

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Revisions to Political Programming and Record-Keeping Rules
MB Docket No. 21-293

REPORT AND ORDER

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By the Commission:

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I. INTRODUCTION

1. In this Report and Order (Report and Order), we 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. We 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.1 We also amend our political file rules consistent with the Bipartisan Campaign Reform Act of 2002 (BCRA), which extends the Commission’s political file requirements to 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 specifies the records that must be maintained.2 These updates, which are consistent with the proposals set forth in the Notice of Proposed Rulemaking (NPRM) in this proceeding,3

1 47 CFR §§ 73.1940(f), 76.5(q).

2 Pub. L. No. 107-155, § 504, 116 Stat. 81 (2002) (codified at 47 U.S.C. § 315(e)).

3 Revisions to Political Programming and Record-Keeping Rules, MB Docket No. 21-293, Notice of Proposed Rulemaking, FCC 21-91 (rel. Aug. 4, 2021) (NPRM).

not only conform our rules with statutory requirements, they also reflect modern campaign practices and increase transparency.

II. BACKGROUND

2. In recognition of the critical role that political programming plays in keeping the electorate informed, Congress has long established specific requirements governing political programming. These requirements ensure that candidates for elective office have access to broadcast facilities and certain other media platforms and foster transparency about entities sponsoring advertisements.

3. *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).⁴ 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.”⁵ Section 312(a)(7) of the Act also applies to SDARS licensees⁶ and DBS service providers,⁷ but it does not apply to cable system operators.⁸ 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.⁹ 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.”¹⁰ The equal opportunity

⁴ 47 U.S.C. §§ 312(a)(7), 315.

⁵ *Id.* § 312(a)(7). Section 312(a)(7) states:

The Commission may revoke any station license or construction permit —

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

Id. See 47 CFR § 73.1944.

⁶ *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).

⁷ *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).

⁸ *Codification of the Commission’s Political Programming Policies*, MM Docket No. 91-168, Report and Order, 7 FCC Rcd 678, 679, para. 4 (1991) (*1991 Political Programming Order*).

⁹ 47 U.S.C. § 315(a). Section 315(a) states, in part:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section.

Id. See 47 CFR §§ 73.1941, 76.205.

¹⁰ 47 U.S.C. § 315(b). Specifically, section 315(b)(1) provides:

and lowest unit charge requirements also apply to cable system operators,¹¹ SDARS licensees,¹² and DBS service providers.¹³ The entitlements afforded by sections 312(a)(7) and 315 of the Act are available only to individuals who have achieved the status of “legally qualified candidate.”¹⁴

4. The Communications Act does not define the term “legally qualified candidate,” but the Commission has adopted a definition and codified it in section 73.1940.¹⁵ Generally, in order to be considered a “legally qualified candidate,” an individual must publicly announce his or her intention to run for office,¹⁶ must be qualified to hold the office for which he or she is a candidate,¹⁷ 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.¹⁸ 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.¹⁹ Section 73.1940(f) of the Commission’s rules establishes the requirements for making a “substantial showing” of a bona fide candidacy:

The term “substantial showing” of a bona fide candidacy . . . means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities

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The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(A) subject to paragraph (2), during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(B) at any other time, the charges made for comparable use of such station by other users thereof.

Id. See 47 CFR §§ 73.1942, 76.206.

¹¹ 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.”).

¹² See *supra* note 6.

¹³ See *supra* note 7.

¹⁴ 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. *Cf.* 47 U.S.C. § 312(a)(7) (requiring that a legally qualified candidate for *federal* elective office be provided reasonable access to broadcast facilities) with 47 U.S.C. §§ 315(a) and (b)(1) (requiring that broadcast licensees afford equal opportunities and provide the lowest unit charge to legally qualified candidates for *any* public office).

¹⁵ 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).

¹⁶ *Id.* § 73.1940(a)(1).

¹⁷ *Id.* § 73.1940(a)(2).

¹⁸ *Id.* §§ 73.1940(a)(3), 73.1940(b)(1), and 73.1940(b)(2).

¹⁹ *Id.* § 73.1940(b)(2).

commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his or her campaign manager). 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.²⁰

5. *Political Recordkeeping Obligations.* The political recordkeeping requirements are integral to ensuring compliance with the statutory protections for political programming. The Commission initially adopted rules requiring broadcast stations to maintain public inspection files documenting requests for political advertising time more than 80 years ago.²¹ The Commission subsequently extended political file rules to cable television system operators,²² DBS providers,²³ and SDARS licensees.²⁴ Requiring these entities to maintain complete and up to date political files is critical because the information in these files 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.²⁵ In addition, the political files allow the public to verify that Commission licensees and regulatees 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.²⁶

²⁰ *Id.* § 73.1940(f).

²¹ See 3 Fed. Reg. 1691 (1938).

²² *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.

²³ 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).

²⁴ *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).

²⁵ Pursuant to section 73.1941(c) of the Commission's rules, candidates have one week from an opponent's initial "use" to request equal opportunities. 47 CFR § 73.1941(c). The term "use" means a positive, identifiable appearance by voice or likeness of a legally qualified candidate for public office, lasting four or more seconds in any program that is not exempt under section 73.1941(a)(1)-(a)(4) of the Commission's rules. See *Codification of the Commission's Political Programming Policies*, Memorandum Opinion and Order, 9 FCC Rcd 651 (1994); *Request by Carter/Mondale Reelection Committee, Inc. for Interpretive Ruling*, Letter Ruling, 80 FCC 2d 285 (Broadcast Bur., 1980); *Request of Oliver Products for Declaratory Ruling*, Memorandum Opinion and Order, 4 FCC Rcd 5953 (1989). A station's failure 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).

²⁶ *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files*

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6. In 2002, Congress enacted the BCRA, which amended section 315 of the Act.²⁷ The BCRA added a 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 The BCRA also 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,” (i.e., issue ads).²⁹ Specifically, section 315(e)(1) of the Act provides that:

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

- (A) is made by or on behalf of a legally qualified candidate for public office; or
- (B) communicates a message relating to any political matter of national importance, including –
 - (i) a legally qualified candidate;
 - (ii) any election to Federal office; or
 - (iii) a national legislative issue of public importance.³⁰

Additionally, section 315(e)(2) of the Act specifies the kinds of records that must be maintained in political files,³¹ and 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.”³²

7. In August 2021, the Commission adopted an *NPRM* proposing to update the political programming and recordkeeping rules.³³ The *NPRM* proposed to revise the definition of “legally qualified candidate” 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.³⁴ The *NPRM* also proposed to revise the political file rules to conform with section 315(e), as amended by the BCRA.³⁵ Only three comments were submitted in response to the *NPRM*.³⁶ NAB supports adding the use of social media and the creation of a campaign website to the list of activities that may be taken into account in determining whether a write-in candidate has made a substantial showing that he or she is a “legally qualified candidate for

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 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/>.

²⁷ Pub. L. No. 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.*

³⁰ *Id.* § 315(e)(1). 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. 47 CFR §§ 76.5(p), 76.1701, 25.701, 25.702.

³¹ 47 U.S.C. § 315(e)(2).

³² *Id.* § 315(e)(3).

³³ *NPRM* at para. 1.

³⁴ *Id.* at para. 8.

³⁵ *Id.* at para. 15.

³⁶ Comments of the National Association of Broadcasters, MB Docket No. 21-293 (filed Oct. 1, 2021) (NAB Comments); Comments of Canal Partners Media, LLC, MB Docket No. 21-293 (filed Oct. 1, 2021) (Canal Partners Comments); Comments of Kenia Trujillo, MB Docket No. 21-293 (filed Oct. 1, 2021) (Trujillo Comments).

public office” but submits that certain conditions should apply.³⁷ Trujillo raises concerns that adding the use of social media to this list would make it too easy for anyone to obtain status as a “legally qualified candidate for public office.”³⁸ Canal Partners asserts that broadcast licensees often refuse to comply with the political file obligations, which makes it difficult to monitor their compliance with the political programming requirements.³⁹ No reply comments were submitted.

III. DISCUSSION

A. Substantial Showing for Write-In Candidates

8. We adopt our proposal and update the definition of “legally qualified candidate for public office” in sections 73.1940 and 76.5(q) of the Commission’s rules to add the use of social media and the creation of a campaign website to the list of activities that a broadcast licensee or cable operator may take into account in determining whether an individual running as a write-in candidate has made a “substantial showing” of his or her bona fide candidacy.⁴⁰ As we explain above, only those individuals who have achieved the status of “legally qualified candidate” may avail themselves of the benefits bestowed by the political programming rules, including the reasonable access,⁴¹ equal opportunities,⁴² and lowest unit charge provisions.⁴³ An individual seeking elective office using the write-in method must, in addition to being eligible under applicable law to be a write-in candidate, make a “substantial showing” that he or she is a bona fide candidate for the office.⁴⁴ Sections 73.1940(f) and 76.5(q)(5) 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.”⁴⁵

9. We conclude that adding the use of social media and the creation of a campaign website to the list of activities that may be taken into account in determining whether there has been a “substantial showing” of a bona fide candidacy will ensure that our definition of “legally qualified candidate” more accurately reflects modern campaign practices. As stated above, NAB supports this revision. In so doing, it “agree[s] with the FCC that modern candidates routinely use social media and campaign websites to share their views and solicit votes and financial contributions.”⁴⁶ Recent articles reinforce that bona fide political campaigns use major social media platforms, such as Twitter, Facebook, and Instagram, to share campaign updates, communicate with voters, advertise, solicit support, and fundraise,⁴⁷ and that such

³⁷ NAB Comments at 1.

³⁸ Trujillo Comments at 1.

³⁹ Canal Partners Comments at 1-2.

⁴⁰ 47 CFR § 73.1940, 76.5(q). As discussed 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 revision to the definition in section 73.1940 also applies to these entities.

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

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

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

⁴⁴ 47 CFR §§ 73.1940(b)(2), 76.5(q)(2).

⁴⁵ *Id.* §§ 73.1940(f), 76.5(q)(5).

⁴⁶ NAB Comments at 3 (citing *NPRM* at para. 11). NAB further avers that this revision will not drastically alter current industry practices because broadcasters already consider digital activities in determining whether an individual has established that he or she is a bona fide candidate. *Id.*

⁴⁷ *NPRM* at para. 11 (citing 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*); University of Pennsylvania Knowledge @ Wharton, *How Social Media*

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engagement in social media use typically increases donations for new politicians.⁴⁸ In addition, social media platforms enable political campaigns, especially for new or lesser known candidates, to build support by disseminating campaign updates⁴⁹ and targeting advertisements to potential voters,⁵⁰ and they provide sophisticated tools to regularly measure user engagement.⁵¹ It also has become common practice for bona fide candidates to use campaign websites to connect to a wide audience of potential voters and facilitate direct communication and fundraising.⁵² No commenters challenged or rebutted the proposition that candidates today regularly use social media and campaign websites to connect with voters or the articles and media reports cited in the *NPRM* to support that proposition. We therefore conclude that revising the definition of “legally qualified candidates” to add the use of social media and the creation of a campaign website to the list of activities that may be considered in determining whether there has been a “substantial showing” of a bona fide candidacy is consistent with modern campaign practices.

10. Some examples of social media activities that may support a substantial showing of a bona fide candidacy include the use of social media to fundraise, solicit votes, share policy positions, and engage in digital dialogues with voters.⁵³ These examples are intended to be illustrative, rather than an exhaustive list of the social media activities that may be relied upon in making a substantial showing of a bona fide candidacy. Other campaign-related uses of social media may be taken into account in

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Is Shaping Political Campaigns (Aug. 17, 2020), <https://knowledge.wharton.upenn.edu/article/how-social-media-is-shaping-political-campaigns/>; 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. Commc'n*, 158-59 (2018), <https://static1.squarespace.com/static/570ef9191bbee0bb3dfef44f/t/5a98654e0d929781c5ee7a11/1519936847373/KreissMcGregorPolComm17.pdf>).

⁴⁸ *Id.* (citing Petrova, *Social Media and Political Contributions*, at 28).

⁴⁹ *Id.* (citing 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.”)).

⁵⁰ *Id.* (citing 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 Oct. 21, 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 Oct. 21, 2021)).

⁵¹ *Id.* (citing Facebook Business Help Center, *About Breakdowns, Metrics, and Filtering in Ads Reporting*, <https://www.facebook.com/business/help/264160060861852> (last visited Oct. 21, 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 Oct. 21, 2021) (Report Editor generates reports, which can show performance of ads targeted by location)).

⁵² *Id.* at para. 12 (citing 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. Commc'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 Source* (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)).

⁵³ *NPRM* at para. 12 (seeking comment on the types of campaign-related social media activities that could be used in demonstrating a substantial showing of a bona fide candidacy). We note that no commenters addressed this issue.

determining whether an individual has made a substantial showing that he or she is a “legally qualified candidate.”

11. We emphasize that the use of social media and campaign websites alone will not be sufficient to support a finding that an individual has made a substantial showing that he or she is a “legally qualified candidate.”⁵⁴ As NAB points out, “given the simplicity of creating and running a social media account or website, certain stipulations should apply to ensure the legitimacy of candidates. Otherwise, any individual with a Facebook, Twitter or Instagram account could claim status as a legally qualified candidate”⁵⁵ Accordingly, as proposed in the *NPRM*, social media presence and campaign websites will be treated as additional indicators of activities commonly associated with political campaigning that may be relied on to make a substantial showing of a bona fide candidacy, not as determinative factors.⁵⁶ At NAB’s suggestion, we include language in the substantial showing rules that specifically states that “[t]he creation of campaign websites and the use of social media shall be additional indicators of a bona fide candidacy, not determinative factors.”⁵⁷ We therefore reject concerns raised by Trujillo that the addition of social media to the list of activities that supports a substantial showing for a write-in candidate could allow anyone to rely solely on social media and campaign websites to obtain status as a “legally qualified candidate for public office.”⁵⁸

12. We agree with NAB that only digital activities that are directly related to the campaign should be counted toward the requisite substantial showing.⁵⁹ The definition of “legally qualified candidate” set forth in our rules states that “the term substantial showing of a bona fide candidacy . . . means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning.”⁶⁰ In the *NPRM*, we proposed to add to the list of activities commonly associated with political campaigning “creating a *campaign* website, and using social media *for the purpose of promoting or furthering a campaign for public office.*”⁶¹ This language, which we are including in the final rules, makes clear that only digital activities that are campaign-related should be taken into account in determining whether there has been a substantial showing of a bona fide candidacy.⁶²

⁵⁴ *Id.* (stating that the *NPRM* does not propose that social media presence alone would be sufficient to support a status of “legally qualified candidate”).

⁵⁵ NAB Comments at 3.

⁵⁶ *NPRM* at paras. 12-13. NAB states that it strongly supports the FCC’s characterization of social media accounts and campaign websites as merely additional factors of a candidate’s legitimacy. NAB Comments at 6.

⁵⁷ NAB Comments at 4-5.

⁵⁸ Trujillo Comments at 1.

⁵⁹ NAB Comments at 5. NAB suggests that digital outreach conducted under the umbrella of a political campaign but focused on promoting an individual’s business or service should not be taken into account in evaluating whether the individual has made a substantial showing of a bona fide candidacy. *Id.* We decline at this time to impose specific requirements about the content of the digital activities. While we can envision situations in which digital, commercial activities would not weigh in favor of a finding a bona fide candidacy, we note that the digital content offered by a candidate for elective office could, for instance, tout his or her experience as a business owner as a relevant factor in support of his or her candidacy or discuss his or her business when opining on a relevant political issue. Digital outreach, like any evidence put forth to show a bona fide candidacy for such write-in candidates, must be viewed in its context, and that context may or may not support a determination that touting a candidate’s business experience is campaign-related.

⁶⁰ 47 CFR §§ 73.1940(f), 76.5(q)(5).

⁶¹ *NPRM*, Appx. A, Proposed Rules §§ 73.1940(f), 76.5(q)(5) (emphasis added).

⁶² See *infra* Appx. A, Final Rules.

13. We agree with NAB that digital activities like social media and campaign websites must be combined with campaign activities conducted in the relevant geographic area to substantiate a candidate's "genuine interest in elective office," "given the simplicity of creating and running a social media account or website."⁶³ Therefore, we are including language in the revised substantial showing rules that specifically states that "[t]he creation of a campaign website and the use of social media shall be additional indicators of a bona fide candidacy, not determinative factors, and that such digital activities must be combined with other activities commonly associated with political campaigning that are conducted in substantial portions of the relevant geographic area"⁶⁴ (e.g., establishing a campaign headquarters, making campaign speeches, participating in debates, appearances at community events, and distributing campaign literature).⁶⁵ We note that the *NPRM* contemplated a similar geographic limitation in seeking comment on whether to add any other activities consistent with modern campaign practices, such as digital marketing and advertising, to the list of recognized campaign activities, specifically asking whether the substantial showing analysis should "involve any limiting factors, such as requiring that the marketing and advertising be directed toward persons in areas where votes are being solicited."⁶⁶ We find that the requirement that digital activities like social media and campaign websites must be combined with campaign activities conducted in the relevant geographic area is an appropriate and necessary limitation on our original proposal to ensure a candidate's legitimacy when relying on social media and campaign websites. We will consider what constitutes the "relevant geographic area" on a case-by-case basis. In general, however, the "relevant geographic area" will consist of the legislative, congressional, or other electoral district in which the candidate is soliciting votes from eligible voters.

14. NAB requests that we amend our substantial showing rules to specify that write-in candidates "bear the burden of demonstrating the substantial showing required" to be a legally qualified candidate, and that a Commission licensee or regulatee's "reasonable, good faith determination as to whether a candidate has fulfilled this requirement is entitled to deference."⁶⁷ We agree with these interpretations and note that the Media Bureau has long interpreted the Commission's substantial showing rules in this manner.⁶⁸ Given the dearth of comments on this question, including from political candidates

⁶³ NAB Comments at 3-5.

⁶⁴ See Appendix A, § 73.1940(f)(2).

⁶⁵ NAB Comments at 3-5.

⁶⁶ *NPRM* at para. 14.

⁶⁷ NAB Comments at 4, 5, 7.

⁶⁸ 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.'). 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."). We note that section 73.1940(b)(2) of the Commission's rules by its terms places the burden on the individual claiming to be a "legally qualified candidate" to demonstrate that he or she has made a substantial showing. 47 CFR § 73.1940(b)(2) ("Has publicly committed himself . . . is eligible . . . and makes a substantial showing . . ."). Similarly, we note that the Bureau's practice of deferring to a licensee's good faith determination as to whether a potential write-in candidate has satisfied the "substantial showing" requirement is consistent with the Supreme Court's decision in *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."); see also *NPRM* at para. 10, n.41 (discussing the Media Bureau's precedent on who bears the burden and deference to a licensee's good faith determination under the "substantial showing" requirement).

and the public, we decline to amend our rules. However, we will address these issues based on the facts and circumstances of each particular case in keeping with this interpretation.

15. Additionally, we decline to add any other activities consistent with modern campaign practices, such as the use of digital marketing and advertising, to the list of recognized campaign activities in sections 73.1940(f) and 76.5(q)(5) of our rules.⁶⁹ No commenter expressly supported or even addressed the addition of other such activities to the list of recognized campaign activities set forth in the rules. In the absence of any support or comment in the record on this issue, we conclude that the addition of other activities to the list is not warranted at this time.

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

16. We adopt our proposal and amend the political file rules for broadcast licensees, cable operators, DBS providers, and SDARS licensees consistent with the BCRA and section 315(e) of the Act.⁷⁰ No commenter objects to this update. Enacted in 2002, the BCRA, among other things, added a new section 315(e) of the Act.⁷¹ Section 315(e)(1)(A) codifies the Commission's long-standing requirement that records of a request to purchase advertising time that "is made on behalf of a legally qualified candidate for public office," known as a candidate ad, be maintained in the political file.⁷² Section 315(e)(1)(B) extends political recordkeeping obligations to records of a request for the purchase of advertising time that "communicates a message relating to any political matter of national importance," known as an issue ad.⁷³ Section 315(e)(2) identifies the specific records that must be placed in political files for both candidate and issue ads.⁷⁴ These records include:

- (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.⁷⁵

Although the Commission has provided guidance on political recordkeeping consistent with these statutory requirements following their adoption in 2002, the political file rules were not previously updated to reflect these statutory requirements.

17. We accordingly revise the political file rules for broadcast licensees, cable television system operators, DBS providers, and SDARS licensees to bring them into conformity with section

⁶⁹ *Id.* (seeking 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 sections 73.1940(f) and 76.5(q)).

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

⁷¹ Pub. L. No. 107-155, §504, 116 Stat. 81 (2002) (codified at 47 U.S.C. § 315(e)).

⁷² 47 U.S.C. § 315(e)(1)(A).

⁷³ *Id.* § 315(e)(1)(B).

⁷⁴ *Id.* § 315(e)(2).

⁷⁵ *Id.* § 315(e)(2).

315(e) of the Act. Specifically, we revise our rules to require these entities to maintain in their online political 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 records of each request for advertising time that “communicates a message relating to any political matter of national importance.”⁷⁶ Additionally, we amend the rules to specify the particular records that must be maintained in online political files for both candidate ads and issue ads, consistent with the list set forth in section 315(e)(2).⁷⁷ These revisions ensure that the political recordkeeping rules fully and accurately reflect statutory requirements.⁷⁸ Further, these revisions will foster greater transparency about the entities sponsoring candidate and issue ads.

18. We do not believe this is the appropriate proceeding to address Canal Partners’ proposed interpretation of the phrase “a message relating to any political matter of national importance” in section 315(e)(1)(B).⁷⁹ Canal Partners asserts that “licensees regularly refuse to comply with their public-disclosure obligations”⁸⁰ and urges the Commission to make clear that “the phrase ‘a message relating to any political matter of national importance’ should be interpreted broadly in favor of full disclosure and transparency and that licensees must act fairly, sensibly, honestly, and without any intent to seek commercial advantage when deciding whether to place information in their public political files.”⁸¹ Canal Partners makes allegations against two broadcast stations to support its assertion that licensees regularly refuse to comply with their public-disclosure obligations.⁸²

19. As an initial matter, we decline to address this issue as we did not seek comment on the interpretation of this phrase in the *NPRM*. Even assuming that there was misconduct by the two stations referenced by Canal Partners, we see no need to adopt a rule on this issue at this time. The Commission addresses complaints on their individual merits.⁸³ To the extent that Canal Partners maintains that licensees regularly refuse to comply with their political file obligations, specific allegations of such misconduct are properly addressed through the complaint process.⁸⁴ Furthermore, the Commission recently clarified the standard of review of broadcasters’ compliance with their political file disclosure obligations.⁸⁵ Specifically, the Commission clarified that the agency will apply a standard of reasonableness and good faith decision-making with respect to the efforts of broadcasters to comply with

⁷⁶ *Id.* § 315(e)(1)(A)-(B).

⁷⁷ *Id.* § 315(e)(2).

⁷⁸ 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 make changes to these rules to implement section 315(e)(3).

⁷⁹ 47 U.S.C. § 315(e)(1)(B).

⁸⁰ Canal Partners Comments at 1-2.

⁸¹ *Id.* at 19.

⁸² *Id.* at 5-8, 15-16.

⁸³ See e.g., *Complaints Involving the Political Files of WCNC-TV, Inc., et al.*, Memorandum Opinion and Order, 34 FCC Rcd 10048 (2019) (*Political File Order*).

⁸⁴ We note that on December 20, 2021, Canal Partners filed a complaint against Gray Television Licensee, LLC, licensee of WCGL-TV, Atlanta, Georgia, alleging that WCGL-TV has violated the requirement in 47 U.S.C. § 315(e)(1)(B) to make available for public inspection its complete records related to the purchase of broadcast time of advertisements that “communicate a message relating to any political matter of national importance.” Complaint of Canal Partners Media, LLC against Gray Television Licensee, LLC, Licensee of WCGL-TV, Atlanta, Georgia (filed Dec. 20, 2021). The complaint is pending before the Media Bureau.

⁸⁵ *Complaints Involving the Political Files of WCNC-TV, Inc., et al.*, MB Docket No. 19-363, Order on Reconsideration, 35 FCC Rcd 3846 (2020) (*Political File Order on Reconsideration*).

their obligations under section 315(e) of the Act.⁸⁶ To the extent that Canal Partners challenges the Commission's clarifications, we find that challenge is an untimely petition for reconsideration of that prior order and accordingly we decline to adopt it.⁸⁷

C. Cost-Benefit Analysis

20. We conclude that to the extent that the revised rules impose any costs on Commission licensees and regulatees, such costs will be minimal and are outweighed by the benefits to the public of the revised rules. No commenters explicitly addressed the costs and benefits of the proposed rules or provided specific data and analysis supporting claimed costs and benefits in response to the *NPRM*.⁸⁸ As noted above, however, NAB states that the revision to the definition of "legally qualified candidates" will not drastically alter current industry practices because broadcasters already consider digital activities in determining whether an individual has established that he or she is a bona fide candidate.⁸⁹ In addition, the revisions to the political file rules merely conform our rules to longstanding statutory requirements and the Commission has provided licensees and regulatees guidance on political recordkeeping consistent with these statutory requirements since their adoption in 2002. Thus, we expect that any costs imposed by the updated rules will be minimal and outweighed by the public benefits of transparency and clarity.

IV. PROCEDURAL MATTERS

21. *Final Regulatory Flexibility Act Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, as amended,⁹⁰ the Commission's Final Regulatory Flexibility Analysis of the *Report and Order* is attached as Appendix B.

22. *Paperwork Reduction Analysis.* The *Report and Order* contains either new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).⁹¹ It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. The Commission will publish a separate document in the *Federal Register* at a later date seeking these comments. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. We have described impacts that might affect small businesses in the FRFA in Appendix B.

23. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is "non-major" under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of the *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

24. *Additional Information.* For additional information on this proceeding, contact the Media Bureau's Political Programming staff: Robert Baker, at (202) 418-1417 or Robert.Baker@fcc.gov; Gary

⁸⁶ *Id.* at 3849-50, paras. 7-10.

⁸⁷ Petitions for reconsideration of the *Political File Order on Reconsideration* were due May 21, 2020. 47 CFR § 1.106. No petitions for reconsideration of this order were filed.

⁸⁸ *NPRM* at para. 17 (seeking comment on the benefits and costs associated with adopting the proposed changes).

⁸⁹ *Id.* The current rule describing the requirements for making a "substantial showing" of a bona fide candidacy recognizes that there may be activities not listed in the rule which would contribute to such a showing. 47 CFR § 73.1940(f).

⁹⁰ 5 U.S.C. § 603.

⁹¹ Pub. L. No. 104-13.

Schonman, at (202) 418-1795 or Gary.Schonman@fcc.gov; or Sima Nilsson, at (202) 418-2708 or Sima.Nilsson@fcc.gov.

V. ORDERING CLAUSES

25. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 4(i), 4(j), 303, 307, 312, 315, and 335 of the Communications Act, as amended, 47 U.S.C §§ 151, 154(i), 154(j), 303, 307, 312, 315, and 335, this Report and Order **IS ADOPTED**.

26. **IT IS FURTHER ORDERED** that the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A and such amendments shall be effective 30 days after publication in the *Federal Register*, except for sections 25.701(d), 25.702(b), 73.1943(a) and (b), and 76.1701(a) and (b), 47 CFR §§ 25.701(d), 25.702(b), 73.1943(a), (b), and 76.1701(a), (b), which contain new or modified information collection requirements and will be submitted for approval by the Office of Management and Budget under the Paperwork Reduction Act and shall become effective after the Commission publishes a notice in the Federal Register announcing such approval and the relevant effective date.

27. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

28. **IT IS FURTHER ORDERED** that the Commission will send a copy of this Report and Order in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

BOLD IS NEW LANGUAGE

The Federal Communications Commission amends Parts 25, 73, and 76 of Title 47 of the Code of Federal Regulations (CFR) 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.

2. Amend § 25.701(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 advertising 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 advertising time is accepted or rejected by the DBS operator;**
- (ii) the rate charged for the advertising 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(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, 303, 309, 310, 334, 336, and 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. **The creation of a campaign website and the use of social media shall be additional indicators of a bona fide candidacy, not determinative factors, and such digital activities must be combined with other activities commonly associated with political campaigning that are conducted in substantial portions of the relevant geographic area.**

3. Amend § 73.1943 by revising paragraph (a), renumbering paragraph (b) as (c), adding new paragraph (b), and renumbering paragraph (c) as (d), 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) 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.

(c) * * *

(d) * * *

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

6. 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, 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.

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

§ 76.5 Definitions.

* * * * *

(q) Legally qualified candidate.

* * * * *

- (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. **The creation of a campaign website and the use of social media shall be additional indicators of a bona fide candidacy, not determinative factors, and such digital activities must be combined with other activities commonly associated with political campaigning that are conducted in substantial portions of the relevant geographic area.**

* * * * *

8. Amend § 76.1701 by revising paragraph (a), renumbering paragraph (b) as (c), adding new paragraph (b), and renumbering paragraphs (c) and (d) as (d) and (e) 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 cablecast 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) shall contain information regarding:

- (1) whether the request to purchase cablecast time is accepted or rejected by the cable television system operator;**
- (2) the rate charged for the cablecast 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.**

(c) * * *

(d) * * *

(e) * * *

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)¹ the Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Notice of Proposed Rulemaking (NPRM)* released in this proceeding.² The Federal Communications Commission (Commission) sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Report and Order

2. The *Report and Order* update the 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 to conform these rules with modern campaign practices and statutory requirements and increase transparency. The *Report and Order* revises 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 campaign-related 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 *Report and Order* makes clear that social media presence and campaign websites will be treated as additional indicators of activities commonly associated with political campaigning needed to make substantial showing of a bona fide candidacy, not as determinative factors, and such digital activities must be combined with other activities commonly associated with political campaigning that are conducted in substantial portions of the relevant geographic area.

3. The *Report and Order* also amends the political file rules consistent with the Bipartisan Campaign Reform Act of 2002 (BCRA), which extends the Commission’s political file requirements to 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 specifies the records that must be maintained. The *Report and Order* revises the rules to require that broadcast licensees, cable operators, DBS providers, and SDARS licensees maintain in their online political 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 records of each request for advertising time that “communicates a message relating to any political matter of national importance.”⁴ Further, the *Report and Order* amends the rules to specify that the following record must be placed in online political files for both candidate ads and issue ads:

- (1) whether the request to purchase advertising time is accepted or rejected by the licensee or regulatee;
- (2) the rate charged for the advertising 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

¹ 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *Revisions to Political Programming and Record-Keeping Rules*, MB Docket No. 21-293, Notice of Proposed Rulemaking, FCC 21-91 (rel. Aug. 4, 2021) (*NPRM*).

³ 5 U.S.C. § 604.

⁴ *Id.* § 315(e)(1)(A)-(B).

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.

B. Summary of Significant Issues Raised in Response to the IRFA

4. No comments were filed in response to the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

5. Pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.⁵ The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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

6. 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 rules, if adopted.⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁸ 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.⁹

7. The rules adopted herein will directly affect small television broadcast stations. Below, we provide a description of these small entities, as well as an estimate of the number of such small entities, where feasible.

8. *Television Broadcasting.* This U.S. Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."¹⁰ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to

⁵ 5 U.S.C. § 604(a)(3).

⁶ *Id.* § 603(b)(3).

⁷ *Id.* § 601(6).

⁸ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). 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."

⁹ *Id.* § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

¹⁰ U.S. Census Bureau, 2017 NAICS Definitions, "515120 Television Broadcasting," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

the public.¹¹ 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.¹² 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.¹³ Based on this data, we estimate that the majority of commercial television broadcast stations are small entities under the applicable size standard.

9. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,372.¹⁴ 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 384.¹⁵ 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. There are also 385 Class A stations.¹⁶ Given the nature of this service, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard.

10. *Radio Broadcasting.* This U.S. Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public."¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

¹¹ *Id.*

¹² 13 CFR § 121.201; 2012 NAICS code 515120.

¹³ 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.

¹⁴ Broadcast Station Totals as of September 30, 2021, News Release (MB Oct. 4, 2021) (Sept. 30, 2021 Broadcast Station Totals), <https://www.fcc.gov/document/broadcast-station-totals-september-30-2021>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁸ 13 CFR § 121.201; 2017 NAICS code 515112.

¹⁹ 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.

²⁰ *Id.*

Based on this data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

11. The Commission has estimated the number of licensed commercial AM radio stations to be 4,519 and the number of commercial FM radio stations to be 6,682 for a total of 11,201 commercial stations.²¹ According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 30, 2020, 99% of commercial radio stations had revenues of \$41.5 million or less in 2019, and therefore these stations qualify as small entities under the SBA definition. In addition, there were 4,211 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.

12. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations²² 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.

13. *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.²³ Industry data indicates that, of the 777 cable companies currently operating in the United States, 766 serve 400,000 or fewer subscribers.²⁴ Additionally, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²⁵ According to industry data, there are currently 4,336 active cable systems in the United States.²⁶ Of this total, 3,650 cable systems have fewer than 15,000 subscribers.²⁷ Thus, the Commission believes that the vast majority of cable companies and cable systems are small entities.

²¹ Sept. 30, 2021 Broadcast Station Totals.

²² “[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).

²³ 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).

²⁴ 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).

²⁵ 47 CFR § 76.901(c).

²⁶ 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).

²⁷ *Id.*

14. *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.”²⁸ As of 2019, there were approximately 48,646,056 basic cable video subscribers in the United States.²⁹ 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.³⁰ Based on available data, we find that all but five cable operators are small entities under this size standard.³¹ 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.³² 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.

15. *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.³³ The Wired 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.³⁴ The SBA determines that a wireline business is small if it has fewer than 1,500 employees.³⁵ 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.³⁶ Based

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

²⁹ 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>.

³⁰ 47 CFR § 76.901(e).

³¹ 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.](#)

³² 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).

³³ *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).

³⁴ *Id.*

³⁵ 13 CFR § 121.201 (NAICS Code 517311).

³⁶ *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).

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.³⁷ 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.³⁸ 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,³⁹ we presume that neither would qualify as a small business.

16. *Satellite Radio.* Sirius-XM, which offers subscription services, is the sole, current U.S. provider of satellite radio (SDARS) services, Sirius-XM. Sirius-XM reported revenue of \$8.04 billion and a net income of \$131 million in 2020.⁴⁰ In light of these figures, we believe it is unlikely that this entity would be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

17. In this section, we identify the reporting, recordkeeping, and other compliance requirements adopted in the *Report and Order* and consider whether small entities are affected disproportionately by any such requirements.

18. *Reporting Requirements.* The *Report and Order* does not adopt any new or modified reporting requirements.

19. *Recordkeeping Requirements.* The *Report and Order* revises the political file rules, consistent with the BCRA's amendment to section 315(e) of the Act, to reflect the 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 *Report and Order* revises the political file rules to list the specific records that must be maintained in political files.

20. *Other Compliance Requirements.* The *Report and Order* revises the political programming rules to add the use of social media and the creation of campaign websites 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 bona fide candidacy.

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

21. 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

³⁷ See *Communications Marketplace Report et al.*, GN Docket No. 18-231 et al., Report, 33 FCC Rcd 12558, 12597, paras. 50-51 (2018).

³⁸ 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).

³⁹ 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).

⁴⁰ See *Sirius XM Holdings Inc., Form 10-K (2020)*, https://s1.q4cdn.com/750174072/files/doc_financials/2020/q4/79cefd0d-637d-4069-bddb-2a5dc9d67413.pdf.

the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such 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.”⁴¹

22. The *Report and Order* revises the political programming and political file rules to bring them into conformity with modern campaign practices and statutory requirements. As discussed below, the updates are not expected to significantly impact small entities.

23. The changes in the Recordkeeping Requirements (*see* paragraph 19, *supra*) merely conform our rules with the statutory requirements in section 315(e) of the Act, which was added in 2002 by the BCRA. The Commission has provided guidance on political recordkeeping consistent with these statutory requirements since their adoption in 2002. The revisions ensure that the political file rules fully and accurately reflect the statutory requirements.

24. The changes in the Compliance Requirements (*see* paragraph 20, *supra*) conform with modern campaign practices. NAB states that these changes will not drastically alter current industry practices because broadcasters already consider digital activities in determining whether an individual has made a substantial showing that he or she is a bona fide candidate.

G. Report to Congress

The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁴² In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Report and Order* and FRFA (or summaries thereof) will also be published in the *Federal Register*.

⁴¹ 5 U.S.C. § 603(c)(1)-(c)(4).

⁴² 5 U.S.C. § 801(a)(1)(A).