November 11, 2020

Legal Memorandum

*In this issue, please find information about*

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| *Headlines:* | **Friday November 27, 2020:** [FCC to Lift Freeze on Filing of Minor Modification Applications and Rulemaking Petitions for Certain TV Stations](#_November_27,_2020:)  [FCC Proposes Additional Identification Requirements for Broadcast Material Paid for or Provided By Foreign Governments and Their Representatives](#_FCC_Proposes_Additional)  [Slow Transition to LMS Filing Platform Continues: Assignment and Transfer of Control Applications Available in LMS on November 18, 2020](#_Slow_Transition_to) |

# November 27, 2020: [FCC to Lift Freeze on Filing of Minor Modification Applications and Rulemaking Petitions for Certain TV Stations](#_FCC_Announces_2021_1)

On Friday, November 27, 2020, the FCC’s Media Bureau will lift the long-standing freeze on the filing of certain full-power and Class A television station minor modification applications and full power television station rulemaking petitions to amend the DTV Table of Allotments, according to a recent [Public Notice](https://docs.fcc.gov/public/attachments/DA-20-1269A1.pdf) (“Notice”). Again, the freeze is **not** yet currently lifted; the following application filings will be unfrozen on Friday, November 27th:

* Petitions for rulemaking to change channels in the DTV Table of Allotments;
* Petitions for rulemaking for new DTV allotments;
* Petitions to swap in-core channels;
* Petitions for rulemaking to change communities of license; and
* Modification applications that increase a full power or Class A station’s service area beyond an area that is already served.

The Media Bureau issued initial freezes back in 2004, extending (and, at times, expanding) the freezes over the ensuing years in light of the spectrum incentive auction and repacking process. Given that the Phase 10 transition deadline for repacked stations recently passed in July 2020, the Bureau has determined that the “freezes are no longer required.”

As for LPTV and TV translator stations, the Notice does **not** lift the current freeze on the filing of applications for new stations in those services, given that currently licensed and permitted stations in those services are still being displaced as part of the ongoing technical adjustments made by repacked full power TV stations.

Stations that think they may have an opportunity to improve their signals once the freeze is lifted may wish to contact their consulting engineers and FCC lawyers sooner rather than later since the process is first-come, first-served and the freeze lifts the day after Thanksgiving.

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# FCC Proposes Additional Identification Requirements

# for Broadcast Material Paid for or Provided By

# Foreign Governments and Their Representatives

In a widely anticipated [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-20-146A1.pdf) (the “Notice”), the FCC is seeking comment on its proposal to require specific, standardized disclosures relating to broadcast material paid for or provided by foreign governments and their representatives. The proposal would supplement the existing sponsorship identification requirements that are applicable to broadcasters, which saw their last major update nearly 60 years ago in 1963.

*Background*. The requirement for broadcasters to identify when programming material has been paid for, sponsored, or otherwise provided by someone other than the broadcaster actually predates the creation of the FCC. As early as 1927, Congress adopted legislation—addressing what we now colloquially call “sponsorship identification”—in an effort “to ensure that the public knew who had funded particular broadcast programming, without in any way censoring or prohibiting such programming.”

Over the years, Congress amended its 1927 legislation, and the Commission adopted and provided subsequent guidance regarding its own sponsorship identification rules. Currently set forth in both the Communications Act (as amended) and the FCC’s regulations and interpretive decisions, the sponsorship identification rules require—and we suspect this will all sound familiar to broadcasters—that when a broadcast licensee has received or been promised payment or other consideration for the airing of program material, the station must disclose that fact at the time of airing and identify who paid for or promised to pay for the material. Stations also have the responsibility to exercise “reasonable diligence” in determining whether sponsorship identification is needed, and, if so, in identifying the true sponsor of the broadcast material.

*What the Notice Would Do*. The Notice’s proposals are intended to “specifically target[] . . . situations where a station broadcasts material that has been sponsored and/or provided for free by a foreign government,” including by identifying the relationship of any programming sponsor to a foreign country. As one example of material where the newly proposed disclosures could be beneficial, the Notice identifies recent U.S. broadcasts by “RT America”—a television news network funded and controlled by the Russian government—asserting that 5G services are a health hazard, despite the fact that Russia appears to be strongly promoting the launch of 5G in its own country.

Although the Notice sets out and seeks comment on too many issues to exhaustively catalog in this memorandum, the following summary highlights several of the primary issues of which broadcasters should be aware, including the proposed triggers for, and the required form and placement of, the new disclosures.

Under the proposed rules, new disclosures would be required if the sponsor of broadcast materials falls into any 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 qualifying foreign principal under FARA who is acting in the capacity of 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” under the Communications Act that has filed a report with the FCC.

However, the Notice seeks comment on whether those or any additional categories triggering disclosure are appropriate, as well as on various other related issues, such as what actions broadcasters must take to satisfy the requirement to exercise “reasonable diligence” in ascertaining whether individuals involved with providing programming fall into one of the foregoing disclosure-triggering categories. In the case of programming paid for or provided by a “foreign mission,” for example, the Notice suggests that under its proposals broadcasters would have an obligation to search the *Federal Register* for U.S. Department of State determinations made under the Foreign Missions Act. Thus, the proposal could impose significant burdens and regulatory liabilities on broadcasters and turn stations into foreign propaganda gatekeepers.

Parallel to the current sponsorship identification rules, under the Notice’s proposals disclosure would be required whenever “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.” The Notice further indicates that under the proposals the Commission would expect licensees to be “vigilant” about determining whether any form of consideration has been provided. It is troubling that the Notice does not provide any guidance as to what degree of attention and action would meet the “vigilant” standard.

Additionally, the proposed disclosures would be standardized according to the following form:

“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].”

The Notice seeks comments on many aspects of the proposed standardized disclosure language, including whether stations should be granted discretion to include additional language and whether the disclaimer should always be broadcast in English, in the primary language of the broadcast, or, when applicable, in both the primary broadcast language and English. Required audio and visual components are also proposed and outlined for comment, as well as the specifics of a proposed requirement for stations to place copies of disclosures in their online public inspection files (“OPIFs”).

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As noted above, the foregoing is only a high-level summary of several of the primary issues and proposals under the Notice. Fixed comment dates will be set once the Notice is published in the *Federal Register*, with comments due 30 days after publication and reply comments due 60 days after publication. We have some concerns about the scope of these proposals and welcome your feedback.

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# Slow Transition to LMS Filing Platform Continues: Assignment and Transfer of Control Applications Available in LMS on November 18, 2020

By recent [Public Notice](https://docs.fcc.gov/public/attachments/DA-20-1303A1.pdf), the FCC announced that on Wednesday, November 18, 2020, applications for assignment and transfer of control of broadcast station licenses and construction permits will be available in the Commission’s licensing and management system (“LMS”). The affected applications include the following:

(1) Assignment of Authorization non-*pro forma* (historically labeled Form 314);

(2) Transfer of Control non-*pro forma* (historically labeled Form 315);

(3) Assignment of Authorization or Transfer of Control *pro forma* (historically labeled Form 316); and

(4) Assignment of Authorization of Transfer of Control non-*pro forma* (historically labeled Form 345).

Beginning November 18, 2020,the current consolidated database system (“CDBS”) versions of the applications (Forms 314, 315, 316, and 345) will be decommissioned and no longer accepted through the CDBS filing platform. The applications will be moved to new schedules on FCC Form 2100—Schedules 314, 315, 316, and 345, respectively—and must be filed in LMS going forward.

The Commission first began transitioning to the LMS filing platform in late 2014, and has slowly been moving various broadcast applications to the new platform since that time. Additional guidance regarding the LMS filing platform is available at the following link: <https://www.fcc.gov/media/radio/lms-help-center>.

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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