

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)	
)	
)	
)	

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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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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Information Collection Being Reviewed by the Federal Communications Commission)	OMB Control No. 3060–0174
)	

To: Cathy Williams, Federal Communications Commission via Email

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ submits these comments in response to the Federal Register Notice concerning information collection requirements arising from the Commission’s new foreign sponsorship identification rules.² In the Notice, as required by the Paperwork Reduction Act of 1995 (PRA),³ the Commission seeks comment on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize

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 *Notice of Public Information Collection Being Reviewed by the Federal Communications Commission*, 89 FR 72398 (Sept. 5, 2024) (Notice).

³ 44 U.S.C. §§ 3501-3520.

the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.⁴

The proposed information collection does not comport with the PRA. The newly expanded foreign sponsor ID rule that undergirds the proposed information collection does not comport with the Communications Act of 1934 (Act), the First Amendment, or the Administrative Procedure Act (APA) and therefore cannot be necessary to the proper performance of the functions of the Commission. Moreover, although NAB or any other commenter lacks full details at this stage of the PRA review process, it appears that the Commission has underestimated both the number of respondents and responses and the burdens of compliance, especially in light of the last-minute dramatic expansion of the scope of the rule's application.⁵ Because the proposed information collections are not necessary to the proper performance of the Commission's functions, they should not be approved at the Office of Management and Budget stage of the PRA review process. NAB also urges the Commission to revise certain of its estimates upward to more accurately reflect the costs and burdens of the proposed information collections.

⁴ Notice at 72398.

⁵ *Id.* at 72399 (estimating that there will now be 52,760 respondents (up from 22,900 under the currently approved collection) and 1,939,422 responses (up from 1,886,524); estimating time per response at 0.0011 hour–2.166 hours (up from .0011 to .2011 hours); estimating total annual burden hours at 332,922 (up from 258,567 hours) and total annual costs at \$2,010,723 (up from \$449,773); see *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission*, 87 FR 4019 (Jan. 26, 2022) (estimating respondents, responses and burdens stemming from the sponsor ID rules approved in 2021).

II. BECAUSE THE UNDERLYING ORDER VIOLATES THE LAW, THE PROPOSED INFORMATION COLLECTIONS CANNOT COMPORT WITH THE PRA

The Order⁶ that necessitates the proposed information collections violates multiple provisions of the law and the Constitution. With these deficiencies, the information collections that follow from the Order cannot comport with the PRA because they cannot be “necessary for the proper performance of the functions of the Commission,” nor can they have practical utility. Accordingly, the proposed information collections should not be approved by the Office of Management and Budget (OMB) at the OMB stage of the review process.

Specifically, the Order exceeds the FCC’s authority under the Act and violates the APA and the First Amendment.⁷ First, the Order violates the APA by failing: (1) to follow mandatory-notice-and-comment procedures by extending the foreign sponsorship identification rules to certain short-form advertising that previously was expressly excluded from the rules; (2) to amend the FCC’s rules to adopt the newly-expanded definition of terms, which was set forth only in the preamble; and (3) to give a reasoned explanation or provide any evidence supporting the need to alter the existing rules, including by reversing course to cover certain advertising. Second, the Order contrary to the Act imposes corroboration requirements on lessees (*i.e.*, speakers leasing airtime on broadcast stations for First Amendment-protected speech), when Congress has denied the Commission any

⁶ *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Second Report and Order, MB Docket No. 20-299, FCC No. 24-61 (rel. June 10, 2024) (Order).

⁷ See *NAB v. FCC*, Petition for Review, Case No. 24-1296 (D.C. Cir. Sept. 13, 2024); see also Comments of NAB and MMTC, MB Docket No. 20-299 (Jan. 9, 2023) (NAB/MMTC Comments), at 5-33; Written Ex Parte Communication from Rick Kaplan, NAB, to Marlene Dortch, FCC Secretary, MB Docket No. 20-299 (May 17, 2024), at 1-8 (NAB May 2024 Ex Parte).

power to regulate speakers, and prescribes diligence obligations on broadcasters that go beyond the statute. Third, by imposing specific burdens only on certain forms of advertising (political issue ads and paid public service announcements (PSAs)), the Order establishes an impermissible content-based regulation that ironically penalizes the most protected form of speech, even though the Commission never identified a single instance where a foreign governmental entity has purchased political or public service advertising on a broadcast licensee.

Under modifications to the FCC’s sponsorship identification rules adopted in 2021, broadcasters must provide standardized on-air and online public inspection file disclosures identifying the foreign government involved if they ever air programming sponsored by foreign governmental entities pursuant to a lease. The 2021 Order limited the new rule’s application to “leases” of airtime to prevent its extension to situations without any evidence of foreign government sponsored programming.⁸ The FCC specifically stated that the record did *not* show that advertisements were a source of unidentified foreign governmental programming and that “traditional, short-form advertising” did *not* constitute a lease.⁹

NAB and other affected parties sought review of the piece of the 2021 rules requiring broadcasters to independently investigate whether lessees are foreign governmental entities. The Court agreed with NAB, holding that the investigation requirement exceeded the FCC’s authority under Section 317 of the Act governing sponsorship identification.¹⁰ Following the litigation – and despite the core features of the rules still being in place – the

⁸ *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Report and Order, 36 FCC Rcd 7702, 7716 ¶ 29 (2021) (2021 Order).

⁹ 2021 Order, 36 FCC Rcd at 7716 ¶¶ 28-29.

¹⁰ *Nat’l Ass’n of Broad., et al., v. FCC*, 39 F.4th 817, 820 (D.C. Cir. 2022).

Commission proposed to refashion and expand the rules' requirements by mandating that lessees and stations complete written certifications and requiring stations to upload those certifications into their online public inspection files.¹¹

On June 10, 2024, the Commission released the current Order. It states for the first time that the Commission now will apply its foreign sponsor ID rule to certain forms of advertising, as well as to leases of airtime. Specifically, the Order makes express that, despite being "traditional, short-form advertising," political issue advertising by non-candidates, as well as paid PSAs, will be subject to the rules as programming "leases."¹² The Order further requires broadcasters to complete written certifications that they have taken the diligence steps mandated in the rules, including requesting that the innumerable entities regarded as "lessees" provide written certifications or otherwise document their status.¹³ These allegedly suspect lessees include churches seeking to air their services, schools wanting to air sporting events, local businesses with programming related to their specific lines of business, and now those seeking to air advertisements on political issues.

The Order is plainly contrary to law and the Constitution. The FCC's expansion of its rules to cover issue advertising and paid PSAs (but not other types of advertisements) violates the APA. The Commission failed to give the public any notice of, and an opportunity to comment upon, the extension of the rules to advertising. The Commission also failed to engage in reasoned decision-making, offering no evidence to support the rules' expansion

¹¹ *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Second Notice of Proposed Rulemaking, 37 FCC Rcd 12004 (2022).

¹² Order at ¶¶ 42-45, ¶ 47.

¹³ Order at Appendix A, modified 47 C.F.R. §73.1212(j)(3). A lessee can either complete a certification that it is not a foreign governmental entity as defined in the Rule, or it can print screenshots showing that it does not appear in the Foreign Agents Registration Act database or FCC list of U.S.-based foreign media outlets.

and drawing irrational distinctions between exempt and non-exempt advertising. In addition, the FCC failed to provide a rationale for changing course as required by the APA.

The Commission also lacks authority under the Act to impose corroboration requirements on lessees, via certifications or documentation of their status or otherwise, or to require that licensees demand such corroboration. While station licensees have specific, limited sponsorship identification obligations under Section 317, the FCC has no comparable authority over entities leasing airtime (or advertising) on broadcast stations. And stations' reasonable diligence duties do not extend to demanding corroboration from lessees once they have received the information needed for the required sponsorship announcements, or making the inquiries the rules demand.

Beyond exceeding the FCC's statutory authority, expanding the rules to cover political issue advertising and paid PSAs (but not advertisements for commercial products and services) makes it a content-based regulation of speech contrary to the First Amendment. The Commission does not point to a single instance of a foreign governmental entity engaging in covert political or public service advertising on television or radio stations; indeed, the FCC's 2021 Order expressly excluded advertising from the rules' coverage due to the lack of any evidence that ads were a source of foreign government-sponsored programming.

Given the Order's legal deficiencies, it is not possible for the proposed information collections arising from the Order to be necessary for the proper performance of the functions of the Commission, nor can they have practical utility. The proposed information collections should not be approved.

III. THE PROPOSED INFORMATION COLLECTION AGAIN UNDERESTIMATES THE COSTS AND BURDENS ON BROADCAST LICENSEES AND LESSEE PARTNERS

As it did for its 2021 foreign sponsor ID rules,¹⁴ Commission here again significantly underestimates the impact of its now-expanded rule in terms of the numbers of affected broadcasters and agreements, as well as the time and cost burdens. Although the Commission has made some changes to its earlier estimates which likely reflect the recent changes to its rules, several of the new estimates remain unrealistic and should be adjusted upward. Other estimates remain difficult to assess without additional information from the supporting statement (which is not yet available).

The Commission has made some increases in its estimates from its 2021 rule calculations, now estimating slightly more than twice as many “respondents” (52,760 respondents, up from 22,900 under the currently approved collection). NAB assumes that, since the Commission relied on the total number of broadcast stations (20,600) and cable systems (2,300) in developing the number of respondents for the currently approved collection,¹⁵ the new estimate must reflect the Order’s requirement for lessees to complete certifications and provide them to broadcasters. If this is correct, an estimate of only 29,860 lessees, or slightly more than one per broadcaster, is extremely low, particularly given that the Commission has expanded the definition of “lease” to include non-leases, including certain common forms of advertising. Similarly, the Notice increased the estimated number of responses to 1,939,422 (up from 1,886,524 under the currently approved collection).

¹⁴ See Comments of NAB Before the Office of Management and Budget, OMB Control Numbers 3060-0174 and 3060-0214 (Feb. 25, 2022) at 5-7 (NAB 2022 PRA Comments).

¹⁵ Cable systems are not subject to the foreign sponsorship identification rule, but this OMB Control Number also reflects burdens of compliance with other aspects of the sponsorship identification rules, which apply to cable systems engaged in origination cablecasting.

While this is a small step in the right direction, it is unlikely that only 52,898 more responses will be required given the dramatically expanded scope of the Commission's foreign sponsorship identification rules.

Data before the Commission and in the FCC's own databases demonstrate that the estimated numbers of respondents and responses should be far higher. For example, a recent search of the FCC's online public inspection file (OPIF) database shows that 556,566 files identified as "non-candidate issue ads" already have been uploaded in 2024.¹⁶ Additionally, NAB submitted data in this proceeding showing that a single broadcast group had received 2,309 political issue ad orders from 227 separate advertisers *during a single month* just prior to the 2022 election.¹⁷ It is possible that the total number of issue ad orders will reach 750,000 by the end of the year.

The estimated number of responses in the currently approved collection also is based on unrealistically low estimates of the number of leases. Although the number of leases is difficult to quantify, NAB/MMTC reviewed the total number of leases identified by the broadcasters that submitted declarations in connection with their request to stay implementation of the 2021 Order and submitted data into the record.¹⁸ The total number of leases reported by stay declarants ranged from three to nearly three thousand, with an average of 15.7 leases per station. If this holds true across the entire broadcast industry, full power television stations are analyzing a combined total of 21,556 leases, and full power radio stations are analyzing a combined total of 175,604 leases, or *nearly 200,000*

¹⁶ See NAB Staff Search of OPIF, October 26, 2024.

¹⁷ NAB May 2024 Ex Parte at 5.

¹⁸ NAB/MMTC Comments at 14-15, *citing* NAB, *et al.*, Petition for Stay Pending Judicial Review, MB Docket No. 20-299 (Sept. 10, 2021) at Exhibits 1-6.

leases across all full power commercial television and radio stations.¹⁹ The Commission based its estimated number of leases for the currently approved collection by tallying the number of time brokerage agreements in its online public inspection files (5,524), even though the Commission's definition of "lease" was apparently not limited to time brokerage agreements.²⁰

NAB urges the Commission to increase its estimated total numbers of both respondents and responses. For every separate lessee or advertiser, there will be two "responses," one from the broadcaster and one from the lessee/advertiser. Particularly considering the undercount of responses in the currently approved collection and the low estimate here, a significant increase in the estimated number of responses is required.

NAB also disagrees with the Commission's estimated time per response. The Notice states that time per response could be as low as four seconds.²¹ It is not humanly possible for a lessee to read and understand a legal certification, sign it and return it to a broadcaster in four seconds. Nor is there any possible way for a broadcast station employee to review, sign and save a certification to an electronic or print file in four seconds. The low end of the estimate must be adjusted upward. While it is difficult to comment on the estimated total burden hours and total annual costs until a supporting statement is available for the newly expanded rule, we note that the currently approved collection is

¹⁹ NAB/MMTC Comments at 15.

²⁰ NAB 2022 PRA Comments at 5, *citing* FCC Supporting Statement at 7, n. 7. The 2021 Order defined a lease as "any arrangement in which a licensee makes a block of broadcast time on its station available to another party in return for some form of compensation" regardless of "what those agreements are called, how they are styled, and whether they are reduced to writing." *Id.*, *citing* 2021 Order, 36 FCC Rcd at 7713, 7715 ¶¶ 24, 27.

²¹ Notice at 72399 (estimating time per response at 0.0011 hour–2.166 hours (up from .0011 to .2011 hours under the currently approved collection)).

based on an unrealistic estimate of the burden on broadcast stations in terms of time and cost. This was due in part because the estimate made no allowance for training or educating station personnel on the new rule or the diligence standard and assumed, without evidence, that most stations would be able to take the necessary compliance steps themselves and would not employ counsel to develop and execute a compliance plan.²² Although some of the burdens of the currently approved information collection were eliminated when a court determined that certain elements of the diligence requirements did not comport with the Communications Act,²³ rule compliance is not self-executing. Given the potential for enforcement actions and other potential adverse consequences for failure to comply, many stations will seek the advice of counsel. NAB urges the Commission to develop realistic estimates for this information collection that reflect broadcasters' likely reliance on outside legal advice for assistance with compliance, time for training and education, and the modification of electronic systems and/or processes to reflect the new dual certification requirement and expansion of the rules to an expansive new array of broadcast material.

IV. CONCLUSION

Because the Order does not comport with the Communications Act, the APA or the Constitution, the proposed information collections cannot be necessary to the proper performance of the Commission's functions and therefore cannot meet the PRA standard. Absent modifications to the underlying rules, the proposed information collections should not be approved by the Office of Management and Budget at the next phase of PRA review.

²² NAB 2022 PRA Comments at 6-7.

²³ *Nat'l Ass'n of Broad., et al., v. FCC*, 39 F.4th 817, 819 (D.C. Cir. 2022).

At the very least, NAB urges the Commission to revise certain of its estimates upward. This adjustment is required to reflect the likely number of respondents and responses; to account for the likelihood that broadcasters will seek legal advice in developing compliance plans for the revised rules; to include the time associated with the training and education of station personnel; and to reflect the modification of electronic or other systems to address the new dual certification requirement and application of the rules to certain advertising and other broadcast material.

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