

D.C. Circuit Vacates FCC Rule Requiring Broadcasters to Verify Foreign Governmental Sponsorship of Programming

Article By:

Robert A. Silverman

Martin L. Stern

The U.S. Court of Appeals for the D.C. Circuit, in a unanimous decision, ruled that the Federal Communications Commission (FCC) exceeded its statutory authority in requiring, as part of a new foreign sponsorship identification rule adopted in 2021, that broadcasters must verify, through inquiry to U.S. Department of Justice (DOJ) and FCC sources, whether programming time is being leased on a broadcast station by a foreign governmental entity.

Fearing that the Chinese and Russian governments, among others, have been secretly leasing airtime to broadcast propaganda on American radio and TV stations, the FCC adopted the new sponsorship identification rule requiring broadcasters to make an on-air disclosure where airtime is being leased by a foreign government entity or its agent. In adopting the new foreign sponsorship disclosure requirement, the FCC also required broadcasters, whenever they lease airtime to a sponsor, to separately verify the sponsor's potential status as a foreign governmental entity or agent, through inquiry to the DOJ's Foreign Agent Registration Act (FARA) website and an FCC foreign media outlet report.

The new foreign sponsorship identification requirement was adopted under a provision of the Communications Act, Section 317, which requires broadcasters to announce at the time of the program, who "paid for or furnished" a sponsored program, and requires the FCC to adopt rules implementing the provision. The FCC has had sponsorship identification rules in place for years, which are the source of the familiar sponsorship identification announcements on broadcast programming regarding payments made and consideration provided in connection with broadcast matter.

In response to the challenge to the DOJ/FCC verification requirement from the National Association of Broadcasters, the D.C. Circuit observed that Section 317 only requires broadcasters to exercise reasonable diligence in obtaining information necessary to make the required sponsorship identification announcement from its employees and "from other persons with whom it deals directly" in connection with the broadcast matter, typically the sponsor or program provider. Basically, the court found that by imposing a separate verification requirement that extended beyond inquiry to employees and entities providing sponsored programming, the FCC exceeded its statutory authority.

As the D.C. Circuit found, the FCC “has decreed a duty that the statute does not require and that the statute does not empower the FCC to impose.” This proved fatal to the verification requirement, no matter how compelling the underlying policy rationale – here the feared use of American airwaves for foreign governmental propaganda by undisclosed foreign principals and agents.

The FCC argued before the court that verifying accuracy of information is just an element of reasonable diligence when acquiring information from a source, consistent with the requirements of Section 317. The Court rejected this view, concluding that broadcasters do not bear responsibility for the truth of the information they obtain beyond their duty of inquiry under the statutory provision to employees and the sources of sponsored material. According to the court, “a generic grant of rulemaking authority to fill gaps . . . does not allow the FCC to alter the specific choices Congress made.” Rather, “the FCC must abide ‘not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.’” While the issue in the foreign sponsorship identification case was a fairly narrow one, the key holding in the case is an important reminder that the FCC’s authority is limited by the scope of the statutory provisions under which it is acting, no matter the issue or the perceived public policy imperative.

FCC Chairwoman Jessica Rosenworcel, in response to the ruling, issued a statement reiterating the policy rationale for the vacated rule, but stopped short of defending the Commission’s authority to adopt it, [stating](#) that “consumers deserve to trust that public airwaves aren’t being leased without their knowledge to private foreign actors.” NAB President and CEO Curtis LeGeyt [applauded](#) the decision, remarking that it “ensures that the rules rightly continue requiring the handful of stations airing foreign government-sponsored programming to identify it as such, but removes the burden on the overwhelming majority of stations that never air foreign government-sponsored content.”

Although the Court vacated the verification requirement, the decision otherwise leaves the FCC’s new foreign-sponsorship rules largely intact. Broadcasters must continue to disclose to listeners and viewers through broadcast announcements foreign governmental sponsorship of programming material broadcast through the lease of station time and maintain programming lease agreement records in their public station files.

The FCC has not indicated at this point whether it will seek review of the D.C. Circuit decision, or propose an alternative to the vacated verification requirement.

Ryan Gillcrist, a Summer Associate in the Washington, D.C. office, contributed to this alert.

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