain different types of sponsorship identification material adds to the complexity of compliance with FCC rules and creates undue administrative burdens, particularly given that new FCC disclosure requirements will duplicate existing FARA requirements and, thus, provide little if any additional public benefit.[54]

With respect to the timing of on-air disclosure, the Notice observes that the sponsorship identification rules require an announcement at the beginning and end of each program, except that for any broadcast of five minutes duration or less, only one such announcement need be made at either the beginning or conclusion of the program.[55] The Notice seeks comment on whether this frequency would be appropriate for disclosure of foreign government-provided programming or whether more frequent disclosures would be appropriate. NAB urges the Commission to adopt timing and frequency requirements that are no more burdensome than its existing rules. The Notice cites no evidence that the existing timing and frequency standards are failing to adequately inform audiences of the sources of the programming they hear and/or see, so there is no basis for adopting heightened standards here. Requiring a disclosure at the beginning and end of program

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[53] Notice at ¶ 45.

[54] *See* Section II, *supra*. If a regulation provides no, or very limited, public benefit, then any substantial burden imposed by that rule on broadcasters would fail a cost/benefit analysis.

[55] Notice at ¶ 40.

material five minutes or shorter could make a radio station's disclosure nearly as lengthy as the programming itself. Moreover, there is no evidence that more frequent disclosures will better inform the public. Indeed, disclosures that are too long or too frequent may cause audiences to simply "tune out" and ignore important information.[56]

Finally, NAB urges the Commission to provide greater flexibility in the text of the on-air disclosure to conform to existing sponsorship identification requirements. The current rule requires stations to air an announcement that identifies the entity that has "sponsored, paid for, or furnished" programming. Station personnel are accustomed to using one of these three terms in their sponsorship identification announcements. NAB urges the Commission to provide the same flexibility by permitting stations to use any of the three terms commonly used for sponsorship identification announcements (sponsored, paid for, or furnished) in their announcements, rather than mandating that the announcement state "paid for, or furnished."[57]

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[56] Research on advertising and communication recognizes the limits of a consumer's ability to process information. *See*, *e.g*, Murray N.M. et al., *Public Policy Relating to Consumer Comprehension of Television Commercials: A Review and Some Empirical Results*, 16 J. Consumer Pol'y 145, 155, 160-161, 164-165 (1993) (demonstrating that the number of words in a disclosure is negatively correlated with comprehension and that lack of viewer opportunity to process information disclosed in television advertising can contribute to reduction in comprehension); Murphy, J. & Richards, J., *Investigation of the Effects of Disclosure Statements in Rental Car Advertisements*, 26 J. Consumer Aff. 351, 355-356 (1992) (finding that if the amount of information presented exceeds consumers' ability to process it, the quality of consumer decision-making may be negatively affected). Murphy and Richards further state that "[a]lthough any efforts by regulators to facilitate informed decision-making may be laudable, failure to ensure that the chosen method of presentation is appropriate for consumer use can make those regulations worthless or even detrimental to consumer interests. If consumers are unable to understand or recall the information in the legally mandated form another disclosure technique…may be more efficacious." *Id*. at 373.

[57] Notice at ¶ 35.

V. CONCLUSION

NAB urges the Commission to narrowly tailor its proposed sponsorship identification rules for foreign government-provided programming to achieve its goal of ensuring Americans are aware of foreign propaganda. Without modifications, the proposal could mandate disclosures for material as innocuous as vacation advertising. To more appropriately address First Amendment considerations, the Commission could instead require that broadcasters and cable operators pass through all the disclosures mandated by FARA. Should the Commission choose to adopt additional disclosure requirements, we propose requiring disclosures only where the provider of the programming or advertising is a foreign governmental entity *and* the content provided addresses a controversial issue of public importance. To comport with its obligations under the Communications Act and the APA, the Commission's reasonable diligence standard must permit stations to obtain information on the foreign governmental status of programmers or advertisers from those entities, rather than consulting the moving target of the DOJ's FARA lists, and the OPIF and on-air disclosures should not be stricter than those for other issue advertising.

Respectfully submitted,

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