



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

FCC Clarifies Critical Political File Record-Keeping Requirements

With the first primaries in advance of the 2020 general election just months away, the FCC yesterday released a long-anticipated Memorandum Opinion and Order (“Order”) in which it clarified several online political file record-keeping requirements, some of which have been a source of confusion for years. As set forth below, the Order provides helpful guidance for broadcasters regarding what they must do (and what they do not have to do) on a range of previously uncertain political record-keeping matters. At the same time, broadcasters can expect that “public interest” and “watchdog” groups will see the FCC’s clarifications as an opportunity to scrutinize even more carefully stations’ online public inspection files—and to draw attention, perhaps by way of complaints to the Commission, to purported deficiencies in them.

In summary, the Order clarifies the following:

- The FCC will consider context in determining whether an advertisement constitutes a “political matter of national importance” that triggers record-keeping obligations. A broadcast message must be *political in nature* and must be *of national importance* to trigger a licensee’s record-keeping obligations under the Communications Act (the “Act”). The Order concludes that the term “political matter of national importance” encompasses political issues that are the subject of controversy or discussion at the national level and includes—but is not limited to—issues relating to a legally qualified candidate, an election to federal office, or a national legislative issue of public importance.
- For each request to purchase political advertising time that triggers disclosure obligations because the broadcast time “communicates a message relating to any political matter of national importance” (i.e., issue ads addressing topics of controversy or discussion at the national level, including national legislation and elections for federal office), licensees must disclose in their online political files *all* political matters of national importance, including the names of *all* legally qualified candidates for

federal office (and the offices to which they are seeking election), *all* elections to federal office, and *all* national legislative issues of public importance to which the communication refers.

- Licensees must disclose *all* of the chief executive officers or members of the executive committee or board of directors of any third-party (i.e., not a candidate or candidate committee) seeking to purchase political advertising time that “communicates a message relating to any political matter of national importance.” In cases where the station has a reasonable basis for believing that the information provided to it by the advertiser appears to be incomplete, e.g., where the name of only **one** official has been supplied, the station will be deemed to have satisfied this obligation by making a single inquiry to either the organization sponsoring the ad or the third-party buyer of advertising time acting on the organization’s behalf as to whether there are any other officers or members of the executive committee or of the board of directors of such entity.

Background. The Order today has been a long time coming, as it resolves 11 complaints filed against various television stations by the Campaign Legal Center and the Sunlight Foundation way back in May of 2014. The complaints alleged that the stations failed to maintain certain required information regarding political advertisements in their online public inspection files (OPIFs).

If this case sounds familiar to you, there’s good reason: the Media Bureau (i.e., not the full Commission) released a similar order relating to the 11 complaints in January 2017, just before former Chairman Wheeler left the FCC. When Chairman Pai took over, the Commission set aside those Media Bureau orders, concluding the important political advertising record-keeping matters at issue would be more appropriately addressed by the full Commission.

The Commission (finally) addresses those issues in the Order. For the record, the Commission in the Order does not propose fines against any of the stations; rather, it admonishes eight stations and does not take action against the other three.

The Relevant Provisions of the Communications Act. In the Order, the Commission clarifies its interpretation of a few key provisions of Section 315(e) of the Act, which requires licensees to maintain political files for two types of requests to purchase political advertising time: (1) those made by or on behalf of a legally qualified candidate, and (2) those that communicate a message relating to “any political matter of national importance.” The Order (and, therefore, this memo) deals exclusively with the second category of ads—“issue” ads that are not paid for by or on behalf of a candidate.

The statutory language at issue can be a bit confusing (hence the FCC’s desire to clarify it!). While we aren’t always fans of quoting the law in these memos, we believe it is helpful here. Section 315(e)(1) of the Acts states that:

“A licensee shall 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.”

Further, Section 315(e)(2) requires broadcast licensees 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;
- (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.”

The above language of Sections 315(e)(2)(E) and (G) is highlighted because the Order focuses on it, and we wanted to draw your attention to it.

What the Order Clarifies. The Order clarifies three aspects of broadcasters’ political advertising record-keeping obligations: (1) what constitutes a “political matter of national importance”; (2) what must be disclosed in terms of the subject matter of a spot that communicates a message relating to any political matter of national importance; and (3) broadcasters’ obligations when they are provided by a non-candidate advertiser with what appears to be an incomplete list of the chief executive officers or the board of directors of the purchasing entity.

Determining Whether an Advertisement Constitutes a “Political Matter of National Importance”. The Order clarifies what kinds of requests to purchase political advertising time trigger a station’s disclosure obligations because they “communicate a message relating to a matter of national importance.” Note, again, that we are not talking about ads purchased by or on behalf of a legally qualified candidate; we are talking here about ads purchased by some other person or entity—what we commonly refer to as “issue” ads.

The Act requires disclosure when an issue ad “communicates a message relating to any political of national importance,” including (but not limited to) when that message relates to “a legally qualified candidate”; “any election to Federal office”; or “a national legislative issue of public importance.” In the Order, the Commission clarifies the following:

- “Legally qualified candidate” for these disclosure purposes means a legally qualified candidate for federal office (i.e., not state or local office).
- “National legislative issue of public importance” means an issue that is the subject of federal legislation that has been introduced and is pending in Congress at the time the request for airtime is made.
- An ad that references a political issue that is the subject of controversy and/or discussion at a national level could constitute a “political matter of national importance” and therefore require disclosure even if the ad does not contain material that fits within the narrow definition of a “national legislative issue of public importance” above. In other words, an ad that references an issue like, say, gun control, could constitute a “political matter of national importance” (and require disclosure) even if there is not then-pending any federal gun control legislation.

The upshot of these clarifications is that stations need to be thinking “disclosure obligations” when they receive a request to purchase time from a non-candidate entity that references a federal candidate, and/or a federal election, and/or national legislation, and/or an issue that is controversial or generating discussion at a national level. Remember, however, that a broadcast message must be *political in nature* and must be *of national importance* to trigger a licensee’s record-keeping obligations under the Act.

The good news is that these clarifications are generally in keeping with what broadcasters have already been doing; hopefully, the Order will not add significant burdens to most stations. Erring on the side of “over-disclosure” in a station’s political file may be viewed by some stations as a prudent course of action.

All Issues Must Be Disclosed for Spots that Communicate a Message Relating to Any Matter of National Importance. As discussed above, the Act requires that a broadcast licensee maintain in its OPIF a complete record of a request to purchase air time that “communicates a message relating to any political matter of national importance.” Part of that “complete record” of the request that must be disclosed is “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).”

The Order clarifies that, when such a request to purchase broadcast time is (again, we are dealing with a request made by an entity that is not a legally qualified candidate for public office or his/her candidate committee), the broadcaster must place in its OPIF *all* political matters of national importance mentioned in the advertisement, which includes (1) the names of *all* legally qualified candidates for federal office, (2) the respective offices to which they are seeking election,

(3) *all* elections to federal office, and (4) *all* national legislative issues of public importance to which the communication refers.

The key here is that if a non-candidate ad communicates a message relating to a political matter of national importance, and it references more than one candidate or election or national legislative issue of public importance, then the station must note ALL of the candidates/elections/issues in its political file—not just one of them.

In other words, broadcasters are not allowed to selectively disclose the political matters of their choice when a spot refers to more than one of them. By way of example, the Order notes that “if several stations broadcast the same ad containing references to multiple categories of political matters of national importance, and each was permitted to select a single category to disclose, the result could be political files containing dramatically different records, creating the potential for confusion and, thereby, frustrating the ability of those who are seeking to track and analyze political advertising in a particular market.”

List of Officers or Officials That Must Be Placed in Political File. The Act requires that when requests for political advertising time that communicates a message related to an issue of national importance are made by someone other than a candidate or on behalf of a candidate, a station must maintain in its political file “a list of the chief executive officers or members of the executive committee or of the board of directors” of the entity requesting the time. Further, the Commission’s rules require that:

“[w]here material broadcast 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 . . . [make available for public inspection] 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.”

Over the years, the statute and the rule mentioned above have combined to present broadcasters with a tricky situation when they don’t receive (or believe they haven’t received) a complete list of the required individuals from the entity making an “issue ad” buy. The Order clarifies how broadcasters can handle that situation while remaining compliant with the law.

Here’s what the Commission has to say: “we conclude that if the station has a reasonable basis for believing that the information provided appears to be incomplete, e.g., where the name of only one official has been supplied, the licensee will be deemed to have satisfied its record-keeping obligations by making a single inquiry to either the organization sponsoring the ad or the third-party buyer of advertising time acting on the organization’s behalf as to whether there are any other officers or members of the executive committee or of the board of directors of such entity.”

In concluding that broadcasters must make this one follow-up inquiry, the Commission rejected arguments that broadcasters have no affirmative duty to try and get information when the

purchasing entity fails to provide it. The Order states that, where a purchaser of political advertising time has provided incomplete information (e.g., the name of only one official), stations may discharge their legal obligation by (1) asking the purchaser whether there are other officials of the sponsoring entity that must be identified under the law, or (2) informing the purchaser as to which officials must be identified under the law and asking the entity to provide that information. It would be advisable that stations document their follow-up inquiries in writing.

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Identification of Political Advertisers in Political File Records. In a separate [order](#), also released on October 17, 2019, the FCC weighed in on the manner in which broadcasters identify the entities paying for political advertising spots in their online political files. In the case at issue in that order, the Commission found that a station’s use of the acronym “DSCC-IE” to identify the sponsor (Democratic Senatorial Campaign Committee) of national issue advertising in the station’s political file records was insufficient because there was “nothing in the record to indicate that ‘DSCC-IE’ is a commonly recognized acronym for Democratic Senatorial Campaign Committee, or that there is widespread usage of that acronym to ensure that the general public is likely to be aware of what organization that acronym represents.” This decision suggests that stations, when uploading political file records to the online political file, may wish to adopt a practice of identifying the full name of issue advertisers in addition to any acronym that is used for the advertiser, especially for acronyms that perhaps only “policy wonks” would recognize.

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As mentioned, the Commission did not propose to fine any of the stations that were the subject of the 2014 complaints at issue. But stations should know it is unlikely that will be the case moving forward. In fact, the Commission specifically places licensees subject to the disclosure rules “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.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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