



FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 25, 73, and 76

[MB Docket No. 21-293; FCC 21-91; FR ID 43007]

Revisions to Political Programming and Recordkeeping Rules

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes to update its political programming and recordkeeping rules for broadcast licensees, cable television system operators, Direct Broadcast Satellite (DBS) service providers, and Satellite Digital Audio Radio Service (SDARS) licensees. The Commission proposes to update its political programming rules by adding the use of social media and the creation of a campaign website to the existing list of activities that may be considered in determining whether an individual running as a write-in candidate has made a “substantial showing” of his or her bona fide candidacy. The Commission also proposes to update its political recordkeeping rules by incorporating provisions which were adopted in the Bipartisan Campaign Reform Act of 2002.

DATES: Comments are due on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**; reply comments are due on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by MB Docket No. 21-293, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.¹
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

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FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Gary Schonman, Special Counsel, Federal Communications Commission, Media Bureau, Policy Division, Political Programming Staff, at Gary.Schonman@fcc.gov or 202-418-1795.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM), FCC 21-91, adopted on August 3, 2021, and released on August 4, 2021. The full text of this document is available for public inspection and copying via ECFS at <http://apps.fcc.gov/ecfs> and the FCC's website at <https://docs.fcc.gov/public/attachments/FCC-21-91A1.pdf>. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an e-mail to fcc504@fcc.gov or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

¹ See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

In this Notice of Proposed Rulemaking (NPRM), we propose to update our political programming and recordkeeping rules for broadcast licensees, cable television system operators, Direct Broadcast Satellite (DBS) service providers, and Satellite Digital Audio Radio Service (SDARS) licensees. While the agency has strived to update its guidance to reflect changes in law and campaign practices, it has not undertaken a formal review to update the political programming and recordkeeping rules since 1991.² Given the substantial growth of such programming in recent years,³ the updates proposed in this item are intended to conform our rules with statutory amendments, increase transparency, and account for modern campaign practices.

We propose two revisions to our political programming and recordkeeping rules.⁴ First, consistent with modern campaign practices, we propose to revise the definition of “legally qualified candidate for public office” to add the use of social media and creation of a campaign website to the existing list of activities that may be considered in determining whether an individual running as a write-in candidate has made a “substantial showing” of his or her bona fide candidacy.⁵ Second, we propose to revise the Commission’s political file rules to conform with the Bipartisan Campaign Reform Act of 2002 (BCRA), which included within the political file requirements any request for the purchase of advertising time that “communicates a message relating to any political matter of national importance” (i.e., issue ads) and specify the records that must be maintained.⁶

I. Background

In addition to the First Amendment protections afforded to material aired by Commission licensees and regulatees, political programming receives additional, special protections.

Congress has recognized the great importance of political programming in the United States by

² *Codification of the Commission’s Political Programming Policies*, MM Docket No. 91-168, Report and Order, 7 FCC Red 678 (1991) (*1991 Political Programming Order*).

³ John Haltiwanger, *Americans are Already Exhausted with the 2020 Election, and it’s Just Getting Started. Other Countries Have Laws Limiting the Length of Campaigns* (Feb. 10, 2020), <https://www.businessinsider.com/us-presidential-elections-are-absurdly-long-compared-rest-of-world-2020-2> (explaining that the 2020 U.S. Presidential election would last approximately 1,194 days); Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion* (Feb. 11, 2021), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/> (2020 campaign spending doubled the amount in 2016).

⁴ Information in a station’s political file is available to the public on the Commission-hosted website at <https://publicfiles.fcc.gov/>.

⁵ 47 CFR 73.1940(f), 76.5(q).

⁶ Pub. L. 107-155, § 504, 116 Stat. 81 (2002) (codified at 47 U.S.C. 315(e)).

passing laws to ensure that those who run for elective office have access to broadcast and other platforms so that they may inform citizens of their positions on critical issues of the day.

Political Programming Obligations. Political programming obligations for certain Commission licensees and regulatees are set forth in sections 312(a)(7) and 315 of the Communications Act of 1934, as amended (Act).⁷ Section 312(a)(7) requires broadcast licensees to give legally qualified candidates for federal office “reasonable access” to their facilities, or to permit them to purchase “reasonable amounts of time on behalf of their candidacy.”⁸ Section 312(a)(7) of the Act also applies to SDARS licensees⁹ and DBS service providers,¹⁰ but it is not applicable to cable system operators.¹¹ Under section 315(a), if a broadcast licensee permits one legally qualified candidate for a public office to use its station, it must afford all other candidates for that office an “equal opportunity” to use the station.¹² Section 315(b) provides that, during certain periods before an election, legally qualified candidates are entitled to “the lowest unit charge of the station for the same class and amount of time for the same period.”¹³ The requirements in section 315 also apply to cable system operators,¹⁴ SDARS licensees,¹⁵ and DBS service providers.¹⁶ The entitlements embodied in sections 312(a)(7) and 315 of the Act are available only to persons who

⁷ 47 U.S.C. 312(a)(7), 315.

⁸ 47 U.S.C. 312(a)(7). *See* 47 CFR 73.1944.

⁹ *See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, IB Docket No. 95-91, Gen. Docket No. 90-357, Report and Order Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5792, para. 92 (1997) (extending the political programming provisions in sections 312(a)(7) and 315 of the Act to SDARS licensees); 47 CFR 25.702(a)-(b).

¹⁰ *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, MM Docket No. 93-205, Report and Order, 13 FCC Rcd 23254 (1998) (*DBS Public Interest Obligations Report and Order*) (establishing rules applying the political programming rules in sections 312(a)(7) and 315 of the Act to DBS service providers, in accordance with section 335 of the Act), *recon. denied*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 19 FCC Rcd 5854 (2003) (*Order on Reconsideration*), *Order on Reconsideration vacated and superseded by Second Order on Reconsideration of First Report and Order*, 19 FCC Rcd 5647 (2004) (*DBS Public Interest Obligations Sua Sponte Reconsideration*); 47 CFR 25.701(b)-(d).

¹¹ *See 1991 Political Programming Order*, 7 FCC Rcd at 679, para. 4.

¹² 47 U.S.C. 315(a). *See* 47 CFR 73.1941, 76.205.

¹³ 47 U.S.C. 315(b). Pursuant to section 315(b)(1)

¹⁴ Section 315(c) of the Act defines the term “broadcasting station” as including cable television systems and the terms “licensee” and “station licensee” as including cable operators. 47 U.S.C. 315(c) (“For purposes of this section— (1) the term ‘broadcasting station’ includes a community antenna television system; and (2) the terms ‘licensee’ and ‘station licensee’ when used with respect to a community antenna television system mean the operator of such system.”).

¹⁵ *See supra* note 8.

¹⁶ *See supra* note 9.

have achieved the status of “legally qualified candidate.”¹⁷

The Communications Act does not define the term “legally qualified candidate,” and therefore the Commission has adopted a definition, as reflected in § 73.1940.¹⁸ Generally, an individual seeking election (other than for President or Vice President) must publicly announce his or her intention to run for office,¹⁹ must be qualified to hold the office for which he or she is a candidate,²⁰ and must have qualified for a place on the ballot or have publicly committed himself or herself to seeking election by the write-in method.²¹ If seeking election by the write-in method, the individual, in addition to being eligible under applicable law to be a write-in candidate, must make a “substantial showing” that he or she is a bona fide candidate for the office being sought.²² Section 73.1940(f) of the Commission’s rules specifies the requirements to demonstrate a “substantial showing” of a bona fide candidacy by providing a nonexclusive list of activities commonly associated with political campaigning.

Political Recordkeeping Obligations. The political recordkeeping requirements serve to reinforce the statutory protections for political programming. The Commission first adopted rules requiring broadcast stations to maintain public inspection files documenting requests for political advertising time more than 80 years ago.²³ It is crucial that stations maintain political files that are complete and up to date because the information in them directly affects, among other things, the statutory rights of opposing candidates to request equal opportunities under section 315(a) of the Act and present their positions to the public prior to an election.²³²⁴ Additionally, these files enable the public to verify that licensees have complied with their obligations relating to use of their facilities by candidates for political office and to obtain information about entities

¹⁷ While section 312(a)(7) applies only to legally qualified candidates for federal office, section 315 applies to all candidates for elective office, whether federal, state, or local.

¹⁸ 47 CFR 73.1940. Section 76.5(q) of the Commission’s rules includes an identical definition of “legally qualified candidates for public office” used for purposes of the political programming rules governing cable systems. *Id.* § 76.5(q). The definition of “legally qualified candidates for public office” set forth in section 73.1940 also applies for purposes of the political programming obligations of DBS providers and SDARS licensees. *Id.* §§ 25.701(b)(1), 25.702(a).

¹⁹ *Id.* § 73.1940(a)(1).

²⁰ *Id.* § 73.1940(a)(2).

²¹ *Id.* §§ 73.1940(a)(3), 73.1940(b)(1), and 73.1940(b)(2).

²² *Id.* § 73.1940(b)(2).

sponsoring candidate and issue advertisements.²⁵ The Commission also has applied political file rules to cable television system operators,²⁴ DBS providers,²⁵ and SDARS licensees,²⁶ finding that the rationale for imposing such requirements on broadcasters similarly applies to these entities. In 2002, Congress enacted the BCRA, which amended section 315 of the Act.²⁷ The BCRA added new section 315(e) to codify the Commission’s existing political file obligations by requiring that information regarding any request to purchase advertising time that “is made on behalf of a legally qualified candidate for public office” be placed in the political file.²⁸ In addition, the BCRA expanded the political file requirements to include any request to purchase political advertising time that “communicates a message relating to any political matter of national importance.”²⁹ Specifically, section 315(e)(1) of the Act requires licensees to make available for public inspection a complete record of each request for the purchase of broadcast time by or on behalf of a legally qualified candidate and by or on behalf of any other entity whose ad communicates a message relating to any political matter of national importance.

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 –

²⁵ *Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, MM Docket No. 97-138, Report and Order, 13 FCC Rcd 15691, 15716, para. 54 (1998). In order for the public to verify that licensees have complied with their obligations, the public can visit a particular station or other entity’s political file on the Commission-hosted website <https://publicfiles.fcc.gov/>.

²⁴ *Amendment of Part 76 of the Commission’s Rules and Regulations Relative to Obligations of Cable Television Systems to Maintain Public Inspection Files and Permit System Inspections*, Docket No. 19948, Report and Order, 48 FCC 2d 72, para. 1 (1974); 47 CFR 76.1701.

²⁵ Section 335 of the Act imposes public interest obligations on DBS providers and requires the Commission, at a minimum, to apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to DBS providers. 47 U.S.C. 335(a). The Commission adopted rules requiring DBS providers to abide by political file obligations similar to those requirements placed on terrestrial broadcasters and cable systems in order to assist in evaluations of compliance with the political programming rules and to enable competing candidates to review other candidates’ advertising access and rates. *DBS Public Interest Obligations Report and Order*, 13 FCC Rcd at 23271, para. 41; *DBS Public Interest Obligations Sua Sponte Reconsideration*, 19 FCC Rcd at 5561, para. 35; 47 CFR 25.701(d).

²⁶ *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No. 14-217, Report and Order, 31 FCC Rcd 526, 537-38, paras. 26-27 (2016) (*Expansion of Online Public File Obligations*); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12415, para. 146 (2008); 47 CFR 25.702(b).

²⁷ Pub. L. 107-155, § 504, 116 Stat. 81 (2002) (codified at 47 U.S.C. 315(e)).

²⁸ 47 U.S.C. 315(e)(1).

²⁹ *Id.*

(i) a legally qualified candidate;

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The BCRA, at section 315(e)(2) of the Act,³¹ also specifies the kinds of records that must be maintained in political files, and it provides, at section 315(e)(3) of the Act, that “[t]he information required by [section 315(e)] shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years.”³²

II. Discussion

A. “Substantial Showing” for Write-In Candidates

In order to update our rules to make them consistent with present-day campaign practices, we propose to amend §§ 73.1940(f) and 76.5(q) of the Commission’s rules to add the use of social media and creation of a campaign website to the list of activities that a broadcast licensee or cable operator may consider in determining whether an individual who is running as a write-in candidate has made a “substantial showing” of his or her candidacy.³³ The proposed amendment would recognize both activities as among the practices that are now commonly associated with political campaigning.

Only those individuals who have achieved the status of “legally qualified candidate” are entitled to avail themselves of the benefits and privileges bestowed by the political programming rules, including the reasonable access,³⁴ equal opportunities,³⁵ and lowest unit charge provisions.³⁶ If seeking election by the write-in method, an individual, in addition to being eligible under applicable law to be a write-in candidate, must make a “substantial showing” that he or she is a bona fide candidate for the office being sought.³⁷

Questions as to whether an individual who is running as a write-in candidate has made a

³⁰ The reference to “licensee” in section 315(e)(1) includes broadcast licensees and cable system operators, SDARS licensees, and DBS service providers engaged in origination programming. *See* 47 CFR 76.5(p), 76.1701, 25.701, 25.702.

³¹ 47 U.S.C. 315(e)(2).

³² *Id.* Section 315(e)(3). *See infra* para. 15.

³³ 47 CFR 73.1940(f), 76.5(q). As we explain above, the definition of “legally qualified candidates for public office” set forth in section 73.1940 also applies for purposes of the political programming obligations of DBS providers and SDARS licensees. *Id.* §§ 25.701(b)(1), 25.702(a). Thus, the analysis and discussion here as well as revisions to the definition in section 73.1940 would apply to these entities as well.

³⁴ 47 U.S.C. 312(a)(7); 47 CFR 73.1944.

³⁵ 47 U.S.C. 315(a); 47 CFR 73.1941, 76.205.

³⁶ 47 U.S.C. 315(b); 47 CFR 73.1942, 76.206.

³⁷ *Id.* Sections 73.1940(b)(2), 76.5(q)(2).

“substantial showing” ordinarily arise when such individual approaches a broadcast station or cable system and makes a request to purchase time in furtherance of his or her candidacy or seeks to avail himself or herself of equal opportunities.³⁸ Sections 73.1940(f) and 76.5(q) define what it means to make a “substantial showing” by listing various activities that are commonly associated with political campaigning, including “making campaign speeches, distributing campaign literature, issuing press releases, [and] maintaining a campaign headquarters.”³⁹

At the time our current rules were drafted, social media and campaign websites did not exist.

Media coverage of recent campaigns on the national, state, and local levels indicates that the use of social media has become an activity that bona fide candidates routinely use to solicit support, financial contributions, and votes.⁴⁰ Recent articles reveal that bona fide political campaigns use major social media platforms to advertise, connect with supporters, and fundraise⁴¹ and that such engagement in social media use, for example, by creating a Twitter or Facebook account, typically increases donations for new politicians.⁴² For instance, reports of the most recent election reflect that candidates garnered support by posting photographs and hosting chats on

³⁸ 47 U.S.C. 315(a).

³⁹ 47 CFR 73.1940(f), 76.5(q)(5). The Media Bureau has long required that an individual claiming to be a “legally qualified candidate” by the write-in method bears the burden of demonstrating that he or she has made a “substantial showing” of a bona fide candidacy. See, e.g., *Complaint of Michael Stephen Levinson*, 87 FCC 2d 433, 435 (Broadcast Bur. 1980) (“The burden is on [the potential candidates] to establish to the stations from which [they] seek broadcast time under Section 312 that [they] have ‘engaged to a substantial degree in activities commonly associated with political campaigning.’”). Further, the Media Bureau has held that a broadcaster’s or cable operator’s determination as to whether a potential write-in candidate has satisfied the “substantial showing” requirement is entitled to deference, provided the determination is reasonable and made in good faith. See *Complaint by Michael Levinson Against Station WXXI-TV, Rochester, New York*, 1 FCC Rcd 1305 (MMB 1986) (*Michael Levinson*) (“This agency will review the licensee’s decision only to determine if it was unreasonable or made in bad faith.”); *Complaint of Douglas S. Kraegar Against Radio Station WTLB Utica, New York*, 87 FCC 2d 751, 753 (Broadcast Bur. 1980) (“A licensee has the discretion to make a good faith judgment as to the bona fide qualifications of a write-in candidate.”). Cf., *CBS, Inc. v. FCC*, 453 U.S. 367, 387 (1981) (“If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission’s analysis would have differed in the first instance.”).

⁴⁰ See, e.g., Lata Nott, *Political Advertising on Social Media Platforms* (June 26, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/political-advertising-on-social-media-platforms/; Daniel Kreiss, Regina G. Lawrence, and Shannon C. McGregor, *In Their Own Words: Political Practitioner Accounts of Candidates, Audiences, Affordances, Genres, and Timing in Strategic Social Media Use*, 35 Pol. Comm’n 26, 12-13 (2018) (finding that each social media platform, with different audiences and capabilities, provides “a primary way for candidates to introduce themselves to vastly dispersed constituencies and build their support among potential volunteers, donors, and voters”).

⁴¹ See, e.g., Maria Petrova, Ananya Sen, and Pinar Yildirim, *Social Media and Political Contributions: The Impact of New Technology on Political Competition*, *Management Science*, 7-8 (2020) (Petrova, *Social Media and Political Contributions*); Daniel Kreiss and Shannon C. McGregor, *Technology Firms Shape Political Communication: The Work of Microsoft, Facebook, Twitter, and Google with Campaigns During the 2016 U.S. Presidential Cycle*, 35 Pol. Comm’n, 158-59 (2018).

⁴² Petrova, *Social Media and Political Contributions*, at 28.

Instagram.⁴³ In addition, social media platforms enable political campaigns to build support by disseminating campaign updates⁴⁴ and targeting advertisements to potential voters,⁴⁵ and they provide sophisticated tools to regularly measure user engagement.⁴⁶

In order that our rules reflect ordinary campaign practices, we propose to add the use of social media for the purpose of promoting or furthering a campaign for public office to the list of recognized campaign activities in §§ 73.1940(f) and 76.5(q). We seek comment on this proposal and the types of campaign-related activities for which social media could be used in demonstrating a substantial showing of a bona fide candidacy. For instance, a candidate might use social media to raise funds, solicit votes, share policy positions, and engage in digital dialogues with voters. We note that we are not proposing that social media presence alone would be sufficient to support a status of “legally qualified candidate” but that it would be an additional indicator of activities commonly associated with political campaigning needed to make substantial showing of a bona fide candidacy.

We also propose to add creation of a campaign website to the list of recognized campaign activities in §§ 73.1940(f) and 76.5(q). Recent articles indicate that campaign websites, like social media platforms, are used by candidates to connect to a wide audience of potential voters instantaneously and facilitate direct communication and fundraising.⁴⁷ Accordingly, we

⁴³ University of Pennsylvania Knowledge @ Wharton, *How Social Media Is Shaping Political Campaigns* (Aug. 17, 2020), <https://knowledge.wharton.upenn.edu/article/how-social-media-is-shaping-political-campaigns/>.

⁴⁴ See Petrova, *Social Media and Political Contributions*, at 5, 26-27 (“[M]ore frequent and more informative tweets (e.g., including links to websites, responding to news fast, or more anti-establishment Tweets) are associated with receiving higher contributions after adopting Twitter.”).

⁴⁵ See, e.g., Google Transparency Report Help Center, *Political Advertising on Google FAQs*, <https://support.google.com/transparencyreport/answer/9575640#zippy=%2Cwhat-targeting-criteria-can-be-used-for-election-ads> (last visited May 25, 2021); Snapchat Business Help Center, *Audience Insights*, https://businesshelp.snapchat.com/s/article/audience-insights?language=en_US&_ga=2.101326145.1539846222.1621879796-1506173507.1621879796 (last visited May 25, 2021).

⁴⁶ See, e.g., Facebook Business Help Center, *About Breakdowns, Metrics, and Filtering in Ads Reporting*, <https://www.facebook.com/business/help/264160060861852> (last visited May 25, 2021) (Ads Reporting allows advertisers to analyze demographic metrics including country, region, and designated market region); Google Ads Help, *About Measuring Geographic Performance*, <https://support.google.com/google-ads/answer/2453994?hl=en> (last visited May 25, 2021) (Report Editor generates reports, which can show performance of ads targeted by location).

⁴⁷ See, e.g., Dick Morris, *Direct Democracy and the Internet*, 34 Loy. L.A. L. Rev. 1033 (2000); Diana Owen, *New Media and Political Campaigns*, *The Oxford Handbook of Pol. Comm’n* (2014). (since 2008, campaigns have used websites to incorporate interactive applications and link to their social media accounts); Elisa Shearer, Pew Research Center, *Candidates’ Social Media Outpaces Their Websites and Emails As An Online Campaign News Sources* (2016), <https://www.pewresearch.org/fact-tank/2016/07/20/candidates-social-media-outpaces-their-websites-and-emails-as-an-online-campaign-news-source/> (while candidates’ social media posts outpace campaign websites as a source of online campaign news, campaign websites are also an important source of online campaign information).

tentatively conclude that adding the creation of a campaign website to the list of recognized activities is justified for the same reasons provided in support of including use of social media. We again note that a website alone would not be sufficient to support a status of “legally qualified candidate” but that it would be an additional indicator of activities commonly associated with political campaigning needed to make substantial showing of a bona fide candidacy. We seek comment on this conclusion and the proposal.

Finally, we seek comment on whether other activities consistent with modern campaign practices, such as the use of digital marketing and advertising, should be added to the list of recognized campaign activities in §§ 73.1940(f) and 76.5(q). If additional activities are included, should the substantial showing analysis involve any limiting factors, such as requiring that the marketing and advertising be directed toward persons in areas where votes are being solicited?

B. Implementation of the BCRA and Section 315 of the Act

We propose to revise the political file rules for broadcast licensees, cable operators, DBS providers, and SDARS licensees to bring them into conformity with the BCRA and section 315(e) of the Act.⁴⁸ As discussed above, in 2002, Congress enacted the BCRA, which, among other things, adopted new section 315(e) of the Act.⁴⁹ While the Commission has advised relevant parties consistent with the recordkeeping requirements embodied in section 315(e), the rules were not updated. Therefore, the changes that we are proposing today would conform our rules to the statutory requirements. Specifically, section 315(e)(1) codifies the requirement that information regarding any request to purchase advertising time that “is made on behalf of a legally qualified candidate for public office,” also known as candidate ads, be placed in the political file. It also specifies that the political recordkeeping obligations include any request for the purchase of advertising time that “communicates a message relating to any political matter of national importance,” also known as issue ads.⁵⁰ Section 315(e)(2) identifies the specific records that must be placed in political files for both candidate ads and issue ads that communicate a message relating to a political matter of national importance.⁵¹ These records include whether the

⁴⁸ 47 U.S.C. 315(e); 47 CFR 25.701(d), 25.702(b), 73.1943, 76.1701.

⁴⁹ Pub. L. 107-155, §504, 116 Stat. 81 (2002) (codified at 47 U.S.C. 315(e)).

⁵⁰ 47 U.S.C. 315(e)(1)(a) through (b).

⁵¹ 47 U.S.C. § 315(e)(2).

request to purchase broadcast time has been accepted or rejected, information about the advertisement(s), and information about the advertiser. The Commission’s political file rules for broadcast licensees, cable television system operators, DBS providers, and SDARS licensees currently require these entities to maintain for public inspection only those records that relate to requests for time by or on behalf of candidates for public office.⁵⁴ These rules make no mention of the obligation specified in section 315(e)(1)(B) of the Act to also maintain records of requests for time about issue ads that communicate a message relating to any political matter of national importance. Our rules therefore do not fully reflect all of the statutory requirements. We propose to revise the political file rules for these entities to conform with the language in sections 315(e)(1) and (e)(2) of the Act. Specifically, we propose to revise these rules to require these entities to maintain in their online political inspection files not only records of each request for advertising time that is made by or on behalf of a legally qualified candidate for public office, but also for each request for advertising time that “communicates a message relating to any political matter of national importance.”⁵² In addition, we propose to revise our rules to list the specific records that must be maintained in online political files for both candidate ads and issue ads, consistent with list enumerated in section 315(e)(2). These proposed revisions would implement Congress’s directive in the BCRA and ensure our political recordkeeping rules reflect statutory requirements. We seek comment on this proposal.⁵³

C. Cost-Benefit Analysis

Finally, we seek comment on the benefits and costs associated with adopting the proposed changes. In addition to any benefits to the public at large, are there also benefits to industry through clarification of the obligations on licensees and regulatees? We also seek comment on any potential costs that would be imposed on licensees and regulatees if we adopt the proposals contained in this NPRM. In this regard, we note that the proposed changes would largely

⁵⁴ 47 CFR 25.701(d), 25.702(b), 73.1943, 76.1701.

⁵² 47 U.S.C. 315(e)(1)(B).

⁵³ We note that section 315(e)(3) of the Act provides that “[t]he information required by [section 315(e)] shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years.” 47 U.S.C. 315(e)(3). Our existing political file rules already include this requirement. 47 CFR 25.701(d)(2), 25.702(b)(2), 73.1943(c), 76.1701(c). Therefore, we need not propose changes to these rules to implement section 315(e)(3).

conform our rules to the requirements of the statute. Comments should be accompanied by specific data and analysis supporting claimed costs and benefits.

III. Procedural matters

Ex Parte Rules - Permit-But-Disclose. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁵⁴ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

Initial Regulatory Flexibility Act Analysis. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁵⁵ The RFA generally

⁵⁴ 47 CFR 1.1200 *et seq.*

⁵⁵ 5 U.S.C. 603.

defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁵⁶ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵⁷

With respect to this Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in Appendix B. Written public comments are requested on the IFRA and must be filed in accordance with the same filing deadlines as comments on this Notice of Proposed Rulemaking, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this Notice of Proposed Rulemaking and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the Federal Register.

Paperwork Reduction Act. This document proposes new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁵⁸ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic

⁵⁶ *Id.* Section 601(3) (adopting by reference the definition of “small business concern” in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. 601(3).

⁵⁷ 15 U.S.C. 632.

⁵⁸ 5 U.S.C. 603. The RFA, 5 U.S.C. 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

impact on small entities of the policies and rules proposed in this NPRM. The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).⁵⁹ In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.⁶⁰

Need for, and Objectives of, the Proposed Rules

While the agency has strived to update its guidance to reflect changes in law and campaign practices, it has not undertaken a formal review to update the political programming and recordkeeping rules since 1991.⁶¹ Given the substantial growth of political media messaging in recent years,⁶² the updates proposed in this item are intended to conform our rules with statutory amendments, reflect existing practices and guidance,⁶³ and account for modern campaign practices.

Sections 312(a)(7) and 315 of the Communications Act of 1934, as amended (Act), set forth the political programming obligations of broadcast licensees and other Commission regulatees.⁶⁴

⁵⁹ 5 U.S.C. 603(a).

⁶⁰ *Id.*

⁶¹ *Codification of the Commission's Political Programming Policies*, MM Docket No. 91-168, Report and Order, 7 FCC Rcd 678 (1991) (*1991 Political Programming Order*).

⁶² John Haltiwanger, *Americans are Already Exhausted with the 2020 Election, and it's Just Getting Started. Other Countries Have Laws Limited the Length of Campaigns* (Feb. 10, 2020), <https://www.businessinsider.com/us-presidential-elections-are-absurdly-long-compared-rest-of-world-2020-2> (explaining that the 2020 U.S. Presidential election would last approximately 1,194 days); Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion* (Feb. 11, 2021), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/> (2020 campaign spending doubled the amount in 2016).

⁶³ The Commission has a longstanding practice of providing informal guidance to broadcasters and other regulatees regarding their political programming and related recordkeeping obligations and working with industry representatives to foster compliance.

⁶⁴ 47 U.S.C. 312(a)(7), 315. The Commission has concluded that section 312(a)(7) does not apply to cable operators. *1991 Political Programming Order*, 7 FCC Rcd at 679, para. 4. Section 315(c) of the Act defines the term "broadcasting station" as including cable television systems and the terms "licensee" and "station licensee" as including cable operators. 47 U.S.C. 315(c) ("For purposes of this section— (1) the term 'broadcasting station' includes a community antenna television system; and (2) the terms 'licensee' and 'station licensee' when used with respect to a community antenna television system mean the operator of such system."). Thus, the requirements of section 315 apply to cable operators as well as broadcast licensees. In 1997, the Commission extended the political programming provisions in sections 312(a)(7) and 315 of the Act to SDARS licensees. *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, IB Docket No. 95-91, Gen. Docket No. 90-357, Report and Order Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5792, para. 92 (1997); 47 CFR 25.702(a)-(b). In 1998, in accordance with section 335 of the Act, 47 U.S.C. 335, the Commission established rules applying the political programming rules in sections 312(a)(7) and 315 of the Act to DBS service providers. *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, MM Docket No. 93-205, Report and Order, 13 FCC Rcd 23254 (1998) (*DBS Public Interest*

Section 312(a)(7) requires broadcast licensees to give legally qualified candidates for federal office “reasonable access” to their facilities, or to permit them to purchase “reasonable amounts of time.”⁶⁵ Under section 315(a), if a broadcast licensee, cable operator, or other regulatee permits one legally qualified candidate for a public office to use its station, it must afford all other candidates for that office an “equal opportunity” to use the station.⁶⁶ Section 315(b) provides that, during certain periods before an election, legally qualified candidates are entitled to “the lowest unit charge of the station or cable system for the same class and amount of time for the same period.”⁶⁷ The entitlements embodied in sections 312(a)(7) and 315 of the Act are available only to persons who have achieved the status of “legally qualified candidate.”⁶⁸

Section 73.1940 of the Commission’s rules defines who is a “legally qualified candidate for public office.”⁶⁹ Generally, an individual seeking election (other than for President or Vice President) must publicly announce his or her intention to run for office,⁷⁰ must be qualified to hold the office for which he or she is a candidate,⁷¹ and must have qualified for a place on the ballot or have publicly committed himself or herself to seeking election by the write-in method.⁷² If seeking election by the write-in method, the individual, in addition to being eligible under applicable law to be a write-in candidate, must make a “substantial showing” that he or she is a bona fide candidate for the office being sought.⁷³ Section 73.1940(f) of the Commission’s rules

Obligations Report and Order), recon. denied, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 19 FCC Rcd 5854 (2003) (*Order on Reconsideration*), *Order on Reconsideration vacated and superseded by Second Order on Reconsideration of First Report and Order*, 19 FCC Rcd 5647 (2004) (*DBS Public Interest Obligations Sua Sponte Reconsideration*); 47 CFR 25.701(b)-(d).

⁶⁵ 47 U.S.C. 312(a)(7). See 47 CFR 73.1944.

⁶⁶ 47 U.S.C. 315(a). See 47 CFR 73.1941, 76.205.

⁶⁷ 47 U.S.C. 315(b). See 47 CFR 73.1942, 76.206.

⁶⁸ While section 312(a)(7) applies only to legally qualified candidates for federal office, section 315 applies to all candidates for elective office, whether federal, state, or local.

⁶⁹ 47 CFR 73.1940. Section 76.5(q) of the Commission’s rules includes an identical definition of “legally qualified candidates for public office” used for purposes of the political programming rules governing cable systems. *Id.* § 76.5(q). The definition of “legally qualified candidates for public office” set forth in section 73.1940 also applies for purposes of the political programming obligations of DBS providers and SDARS licensees. *Id.* §§ 25.701(b)(1), 25.702(a).

⁷⁰ *Id.* § 73.1940(a)(1).

⁷¹ *Id.* § 73.1940(a)(2).

⁷² *Id.* §§ 73.1940(a)(3), 73.1940(b)(1), and 73.1940(b)(2).

⁷³ *Id.* § 73.1940(b)(2).

specifies the requirements to demonstrate a “substantial showing” of a bona fide candidacy by providing a nonexclusive list of activities commonly associated with political campaigning. The political recordkeeping requirements serve to reinforce the statutory protections for political programming. The Commission first adopted rules requiring broadcast stations to maintain public inspection files documenting requests for political advertising time more than 80 years ago.⁷⁷ It is crucial that stations maintain political files that are complete and up to date because the information in them directly affects, among other things, the statutory rights of opposing candidates to request equal opportunities under section 315(a) of the Act and present their positions to the public prior to an election.⁷⁴ Additionally, these files enable the public to verify that licensees have complied with their obligations relating to use of their facilities by candidates for political office and to obtain information about entities sponsoring candidate and issue advertisements.⁷⁵ The Commission also has applied political file rules to cable television system operators,⁷⁶ DBS providers,⁷⁷ and SDARS licensees,⁷⁸ finding that the rationale for imposing such requirements on broadcasters similarly applies to these entities.

In 2002, Congress enacted the Bipartisan Campaign Reform Act (BCRA), which amended

⁷⁷ See 3 Fed. Reg. 1691 (1938).

⁷⁴ Pursuant to section 73.1941(c) of the Rules, candidates have one week from an opponent’s initial “use” to request equal opportunities. 47 CFR 73.1941(c). The failure by a station to promptly upload information about each “use” denies requesting candidates the notice they need to assert their statutory rights to equal opportunities in a timely manner. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Docket Nos. 00-168 and 00-44, Second Report and Order, 27 FCC Rcd 4535, 4562, para. 55 (2012).

⁷⁵ *Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, MM Docket No. 97-138, Report and Order, 13 FCC Rcd 15691, 15716, para. 54 (1998).

⁷⁶ *Amendment of Part 76 of the Commission’s Rules and Regulations Relative to Obligations of Cable Television Systems to Maintain Public Inspection Files and Permit System Inspections*, Docket No. 19948, Report and Order, 48 FCC 2d 72, para. 1 (1974); 47 CFR 76.1701.

⁷⁷ Section 335 of the Act imposes public interest obligations on DBS providers and requires the Commission, at a minimum, to apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to DBS providers. 47 U.S.C. 335(a). The Commission adopted rules requiring DBS providers to abide by political file obligations similar to those requirements placed on terrestrial broadcasters and cable systems in order to assist in evaluations of compliance with the political programming rules and to enable competing candidates to review other candidates’ advertising access and rates. *DBS Public Interest Obligations Report and Order*, 13 FCC Rcd at 23271, para. 41; *DBS Public Interest Obligations Sua Sponte Reconsideration*, 19 FCC Rcd at 5561, para. 35; 47 CFR 25.701(d).

⁷⁸ *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No. 14.217, Report and Order, 31 FCC Rcd 526, 537-38, paras. 26-27 (2016); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12415, para. 146 (2008); 47 CFR 25.702(b).

section 315 of the Act.⁷⁹ The BCRA added new section 315(e) to codify the Commission’s existing political file obligations by requiring that information regarding any request to purchase advertising time that “is made on behalf of a legally qualified candidate for public office” be placed in the political file.⁸⁰ In addition, the BCRA expanded the political file requirements to include any request to purchase political advertising time that “communicates a message relating to any political matter of national importance.”⁸¹ Specifically, section 315(e)(1) of the Act requires licensees to make available for public inspection a complete record of each request for the purchase of broadcast time by or on behalf of a legally qualified candidate and by or on behalf of any other entity whose ad communicates a message relating to any political matter of national importance.⁸²

The BCRA also specified the records that must be maintained in political files. Specifically, section 315(e)(2) requires licensees to place in their political files information that includes whether the request to purchase broadcast time has been accepted or rejected, information about the advertisement(s), and information about the advertiser.

Section 315(e)(3) of the Act provides that “[t]he information required by [section 315(e)] shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years.”⁸⁷

The NPRM proposes to revise the definition of “legally qualified candidate for public office” to add the use of social media and creation of a campaign website to the existing list of activities that may be considered in determining whether an individual running as a write-in candidate has made a “substantial showing” of his or her bona fide candidacy.⁸³ The NPRM also proposes to revise the Commission’s political file rules to conform with BCRA’s amendment to Section

⁷⁹ Pub. L. 107-155, § 504, 116 Stat. 81 (2002) (codified at 47 U.S.C. 315(e)).

⁸⁰ 47 U.S.C. 315(e)(1).

⁸¹ *Id.*

⁸² *Id.* Section 315(e)(1).

⁸⁷ *Id.* Section 315(e)(3).

⁸⁸ *Id.* Section 315(e)(3).
5(q).

315(e) of the Act, which included within the political file requirements any request for the purchase of advertising time that “communicates a message relating to any political matter of national importance” (i.e., issue ads) and specify the records that must be maintained.⁸⁴

Additionally, the proposed revisions would specify the records that must be maintained in political files.

Legal Basis

The proposed action is authorized under sections 151, 154(i), 154(j), 303(r), 307, 312, 315, 335, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 307, 312, 315, 335, and 403.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted.⁸⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁸⁶ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (SBA).⁸⁷ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁸⁸ Below, we provide a description of such small entities, as well as an

⁸⁴ Pub. L. 107-155, section 504, 116 Stat. 81 (2002) (codified at 47 U.S.C. 315(e)).

⁸⁵ 5 U.S.C. 603(b)(3).

⁸⁶ 5 U.S.C. 601(6); *see infra* note 38 (explaining the definition of “small business” under 5 U.S.C. 601(3)); *see* 5 U.S.C. 601(4) (defining “small organization” as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register”); 5 U.S.C. 601(5) (defining “small governmental jurisdiction” as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register”).

⁸⁷ 5 U.S.C. 601(3) (adopting by reference the definition of “small business concern” in 15 U.S.C. 632(a)(1)).

Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.” *Id.*

⁸⁸ 15 U.S.C. 632(a)(1)-(2)(A).

estimate of the number of such small entities, where feasible.

Television Broadcasting. This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”⁸⁹ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.⁹⁰ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.⁹¹ According to the 2012 Economic Census (when the SBA’s size standard was set at \$38.5 million or less in annual receipts), 751 firms in the small business size category operated in that year. Of that number, 656 had annual receipts of \$25 million or less, 25 had annual receipts between \$25 million and \$49,999,999 and 70 had annual receipts of \$50 million or more.⁹² Based on this data, we estimate that the majority of commercial television broadcast stations are small entities under the applicable size standard.

Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,374.⁹³ Of this total, 1,263 stations (or 92%) had revenues of \$41.5 million or less in 2019, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 30, 2020, and therefore these stations qualify as small entities under the SBA definition. In addition, the Commission estimates the number of noncommercial educational television stations to be 384.⁹⁴ The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many

⁸⁹ U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁹⁰ *Id.*

⁹¹ 13 CFR 121.201; 2012 NAICS code 515120.

⁹² U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

⁹³ Broadcast Station Totals as of March 31, 2021, News Release (MB Apr. 5, 2021) (Mar. 31, 2021 Broadcast Station Totals), <https://www.fcc.gov/document/broadcast-station-totals-march-31-2021>.

⁹⁴ *Id.*

such stations would qualify as small entities. There are also 386 Class A stations.⁹⁵ Given the nature of this service, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard.

Radio Broadcasting. This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”⁹⁶ Programming may originate in the establishment’s own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.⁹⁷ According to Economic Census data for 2012 (when the SBA’s size standard was set at \$38.5 million or less in annual receipts), 2,849 firms in this category operated in that year.⁹⁸ Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.⁹⁹ Based on this data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

The Commission has estimated the number of licensed commercial AM radio stations to be 4,546 and the number of commercial FM radio stations to be 6,682 for a total of 11,228 commercial stations.¹⁰⁰ Of this total, 11,266 stations (or 99%) had revenues of \$41.5 million or less in 2019, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 30, 2020, and therefore these stations qualify as small entities under the SBA definition. In addition, there were 4,213 noncommercial, educational (NCE) FM stations. The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

⁹⁵ *Id.*

⁹⁶ U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁹⁷ 13 CFR 121.201; 2017 NAICS code 515112.

⁹⁸ U.S. Census Bureau, U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515112 Radio Stations)* https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112].

⁹⁹ *Id.*

¹⁰⁰ Mar. 31, 2021 Broadcast Station Totals.

We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations¹⁰¹ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the rules may apply does not exclude any radio or television station from the definition of a small business on this basis and is therefore possibly over-inclusive. An additional element of the definition of “small business” is that the entity must be independently owned and operated. Because it is difficult to assess these criteria in the context of media entities, the estimate of small businesses to which the rules may apply does not exclude any radio or television station from the definition of a small business on this basis and similarly may be over-inclusive.

Cable Companies and Systems (Rate Regulation Standard) The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.¹⁰² Industry data indicates that, of the 777 cable companies currently operating in the United States, 766 serve 400,000 or fewer subscribers.¹⁰³ Additionally, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.¹⁰⁴ According to industry data, there are currently 4,336 active cable systems in the United States.¹⁰⁵ Of this total,

¹⁰¹ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 CFR 21.103(a)(1).

¹⁰² 47 CFR 76.901(d). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket Nos. 93-215 and 92-266, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, para. 28 (1995).

¹⁰³ See S&P Global Market Intelligence, *MediaCensus, Operator Subscribers by Geography: National Report, Subscribers by Operator*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/mediaCensusHome> (last visited Jul. 28, 2020).

¹⁰⁴ 47 CFR 76.901(c).

¹⁰⁵ See S&P Global Market Intelligence, *MediaCensus, Operator Subscribers by Geography: Headend by Headend Report, Subscribers by Headend*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/mediaCensusHome> (last visited Jul. 28, 2020).

3,650 cable systems have fewer than 15,000 subscribers.¹⁰⁶ Thus, the Commission believes that the vast majority of cable companies and cable systems are small entities.

Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”¹⁰⁷ As of 2019, there were approximately 48,646,056 basic cable video subscribers in the United States.¹⁰⁸ Accordingly, an operator serving fewer than 486,460 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.¹⁰⁹ Based on available data, we find that all but five cable operators are small entities under this size standard.¹¹⁰ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.¹¹¹ Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Direct Broadcast Satellite (DBS) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic dish antenna at the subscriber’s location. For the purposes of economic classification, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in the Wired Telecommunications Carriers industry.¹¹² The Wired

¹⁰⁶ *Id.*

¹⁰⁷ 47 U.S.C. 543(m)(2); *see also* 47 CFR 76.901(e).

¹⁰⁸ S&P Global Market Intelligence, *U.S. Cable Subscriber Highlights, Basic Subscribers(actual) 2019, U.S. Cable MSO Industry Total, see also U.S. Multichannel Industry Benchmarks, U.S. Cable Industry Benchmarks, Basic Subscribers 2019Y*, <https://platform.marketintelligence.spglobal.com>.

¹⁰⁹ 47 CFR 76.901(e).

¹¹⁰ S&P Global Market Intelligence, *Top Cable MSOs as of 12/2019*, <https://platform.marketintelligence.spglobal.com>. [The five cable operators all had more than 486,460 basic cable subscribers.](#)

¹¹¹ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(e) of the Commission’s rules. *See* 47 CFR 76.910(b).

¹¹² *See 2017 NAICS Definition*, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017%20NAICS%20Search> (last accessed Jul. 27, 2020).

Telecommunications Carriers industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services.¹¹³ The SBA determines that a wireline business is small if it has fewer than 1,500 employees.¹¹⁴ Economic census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer than 1,000 employees.¹¹⁵ Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. However, currently only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network.¹¹⁶ According to industry data, DIRECTV and DISH serve 14,831,379 and 8,957,469 subscribers respectively, and count the third and fourth most subscribers of any multichannel video distribution system in the U.S.¹¹⁷ Given the capital required to operate a DBS service, its national scope, and the approximately one-third share of the video market controlled by these two companies,¹¹⁸ we presume that neither would qualify as a small business.

Satellite Radio. The rules proposed in this NPRM would affect the sole, current U.S. provider of satellite radio (SDARS) services, Sirius-XM, which offers subscription services. Sirius-XM

¹¹³ *Id.*

¹¹⁴ 13 CFR 121.201 (NAICS Code 517311).

¹¹⁵ See *Information: Subject Series - Estab and Firm Size: Employment Size of Firms for the U.S.: 2012, 2012 Economic Census of the United States, TableID: EC1251SSSZ5*, [https://data.census.gov/cedsci/table?q=EC1251&hidePreview=true&table=EC1251SSSZ5&tid=ECNSIZE2012.EC1251SSSZ5&lastDisplayedRow=28#\(last accessed Jul. 27, 2020\) \(NAICS Code 517110 applied at the time of the 2012 Economic Census\)](https://data.census.gov/cedsci/table?q=EC1251&hidePreview=true&table=EC1251SSSZ5&tid=ECNSIZE2012.EC1251SSSZ5&lastDisplayedRow=28#(last%20accessed%20Jul.%2027%202020)(NAICS%20Code%20517110%20applied%20at%20the%20time%20of%20the%202012%20Economic%20Census)).

¹¹⁶ See *Communications Marketplace Report et al.*, GN Docket No. 18-231 et al., Report, 33 FCC Rcd 12558, 12597, paras. 50-51 (2018).

¹¹⁷ See S&P Global Market Intelligence, *MediaCensus, Operator Subscribers by Geography: National Report, Subscribers by Operator*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/mediaCensusHome> (last visited Jul. 31, 2020).

¹¹⁸ See S&P Global Market Intelligence, *Global Multichannel Top Operators, U.S.*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/multichannelIndustryBenchmarks> (last visited Jul. 31, 2020) (There were approximately 63,650,261 total multichannel subscribers in the U.S. in 2019).

reported revenue of \$5.78 billion and a net income of \$1.1 billion in 2018.¹¹⁹ In light of these figures, we believe it is unlikely that this entity would be considered small.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

Reporting Requirements. The NPRM does not propose any new or modified reporting requirements.

Recordkeeping Requirements. The NPRM proposes to revise the political file rules, consistent with the BCRA's amendment to section 315(e) of the Act, to reflect statutory requirements that broadcast licensees, cable television system operators, DBS providers, and SDARS licensees are obligated to maintain in their online political inspection files records of each request for advertising time that "is made on behalf of a legally qualified candidate for public office" and each request for advertising time that "communicates a message relating to any political matter of national importance" (i.e., issue ads). In addition, the NPRM proposes to list the specific records that must be maintained in political files.

Other Compliance Requirements. The NPRM proposes to revise the political programming rules to add the use of social media to the list of activities that a broadcast licensee or cable operator may consider in determining whether an individual who is running as a write-in candidate has made a "substantial showing" of his or her candidacy.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹²⁰

The proposed revisions to the political file rules to implement the BCRA would largely codify

¹¹⁹ See https://s1.q4cdn.com/750174072/files/doc_financials/2019/ar/2fb89e07-9f09-4e20-be79-9e194d70cd5e.pdf.

¹²⁰ See 5 U.S.C. 603(c).

existing Commission policy and guidance. Thus, we expect that these revisions, if adopted, would not impose significant new recordkeeping burdens on small entities. We also seek comment on possible modifications to the proposed revisions to the political file rules to lessen any burdens on small entities.

In addition, we anticipate that the proposal to add the use of social media to the list of activities that may be considered in determining whether an individual who is running as a write-in candidate has made a “substantial showing” of his or her candidacy would only benefit small entities by providing additional guidance on how to make such determinations.

Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

None.

ORDERING CLAUSES

Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4(i), 4(j), 303, 307, 312, 315, 335, and 403 of the Communications Act, 47 U.S.C 151, 154(i), 154(j), 303, 307, 312, 315, 335, and 403, this Notice of Proposed Rulemaking IS ADOPTED.

IT IS FURTHER ORDERED that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial

Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Parts 25

Radio, Reporting and recordkeeping requirements, Telecommunications.

47 CFR Part 73

Cable television, Education, Radio, Reporting and recordkeeping requirements, Telecommunications

47 CFR Part 76

Cable television, Internet, Reporting and recordkeeping requirements, Telecommunications

FEDERAL COMMUNICATIONS COMMISSION.

Cecilia Sigmund,

Federal Register Liaison Officer,

Office of the Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 25, 73, and 76 as follows:

PART 25 — SATELLITE COMMUNICATIONS

1. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 310, 319, 332, 605, and 721, unless otherwise noted.

2. Amend § 25.701 by revising paragraph (d) to read as follows:

§ 25.701 Other DBS Public interest obligations.

* * * * *

(d) *Political File.* (1) Each DBS operator engaged in origination programming shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that:

- (i) Is made by or on behalf of a legally qualified candidate for public office; or
- (ii) Communicates a message relating to any political matter of national importance, including:
 - (A) A legally qualified candidate;
 - (B) Any election to Federal office; or
 - (C) A national legislative issue of public importance.

(2) *Contents of record.* A record maintained under this paragraph shall contain information regarding:

- (i) Whether the request to purchase broadcast time is accepted or rejected by the licensee;
- (ii) The rate charged for the broadcast time;
- (iii) The date and time on which the communication is aired;
- (iv) The class of time that is purchased;
- (v) 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);
- (vi) 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

(vii) 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.

(3) When free time is provided for use by or on behalf of candidates, a record of the free time provided shall be placed in the political file.

(4) All records required by this paragraph shall be placed in the online political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

* * * * *

3. Amend § 25.702 by revising paragraph (b) to read as follows:

§ 25.702 Other SDARS Public interest obligations.

* * * * *

(b) *Political File.* (1) Each SDARS licensee engaged in origination programming shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that:

- (i) Is made by or on behalf of a legally qualified candidate for public office; or
- (ii) Communicates a message relating to any political matter of national importance, including:
 - (A) A legally qualified candidate;
 - (B) Any election to Federal office; or
 - (C) A national legislative issue of public importance.

(2) *Contents of record.* A record maintained under this paragraph shall contain information regarding:

- (i) Whether the request to purchase broadcast time is accepted or rejected by the licensee;
- (ii) The rate charged for the broadcast time;
- (iii) The date and time on which the communication is aired;
- (iv) The class of time that is purchased;
- (v) 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);

(vi) 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

(vii) 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.

(3) When free time is provided for use by or on behalf of candidates, a record of the free time provided shall be placed in the political file.

(4) All records required by this paragraph shall be placed in the online political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

* * * * *

PART 73 — RADIO BROADCAST SERVICES

4. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

5. Amend § 73.1940 by revising paragraph (f) to read as follows:

§ 73.1940 Legally qualified candidates for public office.

* * * * *

(f) The term “substantial showing” of a bona fide candidacy as used in paragraphs (b), (d) and (e) of this section means evidence that the person claiming to be a candidate has:

(1) Satisfied the requirements under applicable law to run as a write-in (such as registering, collecting signatures, paying fees, etc.); and

(2) Has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his or her campaign manager), creating a campaign website, and using social media for the purpose of promoting or furthering a campaign for public office. Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to

such a showing.

6. Amend § 73.1943 by revising paragraph (a), redesignating paragraphs (b) and (c) as paragraphs (c) and (d), and adding new paragraph (b) to read as follows:

§ 73.1943 Political file.

(a) A licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that:

- (1) Is made by or on behalf of a legally qualified candidate for public office; or
- (2) 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.

(b) *Contents of record.* A record maintained under paragraph (a) of this section shall contain information regarding:

- (1) Whether the request to purchase broadcast time is accepted or rejected by the licensee;
- (2) The rate charged for the broadcast time;
- (3) The date and time on which the communication is aired;
- (4) The class of time that is purchased;
- (5) 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);
- (6) 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
- (7) 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.

* * * * *

7. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

8. Amend § 76.5 by revising paragraph (q)(5) to read as follows:

§ 76.5 Definitions.

* * * * *

(q) * * *

(5) The term “substantial showing” of a bona fide candidacy as used in paragraph (q) (2), (3), and (4) of this section means evidence that the person claiming to be a candidate has:

(i) Satisfied the requirements under applicable law to run as a write-in (such as registering, collecting signatures, paying fees, etc.); and

(ii) Has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his or her campaign manager), creating a campaign website, and using social media for the purpose of promoting or furthering a campaign for public office. Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

* * * * *

9. Amend § 76.1701 by revising paragraph (a), redesignating paragraphs (b) through (d) as paragraphs (c) through (e), and adding new paragraph (b) to read as follows:

§ 76.1701 Political file.

(a) Every cable television system operator engaged in origination programming shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that:

(1) Is made by or on behalf of a legally qualified candidate for public office; or

(2) 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.

(b) *Contents of record.* A record maintained under paragraph (a) of this section shall contain information regarding:

- (1) Whether the request to purchase broadcast time is accepted or rejected by the licensee;
- (2) The rate charged for the broadcast time;
- (3) The date and time on which the communication is aired;
- (4) The class of time that is purchased;
- (5) 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);

(6) 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

(7) 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.

* * * * *