

# FCC Clarifies Political File Rules and Warns of Further Enforcement Action

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The Federal Communications Commission (FCC or Commission), on October 16, 2019, released a Memorandum Opinion and Order (Order) clarifying the online political file requirements for broadcast stations. In a companion decision released the same day, the FCC also admonished a broadcaster for failing to adequately identify in its political file the sponsor of a political ad because the broadcaster used the acronym "DSCC-IE" instead of the entity's full name – the Democratic Senatorial Campaign Committee. In both items, the full Commission underscores the critical responsibility of broadcasters to maintain complete and accurate online political files, and makes clear that the burden of ensuring that all information required to be disclosed in the political file falls squarely on the broadcaster (and not on candidates or other political ad buyers).

The content of the Order may seem familiar – as it is a slightly revised version of an order released in early 2017 by the Media Bureau, in response to a series of complaints filed in 2014 by Campaign Legal Center and Sunlight Foundation arguing that the political files of several stations were incomplete. Shortly after the release of that 2017 Bureau-level decision, the full Commission rescinded it, and the complaints were returned to pending status so that the full Commission could consider the issues raised therein. Now, more than two years later, the full Commission has finally released its own decision, which, like the prior Bureau decision, admonishes the cited stations for various failures of their political file record-keeping obligations, clarifies certain disclosure obligations, and warns all broadcasters that going forward the agency may impose more severe sanctions on stations that violate the political file rules as now clarified.

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The release of the Order at this time – heading into an already active and issue-packed election cycle – should serve as a warning to broadcast stations that the Commission (and public interest groups) will be closely scrutinizing stations’ political files. Accordingly, it is crucial that material in the political file be accurate, complete, and timely uploaded.

In brief, the Order clarified that:

- The record-keeping requirements for candidate ads and third-party issue ads are not mutually exclusive – meaning that if a candidate ad references a political matter of national importance, or a third-party issue ad references a federal candidate, the political file must disclose both the candidate and issue(s) referenced in the ads;
- The broadcaster is responsible for the accuracy and completeness of the documentation placed in the political file, not the party sponsoring the ad (i.e., a candidate or third-party political advocacy group); and
- Promptly uploading complete material to the political file on a timely basis is critical.

### Refresher on Political File Requirements

Before we discuss the clarifications set forth in the Order, here is a brief summary of the political file rules:

Section 315(e) of the Communications Act requires broadcasters to “maintain, and make available for public inspection, a complete **record** of” two types of requests:

- Those made by or on behalf of a **legally qualified candidate**; and
- Those that communicate a message relating to any **political matter of national importance**, including:
  - a legally qualified (federal) candidate;
  - any election to federal office; or
  - a national legislative issue of public importance.

The **record required to be** placed in the political file of a station’s online public inspection file must include:

- whether the request to purchase broadcast time is accepted or rejected by the licensee;
- the **rate** charged for the broadcast time;
- the **date and time** on which the communication is aired; and
- the **class** of time that is purchased.

As applicable, the record must also include:

- the **name of the candidate** to whom the communication refers;
- the **office** to which the candidate is seeking election;

- the **election** to which the communication refers; or
- the **issue** to which the communication refers.

When the request is made **by, or on behalf of, a candidate**, the record must also include:

- the **name of the candidate**;
- the **authorized committee** of the candidate; and
- the **treasurer** of such committee.

For other requests (i.e., issue ads), the record must also include:

- the **name** of the person purchasing the time (i.e., the sponsor);
- 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.

Separately, Section 73.1212(e) of the FCC's rules requires that, when a station broadcasts material (typically, state or local issue ads) that involve a "**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 must place in the political file:

- 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.

To collect the information listed above, many stations rely upon the ad buyer to complete NAB Form PB-18, and then just drop the form in their political files. As the Order makes clear, however, this practice carries significant risk because the onus is on the broadcaster alone to ensure that all required information is placed in the political file. Accordingly, a station should not rely solely on the information submitted by a political ad buyer, but must conduct its own due diligence - including a review of the ad itself - to ensure that the contents of its political file include all required disclosures.

Below is a summary of the Order's clarifications of the FCC's rules governing broadcasters' political file record-keeping obligations.

### **Contents of Political Records to Be Maintained**

In the Order, the Commission interprets Section 315(e)(2)(B) of the Communications Act as requiring stations to disclose in their political file, for each political ad, **all** references to federal candidates (and the offices to which they are seeking election), federal elections and political matters/issues of national importance (including any issue that is the subject of pending federal legislation) referred to in the advertisement. It is insufficient to identify only the primary candidate or the primary issue discussed in the spot.

For example: If the Donald Trump campaign placed a candidate buy for a spot that referenced President Trump's position on immigration and the economy, the station's political file must disclose: the candidate's name: Donald Trump; the office: President; the election: 2020 Presidential Election; and all issues: Immigration and the Economy. These disclosures are in addition to his authorized committee name, treasurer, and other schedule-specific requirements (schedule, class of time, rate, etc.).

If this spot also criticized Joe Biden and Elizabeth Warren's positions on these issues, the political file would also have to disclose the name, office, and election for both of these referenced candidates.

Certain of these enhanced disclosure requirements extend to state or local candidates. For example, if a state or local candidate references a federal candidate, federal election, or political matter of national importance, those references must be disclosed in the political file. However, if a federal (or a state) candidate references a state candidate or state election, or a political matter or controversial issue of public importance (i.e., a state or local issue), these additional references are not required to be disclosed in the record for that ad in the political file under Section 315(e)(1)(B).

Stations should be careful to use the full name of the person, entity, or campaign in the political file documentation. The Commission admonished several stations for using shortened or abbreviated versions of names, or shorthand references such as the "Anti-Peters Senate Race" in their political file documentation, finding that such shorthand references are insufficiently descriptive.

### **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**

Section 315(e) of the Communications Act requires that when a non-candidate advertisement addresses a political matter of national importance, the political file must contain a **list** of the chief executive officers or members of the executive committee or of the board of directors of the entity sponsoring the ad.

In addition, Section 73.1212 of the Commission's rules requires that when an advertisement concerns a **political matter** or **matter involving the discussion of a controversial issue of public importance** and is paid for by a corporation, committee, association, other unincorporated group, or other entity, then the political file must contain 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.

In these instances, when a **list** is required to be placed in the political file, the Order clarifies that the station has an affirmative duty to question the advertiser if the station has a reasonable basis to believe the list is incomplete – for example, if the advertiser provides the station with only a single name. To fulfill its documentation requirement, the station must specifically ask the advertiser to confirm that the list is complete. The FCC does not require that the station receive a response, only that the station make the inquiry.

We recommend that this inquiry be made in writing (email) to the advertiser and that the station retain proof of the request.

## Identifying Issues That Relate to a ‘Political Matter of National Importance’

As discussed above, Section 315(e) of the Communications Act requires certain disclosures if an advertisement “relates to any political matter of national importance.” A “political matter of national importance” could include (but is not limited to) a federal candidate, a federal election, or a “national legislative issue of public importance.”

The Order clarifies that the term “political matter of national importance” is meant to encompass political matters that have “significance on a national level.” Context is relevant for this determination, but any issue that is debated on the national political stage – such as immigration, health care, the economy, taxes, or the environment – would generally be covered.

The Order also clarifies that a “national legislative issue of public importance” only refers to an issue that is “the subject of federal legislation that has been introduced and pending in Congress at the time a request for air time is made.” The Order dismisses the concerns raised by broadcasters that this requires a level of due diligence that their staffs are ill-equipped to undertake. Until further guidance is provided by the Commission, we recommend that stations err on the side of caution and disclose any issue that could reasonably be construed as a “national legislative issue of public importance.” Specifically, if an advertisement addresses a specific piece of legislation (i.e., the Affordable Care Act), that information should be included in the political file.

### Bottom Line

Stations cannot rely upon political ad buyers, either candidates or issue advertisers, to provide all of the information required for the political file. When an advertiser provides NAB PB-18, the station must compare the information on the form to the content of the advertisement to confirm that all required information (i.e., identification of all federal candidates, federal elections, and issues of national importance) are adequately disclosed. In addition, if an issue advertiser does not provide a complete list of the individuals involved in its organization, the station is required to ask the advertiser to confirm the completeness of its disclosure. Finally, stations must not only be diligent in their efforts to obtain the required political file information, but must make every effort to upload the information to their political files immediately.