

[FCC Issues Advisory on Nondiscrimination Clause Required to Be Included in All Broadcast Advertising Contracts - What Should the Clause Say? - Why An Advertising Contract is Important](#)

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March 22, 2011

Last week, we [wrote about the new requirement for a nondiscrimination clause in all broadcast advertising contracts](#). In the new license renewal applications, **broadcasters must certify that they do not discriminate in the sale of advertising time** and that their contracts contain the required certification. Today, the Enforcement Bureau of the FCC issued an [Enforcement Advisory](#), answering questions about the new requirement. Unfortunately, that advisory really does little but reiterate what the FCC has already said - that the Commission is concerned about "**No Urban, no Spanish dictates**", and that broadcasters must make sure that there is no discrimination in the purchase of advertising time on their stations. But, the Commission does make clear in an accompanying [News Release](#), through a statement from Chairman Genachowski, that the Commission "will vigorously enforce its rules against discrimination in advertising sales contracts." The advisory does highlight one new matter - that stations that use advertising rep firms or other sales agents must make sure that these agents have nondiscrimination clauses in their own contracts used to sell advertising time on the station.

This policy has raised several questions from broadcasters. Many have asked what they should do if they have no advertising contracts. Apparently, many broadcasters, especially in smaller markets or when dealing with regular customers, book advertising through emails or phone calls - not formal contracts. The FCC does not address how this should be handled. We've suggested that broadcasters include the nondiscrimination clause in the exchanges that essentially form the contract - e.g. the email confirming the schedule, the rate cards offering the spots for sale, or other communications between the station and the advertiser. We also suggest that stations adopt written contracts, as these contracts can cover issues that are important to broadcasters, e.g. indemnifications from advertisers that they have the rights to all the music and other material used in their ads, statements that the broadcaster reserves the right to preempt ads if they don't like the content or if the broadcaster needs to run something more important, that advertising sold to one party should not be re-sold to anyone else, that the broadcaster is not liable for any consequential damages if an ad does not run for technical or other reasons, and similar issues.

What should the certification say? Again, the FCC does not suggest any specific text. The Commission seems to suggest that the contract certification should cover the fact that the broadcaster is not discriminating in the sale of time - when it probably is more accurate that, to

insure that the advertising is not being purchased pursuant to a "no Urban, no Spanish" dictate, it should be the advertiser who is certifying that their motivation in buying time is not a discriminatory one. We [wrote about a car advertiser who two years ago included such a dictate in a request for an advertising buy](#), and that initiated an uproar in the broadcast advertising world. We would expect that advertisers will have learned from that experience, and it will now be rare that advertisers will be so blatant about such an intention. To discover such intent, broadcasters need to get a certification from the advertiser as to their intention. Thus, we [suggested](#) the following language which expresses the intent of both the advertiser and the station, but each station should carefully consider the language before using it, and discuss it with their counsel:

This station does not discriminate in the sale of advertising time, and will accept no advertising which is placed with an intent to discriminate on the basis of race or ethnicity. Advertiser hereby certifies that it is not buying broadcasting air time under this advertising sales contract for a discriminatory purpose, including but not limited to decisions not to place advertising on particular stations on the basis of race, national origin, or ancestry.

The [Enforcement Bureau Advisory](#) also makes clear that broadcasters, in addition to simply making the required certification and including the required clause in their contracts, must also police advertising to make sure that it is not purchased for discriminatory purposes. So, if some general market advertiser approaches a station with a request for an advertising schedule that seems to discriminate, the broadcaster needs to investigate if in fact there is a discriminatory intent, and reject such advertising if it in fact discriminates. Broadcasters cannot turn a blind eye to potential discrimination in the purchase of advertising by their clients.

We expect that this issue will prompt much controversy in the upcoming renewal cycle. The FCC has appointed a compliance officer to provide information about this requirement, so perhaps more clarification will come before the renewal applications are processed. But, as the certification covers the period beginning last week until the date that the renewal is filed, we are sure that there will remain much confusion - but broadcasters must nevertheless do their best to comply - immediately.

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