

ALERT

FCC Clarifies Political File Rules; Admonishes 10 Stations and Warns All Licensees of Potential Enforcement Actions

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The Media Bureau of the Federal Communications Commission (FCC) on Friday released two orders (available [here](#) and [here](#)) admonishing 10 television stations and warning all other broadcasters that they could face enforcement actions for failing to comply with the Bureau's clarification of broadcasters' political file obligations. The Bureau's clarifications apply not only to broadcasters, but also to cable television system operators engaged in origination cablecasting, Direct Broadcast Satellite providers, and satellite radio licensees. The actions come in response to a series of complaints filed in 2014 by Campaign Legal Center and Sunlight Foundation and a single complaint filed in 2016 by the same two groups in addition to Common Cause and Benton Foundation.

Section 315(e) of the Communications Act requires broadcasters to "maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that – (A) is made by or on behalf of a legally qualified candidate for public office; or (B) communicates a message relating to any political matter of national importance, including – (i) a legally qualified candidate; (ii) any election to Federal office; or (iii) a national legislative issue of public importance."

For each such request, Section 315(e)(2) requires broadcasters to place in their political files the following information:

- (A) whether the request to purchase broadcast time is accepted or rejected by the licensee;
- (B) the rate charged for the broadcast time;

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- (C) the date and time on which the communication is aired;
- (D) the class of time that is purchased;
- (E) the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable);
- (F) in the case of a request made by, or on behalf of, a candidate, the name of the candidate, the authorized committee of the candidate, and the treasurer of such committee; and
- (G) in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person.

Consistent with the Act, Section 73.1212(e) of the FCC's rules requires that, when a station broadcasts material that is "political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall . . . [maintain] a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group . . . for public inspection."

The complaints alleged that certain television stations failed to maintain in their online public files all of the information required for candidate advertisements or advertisements communicating a message relating to a matter of national importance. Although the Bureau refrained from taking enforcement actions against the licensees of the stations subject to the complaints, it "place[d] entities subject to these requirements on notice that, going forward, they will be subject to enforcement action for willful and/or repeated failure to comply with their political file obligations" as clarified in the Order.

The Bureau clarified the political file rules in three areas, explaining that broadcasters are required to collect and place in their political files information that many broadcasters have not previously collected. A summary of the Bureau's clarifications follows.

1. Record-Keeping Requirements for Candidate Ads and Issue Ads Are Not Mutually Exclusive

First, the Bureau clarified that broadcasters must place in their political files all of the information required by Section 315(e)(2)(E). Under this section, broadcasters are required to place in their political files "the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable)." Many broadcasters have interpreted this to mean that if the request is for a candidate ad, then they must identify the name of the candidate and/or the election to which the communication refers, and if the request is for an issue ad, then they must identify the issue to which the communication refers. This interpretation is supported by the use of the disjunctive "or" when describing the requirements.

Nevertheless, focusing on context of this section and the words “as applicable,” the Bureau clarified that broadcasters must include all of the information applicable to the request: (i) the names of all candidates referenced; (ii) the respective offices to which all such candidates are seeking election; (iii) all elections; and (iv) all national legislative issues of public importance referenced. Thus, if the ad criticizes a candidate for U.S. Senate for her position on Medicare, the political file must identify the name of the candidate, the office to which the candidate is seeking election, and that the communication refers to Medicare. Similarly, for a request pertaining to an ad discussing two candidate and two issues, the political file entry must identify both candidates, the offices to which they are seeking election, and both issues.

Stations should be sure that they are reporting the full name of any person or entity identified in their political file documentation. In one case, the Bureau admonished a station for describing an ad’s subject as “Anti-Peters Senate Race” on the basis that it did not adequately identify the candidate referenced in the ad. In another case, the Bureau admonished a station for using an abbreviation for the sponsor of the ad instead of the sponsor’s full name.

Going forward, broadcasters should ensure that they are collecting information sufficient to adequately report all of the required information and that they include all such information in their public files.

2. Broadcasters Must Inquire to Obtain the Names of All Chief Executive Officers or Members of the Executive Committee or Board of Directors of the Entity Seeking to Purchase Air Time

Second, the Bureau clarified both that: (1) broadcasters must identify all chief executive officers or members of the executive committee or board of directors of the entity seeking air time; and (2) the burden is on broadcasters to inquire if the information provided appears insufficient. For requests from someone other than a candidate, Section 315(e)(2)(G) requires broadcasters to include in their political files: “the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person.”

To fulfill this requirement (and the corresponding requirement in Section 73.1212(e) of the Commission’s Rules), many broadcasters provide the buyer with NAB Form PB-18 and then place the responsive information in their political files. Going forward, however, this may not be enough. Specifically, the Bureau clarified that “in cases where a licensee initially is given the name of a single official of a sponsoring entity, or otherwise has a reasonable basis for believing that the information initially provided is incomplete or inaccurate, the licensee has an obligation to inquire whether there are any other officers or members of the executive committee or of the board of directors of such entity.” The Bureau did not provide any further guidance regarding when a broadcaster “otherwise has a reasonable basis for believing that the information initially provided is incomplete or inaccurate.”

While the Bureau’s clarification potentially increases the liability of broadcasters, it also provides a safe harbor, explaining that “licensees may discharge their obligation by asking the purchaser whether there are other officials of the sponsoring entity that must be identified under Section 315(e)(2)(G) of the Act and

Section 73.1212(e) of our rules, or, alternatively, by informing the purchaser as to which officials must be identified under those provisions and asking it to provide that information.” Thus, it should be standard practice for broadcasters to ask the purchaser to confirm that the information provided is accurate and complete.

3. Context Is Key When Determining Whether an Ad Communicates a Message Relating to a “Political Matter of National Importance”

Finally, the Bureau sought to clarify when an advertisement communicates a message relating to a “political matter of national importance.” Section 315(e)(1) of the Act requires that broadcasters maintain records for requests for air time “made by or on behalf of a legally qualified candidate for public office” or to communicate a message relating to “any political matter of national importance.” Section 315(e)(1)(B) identifies advertisements relating to: “(i) a legally qualified candidate; (ii) any election to Federal office; or (iii) a national legislative issue of public importance,” as the type of ads that may “communicate[] a message relating to any political matter of national importance.”

The Bureau first clarified that the three examples enumerated in Section 315(e)(1)(B) are not exclusive of the types of ads that may trigger a broadcaster’s obligation to maintain records of requests to purchase air time. Further, the Bureau emphasized that an ad that is both “political” in nature and of “national importance” satisfies this requirement. Thus, an advertisement pertaining to a candidate for state office could qualify if it references the candidate’s position on issues that are debated at the national level. The Bureau also stressed that Section 315(e)(1) does not include any requirement that the advertisement reference a candidate in connection with an election. Accordingly, any advertisement discussing a political matter of national importance, whether or not it references a legally qualified candidate, triggers the recordkeeping requirement.

Ultimately, the Bureau explained, this inquiry comes down to context. Thus, an advertisement by an auto dealership that announces the sale of new cars to celebrate an upcoming presidential election does not trigger the recordkeeping requirement because it “would not reasonably be deemed to be a message that is political in nature.” Similarly, “an advertisement that promotes the sale of power-operated wheelchairs and mentions that the cost to consumers will be covered by Medicare” would not trigger the recordkeeping requirement because “it is not communicating a message about Medicare; rather Medicare is being mentioned to help sell a commercial product.” However, “an advertisement that discusses the future of Social Security likely would trigger record-keeping obligations even if there were no national legislative proposals being actively considered that relate to that topic at the time the ad is aired.”

The Bureau’s actions serve as a reminder to broadcasters that the transition to online public files has made it easier for groups located outside a station’s viewing or listening area to monitor the station’s activities. In fact, each of the stations subject to the complaints had transitioned to the online public file prior to the dates of the relevant requests.

Should you have any questions about compliance with the political broadcasting rules, please do not hesitate to contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed on this alert.