

FCC Rule Requires Non-Discrimination Clauses in All Advertising Sales Contracts

The FCC renewal cycle has begun, and the FCC has announced that broadcasters must be able to certify that advertising contracts certain contain non-discrimination provisions outlined below. Licensees that are not able to make the appropriate certifications will have to have their renewal applications undergo more thorough review by the FCC Staff.

The FCC Policy focuses primarily on advertising contracts that specifically contain “no Spanish/no Urban” restrictions in the placement of station advertising. Those prohibited contract provisions otherwise restrict the placement of advertising on Spanish language and urban format stations. The restrictions are implicated when advertisers seek to minimize the number of Hispanic or African-American customers that are likely to patronize such advertisers’ businesses by minimizing exposure to their advertising. This practice is racially discriminatory, and the new FCC rule prohibits such contractual restrictions and further, now requires that *all* broadcast advertising contracts now include specific non-discrimination clauses.

This new requirement requires broadcasters to have appropriate non-discrimination clauses in their advertising sales contracts, and requires broadcast licensees affirmatively to *certify* the existence of such clauses in their sales contracts when they next file their license renewal application. This certification will be a pre-requisite to receiving a station license renewal. Accordingly, the Commission has amended the license renewal application (FCC Form 303-S) to include language that will require that broadcasters certify that their contracts “do not discriminate on the basis of race or ethnicity and that such contracts held by the licensee contain nondiscrimination clauses.” The FCC Enforcement Bureau has stated that in order to respond affirmatively to this certification:

Licensees must have a good faith basis for an affirmative certification and a reasonable basis for believing that factual information provided to the Commission is truthful and accurate. For example, a licensee that uses a third party to arrange advertising sales is responsible for exercising due diligence to ensure that the advertising agreement contains the nondiscrimination clause and does not discriminate on the basis of race or ethnicity. Furthermore, a broadcaster that learns of a violation of a nondiscrimination clause while its license renewal application is pending should update its license renewal application so that it continues to be accurate.

Thus, broadcasters who have not already added a nondiscrimination clause to their advertising contracts are advised to do so immediately.

Proposed Contract Provision to Include

The FCC specifically chose not to specify exactly what language advertising contracts can or should contain to comply with this new requirement. However, based upon the concerns expressed in the *Report and Order*, it is recommended that the following contract language be used in all advertising contracts:

NONDISCRIMINATION POLICY: The licensee of this station does not discriminate in the sale of advertising time on the basis of race or ethnicity, and will accept no advertising from any advertiser for placement which illegally discriminates on the basis of race or ethnicity. The licensee will reject any advertising order which violates this policy. It is mutually agreed that any provision of any advertising agreement or order for advertising that conflicts with this policy is hereby superseded and/or void.

Also, if a written agreement is executed with a third-party advertising agency, a written certification should be received from the agency, as well, stating that it will not accept any advertising from any advertiser for placement which illegally discriminates on the basis of race or ethnicity.

If written contracts are not used in conjunction with a transaction, this information nevertheless should be communicated to the advertiser in any some other manner that is feasible – *i.e.*, a letter to the advertiser, an e-mail, etc. In short, keeping a paper trail of your compliance with this Policy is important.

Commentary

As is often the case, questions and ambiguities exist as to exactly “what” practices now are totally prohibited. For example, the Commission has not made clear exactly how this new requirement will be implemented with respect to certain *legitimate* placements of advertising that are routinely based on racial/ethnicity-based demographics evaluated by the advertiser.

The FCC appears to focus on advertising contracts of general market advertisers -- *e.g.*, a car dealership that wishes to enter into a contract that includes a clause requiring that advertising will *not* be placed on a licensee’s stations targeted toward minority audiences, in order to *avoid* contact with a particular audience – which is illegal. Under the Commission’s rules, such a restriction clearly is not allowed. Complying with such a verbal request also would be illegal.

This is in contrast to *targeted* advertising, where an advertiser wants to place ads on certain specific stations it may specifically name – for example, to *attract* a particular specialized audience (*e.g.*, to promote a concert by a foreign-language ethnic recording artist) – which presumably is legal. This advertiser naturally will more likely seek a station that *reaches* an audience *targeting* those audiences, and may even require that its advertisements be placed on stations or shows providing such programming demographics. *Even though* one hypothetically could say that certain of these advertising decisions are decisions that may (in the advertisers’ minds) be “based on race or ethnicity,” it nevertheless is believed that restrictions that are imposed for the purpose a *targeting* and *attracting* advertisers will not be deemed to be based upon an *improper* “discriminatory” purpose as long as those decisions can be viewed as arising from legitimate distinctions based on the inherent nature of particular products. However, it should be noted that this “common sense” interpretation has not yet been litigated, and therefore is not established law.

In short, licensees should be careful not to accept general market advertisements that specifically restrict or prohibit placement based on racial or ethnicity considerations. Stations should also instruct their staff not to either implicitly or explicitly encourage or accept advertising based on such criteria. You also must make a good faith effort to ensure advertising agencies with which you deal do not allow such discrimination to occur.

As is the case with any other FCC certification, just paying lip service to the requirement and adding the proper language to contracts is not sufficient in and of itself. The licensee and its employees must *perform* in accord with the contractual provision and the certification it must make, and thereby must not allow prohibited advertising-based discrimination to occur. If a licensee were to make the required certification yet it was later discovered that the station nevertheless accepted advertisements with prohibited racial or ethnicity restrictions, the licensee could conceivably have to deal not only with discrimination issues before the FCC, but also a question would be raised as to whether the licensee has engaged in a “misrepresentation” to the FCC concerning its actual compliance with the FCC’s rule.

Moreover, a licensee always is responsible for the conduct of its employees. Blaming a violation on the conduct of an employee does not immunize a licensee from the effects of a violation. Thus, staff education will be an important component of compliance with this new rule.

Stations that fail to routinely include required non-discrimination provisions in future sales contracts will be unable to make the required certification at the time the next renewal application is filed, and more likely than not will be subject to delayed processing of their renewal application and issuance of a fine. Conceivably, it also could lead to a determination by the FCC that it will not renew the license in question. Therefore, licensees should immediately take necessary steps to comply with the Commission’s new anti-discrimination requirements for advertising.

If you have any questions, please feel free to contact us.