October 18, 2022

Legal Memorandum

*In this issue, please find information about*

|  |  |
| --- | --- |
| *Headlines:* | [FCC Proposes New Foreign Sponsorship ID Certifications, Seeks Additional Comment on Distinction Between Advertising and Leased Programming](#_Between_Advertising_and)  [Global Music Rights Sues 3 Radio Groups for Copyright Infringement](#_Global_Music_Rights)  [In Continuing Focus on EAS, Commission Adopts Changes to Emergency Alert System; Appears Likely to Adopt New Cybersecurity NPRM](#_Commission_Adopts_Changes_1) |

# FCC Proposes New Foreign Sponsorship ID Certifications,

# Seeks Additional Comment on Distinction

# Between Advertising and Leased Programming

The Commission recently unanimously adopted and released a [Second Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-22-77A1.pdf) (the “Notice”) proposing new compliance requirements related to the Commission’s foreign sponsorship identification rules. The Notice comes on the heels of the Court of Appeals for the District of Columbia Circuit’s decision in [*NAB v. FCC*](https://docs.fcc.gov/public/attachments/DOC-385191A1.pdf), in which the National Association of Broadcasters (“NAB”) and others successfully challenged one of the mandatory due diligence requirements imposed on broadcasters under the original version of the rules. The Notice “seeks to fortify the rules in the wake of the court’s decision,” and therefore proposes new mandatory certification requirements for both broadcasters and lessees of broadcast airtime. The Notice also solicits comment on a pending Petition for Clarification as to the scope of programming arrangements subject to the foreign sponsorship identification rules.

*Background.*  In response to reports of undisclosed foreign governmental programming being transmitted by U.S. broadcast stations, in April 2021 the Commission released a [Report and Order](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjor6ryxdb6AhUPM1kFHc_hARgQFnoECB8QAQ&url=https%3A%2F%2Fdocs.fcc.gov%2Fpublic%2Fattachments%2FFCC-21-42A1.pdf&usg=AOvVaw0VP8r6aMui3BJoNnCOBkyn) (the “Order”) adopting various due diligence and disclosure requirements related to programming provided by foreign governmental entities pursuant to a qualifying “lease of airtime.” According to the FCC, the foreign sponsorship identification rules “seek to increase transparency and ensure that audiences of broadcast stations are aware when a foreign government, or its representatives, are seeking to persuade the American public.” The rules aim to accomplish this by requiring certain, specific disclosures when material is broadcast as part of a “lease of airtime” on a broadcast station that has been sponsored, paid for, or furnished by a “foreign governmental entity” (as that term is defined in the FCC’s rules and regulations). The rules also apply to programming provided by a foreign governmental entity for free, or for a nominal fee, as an inducement to air the material, when the programming is political or involves a controversial issue and is aired pursuant to a lease of airtime.

As is relevant to the Notice, the Order adopted multiple requirements for television and radio broadcasters to adhere to as a means of satisfying the “reasonable diligence” required under the foreign sponsorship identification rules. (The Order also adopted disclosure requirements, which, although not relevant and therefore not discussed in this memo, constitute separate, additional compliance obligations.) Under the new “reasonable diligence” requirements, whenever broadcasters lease airtime to a third party (a “lessee”), at the time of the lease agreement and at lease renewal broadcasters are required to:

1. Tell the lessee about the foreign sponsorship disclosure requirement;
2. Ask the lessee whether it is a foreign governmental entity (as that term is defined in the relevant FCC rules and regulations);
3. Ask the lessee whether it knows if anyone further back in the programming production or distribution chain is a foreign governmental entity (again, as that term is defined in the relevant FCCs rules and regulations);
4. Document those inquiries and investigations and retain that documentation for the remainder of the station’s current license term or one year, whichever is longer.

NAB and others successfully challenged—and the court’s decision in *NAB v. FCC* did away with—another requirement adopted in the Order: that broadcasters independently confirm the lessee’s status by checking the Department of Justice’s Foreign Agents Registration Act (“FARA”) website and the FCC’s U.S.-based foreign media outlets reports.

Additionally, in July 2021, the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FCB Television Affiliates Association, and NBC Television Affiliates (the “Affiliates”) filed a [Petition for Clarification](https://www.fcc.gov/ecfs/document/1071951674496/1) asking the Commission to clarify the Order’s phrase “traditional, short-form advertising,” given that the Order stated that such advertising does not trigger the new foreign sponsorship identification diligence or disclosure requirements.

*The 2022 Notice and Proposed Certification Process.* In response to the D.C. Circuit’s decision vacating the requirement for broadcasters to independently check websites to confirm a lessee’s status as a foreign governmental entity, the Notice proposes various amendments to the foreign sponsorship identification rules. According to the Notice, the proposed rule amendments are necessary given that “the exchange between a licensee and lessee about the lessee’s status [now] takes on heightened importance in ensuring that the necessary disclosure is made, if needed.”

First, the Notice proposes a new certification process that would require two separate certifications—one from the station entering into a lease of airtime, and one from the third-party lessee. Under the rules as proposed, broadcasters would be required to place both certifications in their online public inspection files (“OPIFs”) within 30 days of execution and to retain the certifications for as long as the lease to which the certifications apply is in force (i.e., the same upload timing and retention requirements currently applicable to time brokerage agreements). The Notice further tentatively concludes that by requiring these certifications to be made and uploaded to the OPIF, a station’s compliance with the new requirements would simultaneously satisfy the station’s existing, independent duty to memorialize its foreign sponsorship inquiries. The Notice seeks comment on what procedures should apply in the “rare circumstances” in which a lessee declines or otherwise fails to make the necessary certifications to a station, including whether to require stations in such circumstances to notify the Media Bureau.

The Notice also proposes standardized language for both the station and lessee certifications. The proposed certification language is relatively lengthy and differs slightly as between the station and lessee versions, with the station version containing six total certifications and the lessee version containing nine total certifications (some of which apply only in specific circumstances). Fundamentally, each version’s certifications target the requirements that the station has both informed the lessee of the foreign sponsorship identification rules and obtained certifications from the lessee stating whether it is a foreign governmental entity and whether it knows of any individual/entity further back in the chain of producing or distributing the programming that falls within the foreign sponsorship identification rules. Each certification would need to be signed by a person or entity “authorized to certify on behalf of” the station or lessee (as applicable), and would attest to the truth of the statements made in the certification. The Notice seeks comment on both the utility of providing this standardized language and the specific language proposed in the Notice. Additionally, the Notice proposes a six-month grace period for broadcasters to ensure compliance with the new certification requirements, if adopted.

*Potential Alternative Approach to Satisfy the Diligence Requirement.* As an alternative to the proposed certification requirements outlined above, the Notice also seeks comment on a potential approach raised during the D.C. Circuit oral argument regarding the original rules. There, a member of the court asked whether it would be permissible for the Commission to require a station to ask airtime lessees to provide the station with appropriate documentary “proof” showing that the lessee is not a foreign governmental entity (such as providing the station with a screenshot of the FARA website demonstrating that the lessee does not appear on the list). The Notice seeks comment on whether requiring stations to “seek or obtain” such proof would be a viable alternative approach to the proposed certification process, taking into account the potential burdens on both broadcast licensees and their lessees.

*The 2021 Petition for Clarification.* As noted above, in July 2021 the Affiliates filed a Petition seeking further FCC guidance as to the scope of the term “traditional, short-form advertising”—and, in particular, clarification that the foreign sponsorship identification rules do not apply when a station “sells time to advertisers in the normal course of business, no matter the length of the advertisement.” Because that Petition remains pending, the Notice provides further opportunity for stakeholder comment regarding the types of programming arrangements that trigger the foreign sponsorship identification rules—namely the difference between “advertising” and “leased time.” The Notice expressly solicits comment on “what criteria the Commission might adopt to distinguish between advertising and programing arrangements for the lease of airtime,” such as “duration, content, editorial control, or differences in the nature of the contractual relationship between the licensee and the entity that purchases an advertising spot versus leasing airtime for programming.”

*More to Come.* Comments on the Notice will be due 30 days after the Notice is published in the Federal Register, and reply comments will be due 45 days after publication. The Notice has yet to be published in the Federal Register.

At the same time, various federal legislators have also taken an interest in this issue via recently filed legislation with the intent of “undoing” the D.C. Circuit’s decision—i.e., legislation that would permit the FCC to readopt the requirement for broadcasters to independently check sources to determine whether a lessee qualifies as a “foreign governmental entity.” We will be monitoring the FCC proceeding and the federal legislation and inform you of any subsequent important updates.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Global Music Rights Sues Three Radio Groups for Copyright Infringement

In recent weeks, performing rights organization (“PRO”) Global Music Rights (“GMR”) filed lawsuits against three radio groups, claiming the groups have infringed on copyrights administered by GMR by playing music without the requisite public performance license. Commercial broadcasters have long been required to obtain licenses from PROs—such as ASCAP, BMI, and SESAC—in order to play recordings that embody musical compositions administered by the PRO (note, however, that comparable royalty rates for noncommercial broadcasters’ over-the-air broadcasting are set by the Copyright Royalty Board and not through independent licenses with PROs). Since GMR first began operating as a PRO nearly a decade ago it has slowly grown and now administers the catalogs of a number of high-profile songwriters, including Bruno Mars, Pharrell Williams, and John Lennon—a list of GMR artists can be found on its [website](https://globalmusicrights.com/Catalog).

Historically, GMR has not been hesitant to pursue legal action against broadcasters that GMR believes to have violated copyrights that GMR administers. In its latest lawsuits, GMR claims that the sued radio groups have continued to play works administered by GMR (the “GMR Compositions”) in spite of being given “numerous opportunities” to properly license the material. The suits ask for $150,000 for each infringed GMR Composition—the maximum amount allowed under the Copyright Act for “statutory damages” (i.e., damages that may be claimed without the need to show the actual monetary harm caused by the alleged infringement) when an infringer committed the infringement “willfully.” Because GMR claims each of the groups played over 100 GMR Compositions several thousands of times without a license, these suits—if adequately proven in court—have the potential to result in significant judgments against the defendants, even if the courts were to exercise their statutory discretion to set lower statutory damages than GMR’s requested amounts.

As we reported previously, at the beginning of this year GMR settled its years-long litigation with the Radio Music License Committee (“RMLC”) as to whether GMR should be subject to the same or similar oversight as that imposed by the longstanding antitrust consent decrees that bind ASCAP and BMI. That confidential settlement purportedly set negotiated license terms for stations to broadcast GMR Compositions, and broadcasters were required to either agree to the terms or reach an independent agreement with GMR—without one or the other, stations would generally no longer have the right to play music of artists represented by GMR.

These lawsuits appear to indicate that GMR is continuing to be vigilant in monitoring and taking action against stations GMR believes to be infringing on its clients’ rights, and it would not be surprising to see more, similar actions in the near future. Any commercial broadcaster with questions or concerns regarding their PRO licenses (including GMR) should contact legal counsel or the Association hotline.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Commission Adopts Changes to Emergency Alert System;

# Appears Likely to Adopt New Cybersecurity NPRM

The FCC recently released a [Report and Order](https://docs.fcc.gov/public/attachments/FCC-22-75A1.pdf) (the “Order”) adopting a number of changes to the way participants in the Emergency Alert System (“Participants”) will disseminate emergency alert messages to the public, as well as the content contained in those alert messages. As the rules go into effect, broadcasters will need to adjust their practices for receiving and distributing emergency alerts.

*Background.*  The Emergency Alert System (“EAS”) has long been one of the nation’s most important emergency alerting tools, and is regularly used to notify communities of impending emergencies. The current system incorporates multiple mechanisms for distributing emergency information. The legacy EAS relies on EAS Participants’ monitoring of upstream audio transmissions, in which alerts are distributed as an audio-only message along with various audio signals and so‑called “header codes” (which contain general information about the source of the information and type of emergency) via an audio “daisy chain,” with each alert triggering another downstream alert. More recently, internet distribution has also been developed and deployed for the EAS, which allows for distribution of Common Alerting Protocol (“CAP”)-formatted alerts online through the FEMA-administered Integrated Public Alert and Warning System (“IPAWS”). Whereas legacy EAS messages are audio-only, CAP-formatted messages are IP-based and may incorporate various types of information (text, audio, video, streaming links, etc.). While the CAP system allows for distribution of more varied information, the legacy EAS is considered more robust, and therefore more likely to be available in cases of national emergency.

There is often a discrepancy between the visual text broadcast in conjunction with an audio EAS message, particularly when a CAP-formatted alert is converted into legacy format. For legacy EAS, the accompanying visual crawl is often based entirely on the header codes accompanying the audio message, which may not entirely match the audio message. By contrast, CAP-formatted alerts have the capability to include specific text to accompany audio messages, meaning text alerts are much more likely to contain more detailed and actionable information.

*Preference for CAP-Formatted Alerts.*  Against the foregoing backdrop, the Order adopts various new EAS rules to encourage the use of CAP-formatted alerts when possible. First, EAS Participants must “prioritize” CAP-formatted alerts such that if a broadcaster receives both legacy‑EAS and CAP-formatted versions of the same alert the broadcaster must transmit the CAP version. Second, whenever EAS Participants receive a state or local area alert message in the legacy EAS format, they will be required to poll the IPAWS system for a CAP-formatted version of the same alert and relay the CAP-formatted message if available. To address timing issues between the legacy and IP-based EAS distribution systems, EAS Participants will be required to wait at least 10 seconds after receiving a legacy EAS alert before checking for the CAP-formatted version (if the CAP-formatted version is received first, there is no need to wait before disseminating). There are three specific “event code” exceptions to this requirement: EAS Participants are not required to check for CAP-formatted messages when receiving legacy messages with the event codes EAN (Presidential messages), NPT (National Periodic Test), or RWT (Required Weekly Test). For practical reasons, there is no reason to wait for CAP-formatted messages in these contexts because either CAP-formatted messages do not support the type of message being sent (as with live audio messages from the President) or the nature of the message precludes the use of CAP-formatted messages (as with periodic tests of the EAS system).

*Updating Language.* In addition to changing the process for dissemination of emergency alerts, the Order mandates revisions in the text that accompanies some alert header codes. The Commission’s goal in making these revisions is to remove unnecessarily technical jargon and make emergency alert messages more understandable to the general public. Accordingly, the text for the EAN event code will be changed from “Emergency Action Notification” to “National Emergency Message.” The text for the NPT event code will be changed from “National Periodic Test” to “Nationwide Test of the Emergency Alert System.” And the PEP originator code will be changed from “Primary Entry Point System” to “United States Government.” The Order will make several corresponding changes to the FCC’s rules (such as changing references to the term “Primary Entry Point System” to “National Public Warning System” (“NPWS”)).

*Limitations to Rule Changes.* While the Order represents a notable shift in FCC rules for (and broadcaster compliance obligations relating to) the delivery of EAS messages, there are some changes the Commission considered but ultimately rejected. Most notably, the Order declined to adopt the option to allow “persistent” EAS messages—i.e., alerts that would remain active for a set duration or until cancelled by the alert originator. Although FEMA had proposed such a change earlier in the proceeding, the Commission determined that adoption of persistent alerts, while feasible within the current EAS system, would have the potential to hinder rather than aid in providing needed information during an emergency. For example, because EAS messages cannot be changed after being sent, a persistent message could remain displayed on a recipient’s device, thus preventing updated information from being delivered via subsequent EAS message, or drowning out additional information being sought by the user of the device (e.g., local news coverage).

*Implementation.* Although the Order has not yet formally taken effect, it specifies that all broadcasters must comply with these new rules no later than **one year** from the effective date of the Order. (Although NAB had requested additional time for radio broadcasters, the Commission rejected that request.) We will keep an eye out for the date on which the Order takes effect and update you regarding the corresponding compliance deadline.

As far as the practicalities of compliance are concerned, comments submitted in the proceeding by Digital Alert Systems and Sage Alerting Systems suggest that both the polling process for CAP-formatted messages and changes in header code text may be implemented through updates to the EAS devices used by many broadcasters. For now, broadcasters should take this as an opportunity to review their EAS protocols and confirm that EAS equipment is up to date and fully operational. Over the next year broadcasters will want to monitor for software and other updates from EAS equipment manufacturers to bring systems into compliance with the new rules.

*More to Come.* Lastly, the Commission appears likely to tee up more updates to its EAS rules at its October 2022 Open Meeting, this time focused primarily on ensuring overall EAS operational readiness. Although thus far the Commission has only issued a draft Notice of Proposed Rulemaking on the subject (which, due to its “draft” status, may ultimately change prior to adoption), likely topics to soon be under Commission consideration include, among other things, whether to: (1) potentially reduce the time broadcasters have to repair malfunctioning EAS equipment; (2) require broadcasters to submit notification of malfunctioning EAS equipment within a specified timeframe (e.g., 24 hours of discovery); (3) require broadcasters to notify the FCC in the event their EAS equipment or services have been accessed without authorization; and (4) require broadcasters to annually certify (potentially in EAS Test Reporting System (“ETRS”) Form One) that they have created, updated, and implemented a cybersecurity risk management plan.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*Tim Nelson, Editor*

[BROOKS, PIERCE, McLENDON,](http://www.brookspierce.com/)

[HUMPHREY & LEONARD, L.L.P.](http://www.brookspierce.com/)

[Mark J. Prak](mailto:mprak@brookspierce.com)   
[Marcus W. Trathen](mailto:mtrathen@brookspierce.com)  
[David Kushner](mailto:dkushner@brookspierce.com)  
[Coe W. Ramsey](mailto:cramsey@brookspierce.com)  
[Stephen Hartzell](mailto:shartzell@brookspierce.com)

[Julia C. Ambrose](mailto:jambrose@brookspierce.com)

[Elizabeth E. Spainhour](mailto:espainhour@brookspierce.com)

[J. Benjamin Davis](mailto:bdavis@brookspierce.com)

[Tim Nelson](mailto:tnelson@brookspierce.com)

[Patrick Cross](mailto:pcross@brookspierce.com)

Noah Hock

Micole Little

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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.

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

© 2022 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.