

Section 317 requires a broadcaster to identify the sponsor of “all matter broadcast” for which any payment is made. In implementing this provision, current FCC sponsorship identification rules nominally require that broadcasters disclose on-air the “true identity” of the sponsors of broadcast messages. In addition, for political commercials, the name of the sponsor’s chief executive officers or a list of its executive committee or directors is to be placed in the broadcasting station’s public file.³ Special provisions apply to commercials paid for by a candidate or official campaign committee.

The statutory objective of informing the electorate about who is the “true” sponsor of political messages is not being met. With but minor amendments in 1992, there has been no significant updating of the Commission’s sponsorship identification rules since 1960, and key provisions date back to the early 1940’s. In the wake of recent judicial decisions involving campaign finance laws, there has been a new wave in spending for political and issue advertisements by organizations which are not required to disclose the identities of their donors. Existing campaign finance and IRS regulations allow organizations which are often hollow shells for one or a few organizations or individuals to purchase commercials without identifying the source of their funding.⁴ Examples are legion. Thus, “Iowans for Responsible Government” was the named sponsor of \$370,000 worth of television ads which attacked Republican Terry Branstad as a “liberal” in the run-up to the Republican primary; only later was it disclosed that the sole funder of “Iowans for Responsible Government” was the Democratic Governors Association. “Concerned Taxpayers of America” sponsored \$450,000 of television commercials in two Congressional races, but the ads did not reveal that it was solely

³47 CFR §73.1212(e). References in this petition are to 47 CFR §1212. Parallel provisions appear at 47 CFR §76.1615; these regulations should also be modified accordingly.

⁴*Big money: Outside groups spending for Republicans*, ASSOCIATED PRESS, Oct. 26, 2010, available at <http://tinyurl.com/2454t8h>.

funded by one company and one individual.⁵ The “Ending Spending Fund,” funded by one donor, sponsored over \$1,000,000 in campaign ads.⁶

BACKGROUND

The sponsorship identification requirements are a central element of broadcasters’ obligations. They have been part of federal law since 1927, pre-dating the FCC itself. As the Commission has reflected:

such a requirement is “based on the principle that the public has the right to know whether the broadcast material has been paid for and by whom.” Thus, the purpose of the sponsorship identification requirements mandates that “the audience be clearly informed that it is hearing and viewing matter which has been paid for when such is the case, and that the person paying for the broadcast of the matter be clearly identified.”

Advertising Council, 17 FCCRcd 22616, 22620-21 (2002). It has been a major source of Commission and Congressional concern for generations. Congress even strengthened the law after the “payola” scandals of the 1950s, placing extra obligations on broadcasters.

In its present form, the regulation of sponsorship identification is embodied in Section 317(a)(1) of the Communications Act, which requires that

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person....

47 U.S.C. §317(a)(1).

The law applies to all sponsored programming on television and radio. The Commission itself has stated that the “statute is very broad” and “[t]he Commission has consistently upheld [its] strict

⁵Dan Eggen, *Concerned Taxpayers of America supported by only two donors*, WASH. POST, Oct. 16, 2010, available at <http://wapo.st/brjG27>.

⁶Dan Eggen, *New PACs sprout in final days of 2010 campaign*, WASH. POST, Oct. 29, 2010, available at <http://wapo.st/c3vJWG>; Jeremy P. Jacobs, *Starting Lineup: The Pennsylvania Paradox*, HOTLINE ON CALL, available at <http://bit.ly/bt11dh>.

identification requirements.” *Advertising Council*, 17 FCCRcd at 22620-21.

Section 73.1212 of the Commission's rules implements Section 317. Section 73.1212(a) requires sponsorship identification with language nearly identical to that of Section 317(a)(1). 47 CFR §73.1212(a). Section 73.1212(e) specifies that

The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, ***fully and fairly disclose the true identity*** of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received....

47 CFR §73.1212(e) (*emphasis added*).

IDENTIFICATION OF POLITICAL SPONSORS

The Commission has a long history of particular concern with the identification of sponsors of political messages. *See, e.g., Identification on Broadcast Station*, 40 FCC 2 (1950) (calling on licensees to give particular attention to “the making of adequate announcements when political broadcasts are made”). It was in fact in response to concerns about political advertising that the first regulations implementing Section 317 were written. These rules were specifically intended to redress situations in which listeners to public affairs broadcasts were told that the sponsor of the broadcasts were generic organizations like a “Citizen’s Committee.” Such concerns that came up during the 1944 campaign season are indicated by a notice in the *Federal Register*:

Numerous complaints have recently been received by the Commission concerning the failure of radio stations to identify the sponsors of political spot announcements....[Section 317] requires a full and fair disclosure of the identity of the person furnishing the consideration for such broadcast.

Identification of Sponsors, 9 Fed. Reg. 12817 (Oct. 25, 1944).

Between the Commission’s proposal for regulations implementing the sponsorship identification provisions of Section 317 in September 1944 and the final regulations it adopted in December 1944, an additional disclosure obligation was added to impose the additional duty that further

identifying information be placed in station public files. *Announcement of Sponsored Programs*, 9 Fed. Reg. 14734 (Dec. 12, 1944). Slightly modified, this provision now states:

Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that ***a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation***, committee, association or other unincorporated group, or other entity shall be made available for public inspection.

47 CFR §73.1212(e) (*emphasis added*). In relatively recent times, the Commission has also imposed an additional special requirement for identifying the sponsorship of political advertisements.⁷

CURRENT FCC ENFORCEMENT

The current rules have not ensured meaningful disclosure for political ads due largely to the Commission's current, limited interpretation of the meaning of sponsorship. This very narrow construction was adopted almost by accident in *VOTER*, an unpublished 1979 staff decision.⁸ Without any citation to precedent, the staff in that case agreed that a licensee could be considered reasonably diligent in fulfilling its duty to "go behind an ostensible sponsor to search out the real sponsor of a political broadcast" if the named organization claimed it had editorial control, regardless of the source of its funds. *Id.* The Bureau in *VOTER* did not acknowledge, let alone refute, the Commission's long history of directing stations to pierce the veil of the nominal sponsor. The Commission decades before had stated that stations should "take all reasonable measures" to identify sponsors, specifying that "If a speaker desires to purchase time at a cost apparently disproportionate

⁷In 1992, the Commission strengthened the rules applicable to candidates' commercials. 47 CFR §1212(a)(2)(ii) provides that "In the case of any television political advertising concerning candidates for public office, the sponsor shall be identified in letters equal or greater than four percent of the vertical picture height that air for not less than four seconds." *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 1616 (1992).

⁸The decision is available in the privately published Pike and Fisher Reports as *VOTER*, 46 Rad. Reg. 2d (P & F) 350 (1979).

to his personal ability to pay, a licensee should make an investigation of the source of the funds to be used for payment.” *Albuquerque Broadcasting Co.*, 40 FCC 1 (1946).

The fundamental mistake of the *VOTER* decision, and a later case that followed,⁹ is the idea that sponsorship is largely determined by who claims to have editorial control of the commercial message, rather than who pays. This goes against both the language and the history of the sponsorship identification rule, and creates an inherently subjective standard which is subject to manipulation.

The proper focus of Section 317 is on who is paying for an advertisement, rather than who theoretically has “editorial control.” The statute requires identification of who paid for “all matter broadcast [...] for which any money [...] is directly or indirectly paid,” 47 U.S.C. 317(a)(1), and the Commission has stated that sponsorship identification is intended to “fully and fairly disclose the true identity of the person or persons by whom or in whose behalf **payment** was made.” *Applicability of Sponsorship Identification Rules*, 40 FCC 141, 150 (1963) (*emphasis added*). Similarly, the Commission stated over 50 years ago the finding that “of particular significance is the requirement of **accurate and complete identification of the person or group paying for** or furnishing material in connection with the discussion of political matters.” *Violation of Section 317 of the Communications Act, KSTP, Inc.*, 40 FCC 12, 14 (1958) (*emphasis added*).

Besides the complete absence of a statutory basis for a test based on editorial control, there are two additional glaring problems. First, it seems highly implausible that an organization that was providing most of the funding for an editorially controlling group would not have influence over the content of the group’s activities. It is relatively easy to create a “front” organization, and if that organization’s board members claim that they are making their own independent decisions rather than doing what funders want, then it may be impossible to refute that without another mechanism

⁹*Paul Loveday and Californians for Smoking and No Smoking Sections*, 87 FCC2d 492 (1981), *recon. denied, id., aff’d sub nom. Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983) (Bork, J.).

available. Even if control of content was delegated to an agency or consultant, such an agent would inevitably carry out the will of the sponsor.

The second problem relates to the unenforceability of the interpretation. As a practical matter, broadcasters have no way to determine if an advertiser has editorial control, and requiring third parties to demonstrate who has editorial control poses an insuperable barrier to complainants, who lack the ability to investigate or rebut claims to the contrary.

THE PROPOSED RULE

Two basic changes to the existing rules are needed.¹⁰ First, the rules must require that sponsorship identification be made based on who is actually paying for a message. Second, the public file provisions must be updated to reflect current practices.

Currently, on-air disclosure of the named sponsor of political advertisements is required by the Commission, but the rules have been interpreted so that the actual sponsor, *i.e.*, the source of the funds for the commercials, need not be ascertained or identified. Once the proper focus is required, there is a problem when there are multiple sources of funds for “front groups” and institutional sponsors. On air identification of a very large number of sources is impracticable; MAP proposes that for television advertisements, the proportion of funding that would have to have come from one donor in order to require that such a donor be listed on-air as a sponsor should be set at 25%. (In this case, the absolute maximum of sponsors that could be required to be listed on-air would be four.)¹¹

The current public file requirement is that a “station shall [...] require that a list of the chief executive

¹⁰This petition addresses Section 73.1212. Parallel changes should be made to the companion rule in Part 76, Section 76.1615.

¹¹The Commission should treat radio slightly differently with respect to multiple sponsors. MAP proposes that it limit on-air disclosure to persons or entities providing one-third or more of the funding of a commercial message. Where 10% or more of a commercial’s funding comes from one source, radio political ads could include a mandatory statement during the ad that “a list of sponsors is available in this station’s public file.”

officers or members of the executive committee or of the board of directors” of the entity paying for or furnishing a political broadcast “be made available for public inspection...” 47 CFR 73.1212(e); *see also* 47 CFR 73.3526. The Commission should amend the rule to require that stations keep on file, along with the listing of the nominal sponsor of a political ad and its leadership, all who contribute 10% or more to the funding of the nominal sponsor.

The Commission should also strengthen Section 73.1212(b), which requires a broadcast licensee to “exercise reasonable diligence to obtain...information to enable such licensee to make the announcement required by this section.” This provision lacks any tool to assess compliance with the duty. MAP thus asks that the Commission require broadcasters to obtain sworn statements from political advertisers as to their largest sources of funding and place them to place in the station’s public file.

CONCLUSION

Developments in political broadcast advertising have revealed the limitations of the Commission’s current disclosure requirements. To fulfill the purpose of Section 317 and protect the interests of the American public, the Commission should revise the rules that require on-air disclosure and public filing to enable greater transparency in political advertising.

Respectfully submitted,

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Attachment A

Section 73.1212(e) of the Commission's Rules shall be amended to read as follows:

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished.

- (1) For television stations, such announcement shall also fully and fairly disclose the true identity of any natural person or other entity that directly or indirectly provided, or promised to provide, 25 percent or more of the funds used to make such payment.
- (2) For radio stations, such announcement shall also fully and fairly disclose the true identity of any natural person or other entity that directly or indirectly provided, or promised to provide, one-third or more of the funds used to make such payment. In the case of broadcast matter to which subsection (3)(b) applies, radio stations shall also announce that "a list of sponsors is available in this station's public file."
- (3) Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent. Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter,
 - (a) the station shall, in addition to making the announcement required by this section, require that
 - (i) a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity, and
 - (ii) a list of all entities and all natural persons who have directly or indirectly provided 10 percent or more of the funds provided, or promised to be provided as payment for the material broadcast, shall be made available for public inspection at the location specified by the licensee under 73.3526 of this chapter. If the broadcast is originated by a network, the lists may, instead, be retained at the headquarters office of the network or at the location where the originating station maintains its public inspection file under 73.3526 of this chapter. Such lists shall be kept and made available for a period of two years.
- (4) The station shall require the person or entity contracting for the purchase of such broadcast material to provide within 72 hours of purchase a written certification under penalty of perjury that the information provided for compliance under this section is true to the best of his or her knowledge.

- (5) For the purposes of this section, determination of the true identity of any person or entity that sponsors, pays for, furnishes, promises payment or provides services, materials or other valuable consideration shall not be based upon the exercise of editorial control of the broadcast matter.