Advisory

pillsbury

Communications January 2020

Political Broadcasting Advisory

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Introduction

More than fifteen years after the adoption of the Bipartisan Campaign Reform Act ("BCRA") of 2002, popularly known as "McCain-Feingold," Congress's and the Federal Communications Commission's interest in political broadcasting and political advertising practices remains undiminished. Broadcast stations must meet a broad range of federal mandates, and must therefore familiarize themselves with this regulatory area, ensuring they have adequate policies and practices in place and that they monitor legislative, FCC, and Federal Election Commission developments for changes in the law.

Stations must adopt and meticulously apply political broadcasting policies that are consistent with the Communications Act and the FCC's rules, including the all-important requirement that stations fully and accurately disclose in writing their rates, classes of advertising, and sales practices to candidates. This information should be provided to candidates and their agents in a station's Political Advertising Disclosure Statement.

Many of the political broadcasting regulations are grounded in the "Reasonable Access," "Equal Opportunities," and "Lowest Unit Charge" provisions of the Communications Act. These elements of the law ensure that broadcast facilities are available to candidates for federal office, that broadcasters treat competing candidates equally, and that stations provide candidates with the same rates offered to their most-favored commercial advertisers during specified periods prior to an election. As a general rule, stations may not discriminate between candidates for the same office as to station use, the amount of time given or sold, or in any other meaningful way.

These rules are enforced through fairly stringent recordkeeping requirements, with a station's political advertising documentation required to be kept in its political file—a file that is now available online to the public as part of a station's Public Inspection File. Political files must contain a station's political documentation for the past two years. As of the publication of this Advisory, all TV political file documents going back two years and most radio political file documents going back two years are online. However, the FCC allowed certain smaller, small market, and noncommercial radio stations a longer period of time to move their pre-March 1, 2018 political documents online. For these stations, their political files are not required to be completely online until March 1, 2020.

Because of the transition to online political files, broadcasters must be even more diligent to ensure that all political documents are timely created and uploaded. The past few years have seen an uptick in political complaints from watchdog organizations which now have convenient around-the-clock access to stations' political files. Unfortunately, many of those who have suddenly gained ready access to stations' political files do not understand the political rules and may allege that a station's political file is missing required information when the political file is in fact complete. It is therefore important for stations to understand their obligations so they are able to quickly respond to such allegations before they generate formal FCC complaints. Even where the station is completely in the right, responding to FCC complaints and investigations can be expensive, and diverts the attention of station staff from operating the station and serving the public.

While this Advisory outlines the political broadcasting rules in general terms, application of the rules can be quite fact-specific and there are many additional aspects of the rules too numerous to address within this Advisory. Accordingly, stations should contact legal counsel with specific questions or problems they encounter.

Political Broadcasting Overview

Two basic concepts are fundamental to an understanding of the federal laws, rules, and policies governing political broadcasting. These are the concepts of a "legally qualified candidate" and the "use" of a broadcast facility.

Those seeking the benefits afforded to candidates by the political broadcasting rules must prove that they are in fact legally qualified candidates. A determination of whether and when a candidate has made that showing is a matter of the good faith judgment of the station, applying the rules set forth below.

"Legally Qualified Candidate"

To be a legally qualified candidate for FCC purposes, a person must:

1. have publicly announced that they are a candidate;
2. meet the qualifications prescribed by the applicable laws for the office being sought; **and**
3. meet additional requirements, which vary depending on the office sought and the type of election.

These additional requirements are:

For Primary, General, or Special Elections. A person seeking election to any office, or nomination to any office other than President or Vice President of the United States, by means of a primary, general or special election, in addition to (1) and (2) above, must meet the following additional criteria as to each state in which "legally qualified" status is sought. Specifically, the individual:

a. must have qualified for a place on the ballot; or

b. (i) must have publicly committed to seeking election by the write-in method; **and**

(ii) must be eligible under applicable law to be voted for by sticker, write-in, or other method in that state; **and**

(iii) must make a substantial showing that they are a *bona fide* candidate for nomination or office.

For Non-Presidential Conventions or Caucuses. A person seeking nomination to any public office, except President or Vice President, by means of a convention, caucus, or similar procedure must, in addition to (1) and (2) above, also make a substantial showing that they are a *bona fide* candidate for the office sought. No person seeking such a nomination is considered a legally qualified candidate for nomination by a convention, caucus, or similar procedure prior to 90 days before the beginning of the convention or caucus.

For Persons Seeking Nomination for President or Vice President. A person seeking nomination for these national offices must, in addition to (1) and (2) above:

(a) show that they, or proposed delegates on their behalf, have qualified for the primary or presidential preference ballot in the relevant state; **or**

(b) make a substantial showing of *bona fide* candidacy for nomination in the relevant state.

Any candidate for President or Vice President who meets these qualifications in ten states is considered to then be legally qualified in all states.

The Concept of "Use"

Under present law, any positive broadcast of a candidate's identified or identifiable voice or picture, whether authorized or not, constitutes a political "use" of a station. Understanding a "use" is important, as most of the political broadcasting rules are triggered when a "use" is involved.

As there can be a "use" even if a candidate has not authorized an on-air appearance, Equal Opportunities issues and other problems may occur even when the broadcasts are involuntary and not authorized by the candidate. Appearances of a candidate in old movies or TV shows may be considered "uses." However, an ad attacking a candidate, even if it contains the candidate's voice or picture, is not considered a "use" by the candidate being attacked because it is not a "positive" broadcast. Also, a candidate's appearance in content may be so short in duration that it is considered *de minimis* and therefore not a "use" under the "fleeting use" exception.

Stations must also be careful about employees that become candidates. An on-air appearance by an employee who is also a candidate for public office is a use and could trigger free airtime for opposing candidates under the Equal Opportunities doctrine discussed below.

Exemptions. The presence of a candidate's voice or picture in four kinds of programming never constitutes a use:

1. *bona fide* newscasts, including specialized news shows such as "Entertainment Tonight;"

2. *bona fide* news interviews, including guest interviews on audience participation/call-in shows (the Commission has even found television and radio talk programs—including, for example, Oprah and Howard Stern—which sometimes feature newsworthy guests to be *bona fide* news interview programs as long as the host controls the interview process);

3. *bona fide* news documentaries, where the candidate's appearance is only incidental to the subject; and

4. on-the-spot coverage of *bona fide* news events.

These four classes of content are not uses. The distinction is important because a broadcaster may not censor a use by a candidate. Note, however, that this exception applies only to candidates who are the subject of a report, interview, or other coverage. If the station employee who reads the news, conducts the interview, or otherwise appears is a candidate, the appearance is not exempt and will be considered a use.

Prior Review

A station may ask to review a political spot in advance to ensure that it constitutes a "use" by the candidate, that it contains the necessary sponsorship identification, and that the broadcast will stay within the agreed length. When asking for a tape or script for advance review, a station must inform the candidate that the station is prohibited from censoring the material. However, if the spot does not contain the proper sponsorship identification, the station must inform the candidate and ask the candidate to remedy the problem, or should offer to fix the problem for the candidate. If the candidate refuses to fix the spot, the station may not pull the spot but must fix the spot itself, including, if necessary, covering the

spot's content with the ID tag in order to stay within the purchased ad time. A candidate may be charged the station's normal production rates for the cost of correcting a sponsorship identification.

Censorship of a "Use"

A station may not edit or censor the content of a candidate's "use" message. Even if the ad is of poor quality, contains an outrageous message, is part of a "smear" campaign, or is a "negative ad," it must be run as submitted. Because stations may not edit out defamatory material in a "use," the courts have held that stations are immune from civil liability for statements made in a "use."

Nonetheless, the FCC's staff has indicated that if the content of a "use" violates another federal statute, such as a message that is legally obscene, the station may censor that use. This situation should arise rarely, if ever. The Commission has not made clear what a station may do about spots containing disturbing, indecent, or profane—but not obscene—material. In 1996, a federal appeals court reversed an FCC ruling that would have allowed broadcasters to "channel" political spots containing depictions of aborted fetuses to times in which children are not in the audience.

Refusing to accept a candidate spot based on its content is an invitation to a complaint and an FCC investigation. Therefore, stations should consult counsel before editing or censoring any "use," and before airing disclaimers in connection with such spots.

A station may censor political broadcasts that do not qualify as a "use," including broadcasts by supporters or opponents of legally qualified candidates. Because stations have the power of censorship in these circumstances, they are not immune from liability for libelous or slanderous statements contained in such spots. Thus, stations need to carefully review the content of third-party ads and should request supporting data for any claims made in the spot, especially where the accuracy of the content is being challenged. Where questionable allegations are made in a spot, especially allegations that could be deemed defamatory, the station should decline the spot or contact counsel to determine whether the spot can be aired without creating liability for the station.

Equal Opportunities

When a legally qualified candidate for public office "uses" a station, that use will trigger Equal Opportunities rights, sometimes inexactly referred to as "equal time." Equal Opportunities requires that each opposing candidate be permitted an equal opportunity to either buy time at the same rates paid by the first candidate if the first candidate bought time, or to receive free time if the first candidate received free time. The Equal Opportunities requirement applies whether the candidate is running for federal, state, or local office. Contrary to a common misperception, Equal Opportunities rights do not arise **only** during the pre-election "lowest unit charge" periods (discussed below). They apply **at any time** that a legally qualified candidate "uses" a station.

Time for Making a Demand

Candidates entitled to Equal Opportunities rights must make their demand for airtime within seven days of the prior "use" by the competing candidate. After seven days, the Equal Opportunities right as to that use expires, though subsequent uses may trigger further Equal Opportunities treatment. This "seven-day rule" protects stations from unreasonable demands by candidates hoping to quietly accumulate Equal Opportunities claims over the course of a campaign and then demanding to use all of them in the last few weeks leading up to the election.

Similarly, Equal Opportunities responses cannot be "daisy-chained." Suppose candidates A, B, and C all are legally qualified candidates for the same office. Candidate A broadcasts a use, and B makes a timely Equal Opportunities request in response. C does not make a timely request based on A's use. C may not then demand Equal Opportunities rights seven days after B's responsive use. C must make a demand within seven days of the first prior use to be entitled to Equal Opportunities rights. In this example, the first prior use was A's use.

What Qualifies as "Equal"?

Equal Opportunities treatment does not mean precisely the same amount of time and time period, but rather a "comparable" time and time period. The audience share must be comparable. To avoid controversy, a station should consider providing an audience that is demographically similar to that of the prior use. Also, if a station allows one candidate to use its facilities (e.g., using the station's production studio), the station must do the same for that candidate's opponents, if requested.

Subject of "Use" Irrelevant in Equal Opportunities Context

Candidates appearing pursuant to an Equal Opportunities request may use the airtime as they see fit and are not required to discuss their candidacy. This is an application of the no-censorship provision. An advertisement in which the candidate appears but which does not involve the candidate's campaign, e.g., one for the candidate's car dealership, is still a "use."

Notification to Competing Candidates of a Use Not Required

A station has no obligation to notify opposing candidates when a use has occurred. The onus is on the candidates to monitor stations and to check stations' political files to determine whether a right to Equal Opportunities treatment exists. There is also no duty to notify a candidate about requests for time by an opponent. However, if the station does notify one candidate about an opponent's "use," the station must notify all candidates for that elective position.

Limitations

Remember, the Equal Opportunities provision applies only to uses. If no use has occurred, then there is no right to Equal Opportunities treatment. A common question regarding Equal Opportunities rights is how to handle a candidate's appearance on a station before that candidate has become "legally qualified." If the candidate has not yet completed the steps necessary to become a legally qualified candidate, their appearance does not constitute a use and Equal Opportunities rights are not triggered.

The Demise of the "Zapple Doctrine," or Quasi-Equal Opportunities

Under the "Zapple Doctrine" adopted by the FCC in 1970, if a station sold time during a campaign to supporters of a legally qualified candidate (such as political action committees or spokespersons) urging their candidate's election, discussing campaign issues, or criticizing a competing candidate on the air, the station had to afford comparable time to opposing candidates' supporters or spokespersons where such time was requested.

While the "Zapple Doctrine" operated very much like Equal Opportunities does for candidates, its underpinnings were in the Fairness Doctrine, which was abolished by the FCC in 1987 because of constitutional concerns. After years of uncertainty as to whether the FCC believed the Zapple Doctrine survived the demise of the Fairness Doctrine, the FCC finally answered that question in May of 2014. In a pair of decisions released that month involving Zapple-based license renewal challenges, the Media Bureau ruled that "[g]iven the fact that the Zapple Doctrine was based on an interpretation of the fairness

doctrine, which has no current legal effect, we conclude that the Zapple Doctrine similarly has no current legal effect."

As a result, if a station is approached by a party insisting on being given airtime based upon its Zapple rights, the station should be aware that it is under no obligation to provide such airtime, as the Zapple Doctrine is dead.

Reasonable Access

The Communications Act requires **commercial** stations to provide "legally qualified" candidates for **federal** elective office Reasonable Access to "reasonable amounts of time" to promote their candidacies. A station's license may be revoked for "willful or repeated failure to allow 'reasonable' access or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy."

This right of Reasonable Access applies only to candidates for **federal** elective office. It does not apply to state or local candidates. Reasonable access is a personal privilege that applies only to federal candidates; it does not apply to their spokespersons or any other entities. A station does not have to provide airtime to a political action committee, a political party which is not acting directly on behalf of a candidate, a corporation, union, or to any other non-candidate advertiser—even if their message deals with a federal election.

Thus, while a station may not decline to accept advertising for a federal race, it may pick and choose the state and local elections for which it will accept candidate advertising. For example, it may choose to accept advertising from candidates running for Governor, State Senate, and Mayor, but decline to accept advertising from candidates running for the State House of Representatives or a city council office. Once a station accepts advertising for any candidate in a local or state race, however, it must accept advertising from all candidates in that race.

In order to qualify for Reasonable Access, the legally qualified candidate's request must involve a "use," i.e., the appearance of the identified voice or image of the candidate. The Reasonable Access requirement begins once a candidate becomes legally qualified. It is not limited to the 45 days before a primary or 60 days before a general election, the time period during which the lowest unit charge applies (discussed below).

Charges for Reasonable Access

The Reasonable Access requirement does not require commercial stations to make free time available to federal candidates, but merely to sell airtime to those candidates.

How Much Time Must Be Devoted to "Access"?

Reasonable Access does not give a candidate the right to place ad content during or adjacent to any particular programming. Nor must a station make all of its advertising time available to a candidate, or make so much time available to one or more candidates that the station is forced to preempt an excessive amount of other content.

However, a station should never set limits in advance on how much or what type of time it will make available to **federal** candidates. Each request for access by a federal candidate must be evaluated individually. In responding to a candidate's request for time, a station should weigh the following factors:

1. the individual needs of the candidate, as expressed by the candidate;
2. the amount of time previously provided to the candidate;
3. the potential disruption of regular programming;
4. the number of other candidates likely to invoke Equal Opportunities rights if the broadcaster grants the request; and
5. the timing of the request.

How Much Access Is "Reasonable"?

If a complaint filed with the FCC charges a station with a Reasonable Access violation, the station will have the burden of proving that it gave due consideration to all of these factors. For that reason, the FCC's political advertising staff has warned that stations should not set a blanket policy in advance as to how much Reasonable Access they will allow. A station's Political Disclosure Statement or rate card should not restrict federal candidates to a certain number of spots per daypart or per week. Instead, stations must weigh each request on the merits at the time it is made, and negotiate and discuss with the candidate or their representative the candidate's needs and the station's circumstances. Similarly, a station may not reject a Reasonable Access request (or Equal Opportunities request) because the station is "sold out."

Access to News Programming

Candidates have no right of access to news programming; this is an exception to the general Reasonable Access requirement. Stations may refuse to sell political advertising in all news programming, during some news programs, or during any portion of a specific news program.

News Adjacencies

Stations may establish a separate "news adjacency" class of time, so long as the charge for such spots does not exceed the lowest unit rate for spots run during the newscast. This cap on the price of the "news adjacency" class applies only when (1) the political spots are sold as part of a separate "news adjacency" class in which placement adjacent to the newscast is guaranteed; and (2) candidate advertising is banned from news programming.

Program Length Political Commercials and Non-Standard Length Spots

Requests for non-standard-length spots by federal candidates must be evaluated under the same criteria as all other requests for Reasonable Access. Stations may not flatly refuse to make available non-standard programming lengths or commercial lengths, even if such non-standard lengths have never been programmed on or sold by the station. The rates to be charged for program-length time, if not otherwise sold by the station, may take into account lost revenue, including any diminution of revenue due to lost ratings in immediately following programs.

Weekend Access

Stations that have provided weekend access to any commercial advertiser within the twelve months preceding the pre-election period must provide access to federal candidates the weekend before the election. However, stations need only offer candidates the kinds of weekend services that previously have been made available to commercial advertisers. Thus, if a station has provided weekend access only for deleting copy or canceling spots, as opposed to selling and scheduling new spots, the station is only required to provide the same pre-election weekend services to federal candidates. However, even if a

station has not been open on the weekend in the year prior to the election, the station must still give candidates access to station personnel over the last weekend preceding an election in order to allow candidates to effectively make use of their Equal Opportunities rights.

Ordering Deadlines

Stations may hold candidates to the same ordering deadlines that are applied to commercial advertisers as long as the application of such deadlines does not interfere with a candidate's Reasonable Access or Equal Opportunities rights. When a federal candidate requests access or when any candidate makes a valid Equal Opportunities demand, ordering deadlines and other matters of procedure should be waived as necessary to ensure that Reasonable Access and Equal Opportunities rights are afforded in a timely manner. These obligations are particularly important in the days immediately preceding an election.

Access for Non-Federal Candidates

While a station is not required to provide Reasonable Access to non-federal candidates, it would be unwise to completely ignore state and local elections. The Commission has interpreted a station's broad public interest obligations to include being responsive to the needs and interests of the station's community, which involves providing some coverage of local and state elections. A station whose programming fails to even acknowledge important elections may be accused at renewal time of failing to meet its community's needs. Remember, though, that if a station allows one non-federal candidate a "use," the station must provide Equal Opportunities rights to that candidate's legally qualified opponents for the same office. Furthermore, once access is granted to a state or local candidate, all other political rules, such as lowest unit charge, non-discrimination, and no censorship, apply to all candidate spots for that election.

Note, however, that if a station elects to sell ad time to candidates for a state or local office, the station may restrict such ads to particular dayparts and may place upfront restrictions on how many spots such candidates may buy within that daypart. This is in contrast to federal candidates who must have access to all classes and dayparts offered by a station (except news) and with whom a station must engage in a reasoned discussion of how much time such a candidate may buy. Once a station sells spots to one state or local candidate for a particular office, the station must make available the same opportunities for all candidates for that same office—but races for other state and local offices may be treated differently.

Ballot Issues

Under current law, a station is not required to accept any demand for airtime to promote competing sides of ballot issues. If a station does accept advertising regarding ballot issues, lowest unit charge does not apply, and a station can choose to accept advertising from supporters of only one side of an issue. Also be aware that the protection against defamation suits afforded stations in connection with the broadcast of candidate "uses" does not apply to non-candidate spots, such as ballot issue advertising, so stations should pre-screen all issue advertising to ensure airing such spots will not expose them to defamation liability.

Rates

Charges to Candidates

Legally qualified candidates are always entitled to ad rates comparable to what other advertisers pay so long as the "use" to be aired is in connection with their campaign. Candidates placing ads outside of the "LUC Window" (see below) are entitled to receive volume discounts on the same basis as commercial advertisers purchasing the same amount of advertising. A station may never discriminate against a candidate or charge him or her more than what the station would charge any other advertiser for any of the

station's services, including airtime. Services the station makes available to commercial advertisers must be made available to candidates on the same terms.

Lowest Unit Charge

For "uses" broadcast within the 45 days before a primary or primary runoff election or within the 60 days before a general election (the "LUC Window"), a station may charge candidates no more than its "lowest unit charge" for the same class (rate category) of advertisement, the same length of spot, and the same time period (daypart or program). "Lowest unit charge" is also often referred to as "lowest unit rate." If a station sells spots on election day, those spots must also be sold at the lowest unit rate.

During the LUC Window, a station may charge a candidate no more than it charges its most favored advertiser for a spot that is of the same class, length, and time period. If the station's lowest unit charge is commissionable to an agency, the station must sell to candidates who buy direct at a rate equal to what the station would net from the agency buy.

Within the LUC Window, candidates must also receive the benefit of any volume discounts a station has provided to its other advertisers even if the candidate purchases only one spot. Thus, if a station charges its most-favored advertiser $20 for a single one-minute spot or $150 for 10 of those spots ($15 per spot), the station may charge a candidate only $15 for such a spot even if the candidate buys just one spot. In this example, $15 would be the lowest unit charge for that particular type of spot.

In general, any station practice that enhances the value of advertising spots must be disclosed to candidates, and must be made available to them. These include, but are not limited to, discount privileges that affect the value of the advertising such as bonus spots, time-sensitive make goods, preemption priorities, and other factors that enhance the value of the advertisement. Under the FCC's rules, if a station has provided any commercial advertiser with even a single time-sensitive make good for the same class of spot during the preceding year, the station must be ready to provide time-sensitive make goods for all federal, state, and local candidates purchasing that type of spot.

Who Is Entitled to the Lowest Unit Charge?

Only "uses" by legally qualified candidates for public office (federal, state or local) are entitled to the lowest unit charge. Candidates must appear personally in the spot by voice or image, and the appearance must be in connection with their campaign. If the owner of the general store runs for sheriff, that person is not entitled to the lowest unit charge for spots promoting the store's weekly specials. However, a candidate's appearance in a business advertisement would trigger Equal Opportunities rights for opposing candidates, and, if within the LUC Window, require the lowest unit charge for the opponent requesting Equal Opportunities treatment. Outside the LUC Window, a candidate making a valid Equal Opportunities claim in response to a competitor's spots will be entitled to the same rate the competitor paid.

Only candidates and their authorized campaign committees are entitled to the lowest unit rate. In recent years, political parties have sought to skirt federal campaign finance restrictions through "soft money" advertisements—i.e., spots which depict and support a specific candidate, but which are purchased by the party rather than by the candidate or the candidate's authorized committee. Many of these types of advertisements are "independent expenditures" under FEC Rules. The FCC staff has stated that such spots are entitled to the lowest unit rate only if they are authorized by a federal candidate. As a practical matter, however, such advertisements will rarely, if ever, be authorized by a federal candidate. Such authorization would result in the advertisement losing its "independent expenditure" status under FEC Rules. Corporations and unions purchasing independent ads to support or oppose a candidate are NOT entitled to the lowest unit charge.

Federal Candidate Certifications

As discussed below in connection with the various requirements of BCRA, in order to qualify for the lowest unit charge, **federal** candidates must provide stations with a "stand by your ad" certificate certified by the candidate or the candidate's authorized committee. This certification must state that the candidate will not make any direct reference to an opposing candidate in the advertising unless, in the case of television, there is a clearly identifiable image of the candidate at the end of the spot, and a clearly readable printed statement that the spot was authorized by the candidate and paid for by the candidate or the candidate's authorized committee. In the case of radio, the voice of the candidate identifying himself or herself must be reasonably identifiable, identify the office sought, and make the statement that the candidate approved the spot. A federal candidate who does not provide the station with such a certification is not entitled to the lowest unit charge for the remainder of that LUC Window.

Why Is an Understanding of "Length," and "Period," and "Class" Important?

During the LUC Window, a station may charge a legally qualified candidate no more than the lowest rate charged any other advertiser—commercial or candidate—for the same **length** of spot, the same time **period** in which it is airing, and the same **class** (rate category) of advertisement. These three categories—length, period, and class—must be well understood to permit a determination of whether a candidate has been given the lowest unit rate for a spot. In fact, two spots that run adjacent to each other in the same program break may have entirely different lowest unit rates because they differ in length, period, or class.

What Is the "Length of Spot"?

"Length of Spot" refers to the time occupied by the spot, such as a 60 second, 30 second, 15 second, or 10 second spot. It also refers to non-traditional spot lengths, including program-length commercials. In determining a station's lowest unit rate for a spot, only spots of the same length as the candidate ad being purchased are considered. The rate for a 30 second spot is irrelevant to the lowest unit rate calculation for a candidate's 60 second spot. This is true even where a station bases all of its rates off of the rate for a particular spot length, such as a 30 second spot (e.g., a 15 second spot is 60% of the rate of a 30 second spot, a 60 second spot is 190% of the rate of a 30 second spot, etc.).

What Is the "Period"?

"Period" refers to the time period in which the spot is placed. Depending on how a spot was sold, it can refer to a particular spot break or placement within any break in a particular program. It could also refer to placement within a specific daypart, such as "drive time" or from 9:00 a.m. to 11:00 a.m. The key is once again to compare time periods on an apples-to-apples basis. If a station assigns two spots to run next to each other, one a fixed position 30 second spot guaranteed to run in the second break in the program that runs from 8:00 p.m. to 9:00 p.m. on Wednesday night, the other running as a rotator that is permitted to air any time between 7:00 p.m. and 11:00 p.m. on weekdays and subject to preemption, the spots are of different classes and have different lowest unit rates.

What is a "Class of Time"?

"Class" refers to rate categories such as fixed position non-preemptible, preemptible, highly preemptible, and run-of-schedule ("ROS"). A station's lowest unit charge for fixed position non-preemptible spots will typically be higher than the lowest unit charge for preemptible spots (since fixed spots are guaranteed to air), even if both spots are of the same length and end up airing during the same time period.

Preemptible Spots as Distinct Classes

At one time, the FCC held that all preemptible spots must be treated as a single class (assuming they are of equal length and daypart). This meant that a candidate who had paid more for a preemptible spot that had a better chance of airing was entitled to a rebate if any lower-priced preemptible spot aired in the same time period. This remains the case for stations that sell preemptible time solely by the “auction” method (i.e., where any advertiser can preempt another by paying a higher rate). Since all “auction” spots of a particular length and daypart are distinguished only by price, they are considered by the FCC to be in the same class, and a rebate must be issued to the advertiser whenever a lower-priced preemptible spot airs in the same time period as the advertiser’s spot.

Stations that do not sell ad time on an “auction” basis, however, are allowed by the FCC to treat each meaningfully different level of preemptibility as a distinct class of time. In such a case, all classes of preemptible time must be disclosed and made available to candidates. Candidates must also be told the likelihood of each class airing. Station sales personnel may not claim that a class of preemptible time is highly unlikely to air when experience indicates otherwise.

Defining Classes of Time

Stations have broad discretion in designating different classes of time for lowest unit charge purposes. Nevertheless, those classes must be distinguished on the basis of real differences, rather than simply on price or the identity of the advertiser. For example, a station may not create a special, premium-priced class of time that is sold only to candidates. A distinct class will be recognized only when a higher ad rate buys some demonstrable benefit, such as a lower risk of preemption or more favorable make-good privileges. Stations with enough spot volume to define separate levels of preemptibility may find it worthwhile to do so to help reduce the need to issue rebates. If the station sells spots at different rates within a single class of preemptible time, candidates will be entitled to a rebate only if a preemptible spot **of the same class** airs in the same time period at a lower rate than the candidate paid. In contrast, a station airing spots via the “auction” method must issue a rebate to the candidate if *any* preemptible spot clears during the same time period at a lower rate.

Utilizing multiple classes of preemptible time will work only when the station scrupulously adheres to the requirements for each class of time. Candidates are allowed to challenge the *bona fides* of a station’s class structure by filing a complaint with the FCC. The criteria the FCC uses to determine whether the class distinctions are reasonable include, but are not limited to: (a) whether the same classes are used year-round or just during campaign season; (b) whether the station has applied the criteria to all advertisers consistently and fairly; (c) whether the station has adequately disclosed and explained the various classes to candidates; and (d) whether the candidate received the appropriate lowest unit charge for the class of time purchased.

Special Candidate-Only Class of Time

While establishing multiple classes of preemptible time can help reduce the size and number of candidate rebates, it can be complex for smaller stations to track and implement such a system. Some stations seek to eliminate the complexities and rebates created by having numerous classes of preemptible time by establishing a special candidate-only class of non-preemptible time. This may be done only if the special class is sold below the prevailing rate for preemptible time. Of course, even if a station adopts a candidate-only class of non-preemptible time, it may not refuse to sell other classes of time to candidates. It must still disclose and sell all commercially available classes of time to candidates.

Sold Out Time

When a station sells advertising strictly on an "auction" basis, in which one advertiser may preempt another simply by paying a higher price, the station can never be "sold out." It would be a violation of the FCC's political time rules in such cases to tell candidates that preemptible time is sold out and that only fixed time is available. As discussed above, the difficulty stations face in this situation is that they must sell the candidate the spot at the prevailing "auction" rate—giving the candidate the best shot at clearing—and then rebate the difference between the rate paid and the lowest-priced preemptible spot that actually cleared during the same daypart.

This burden is lessened when a station sells spots with different levels of preemptibility. When more than one level of preemptibility is offered, candidates choose their rates based on the level of preemption protection desired. In this scenario, a station can be "sold out" of certain classes of preemptible time; if so many spots have been sold in Preemptible Class 2 that no spots in Preemptible Class 1 will air, then Class 1 is "sold out." If a candidate wants a chance of their spot airing, they must buy the more expensive Class 2. The FCC has, however, repeatedly stressed that a station may not steer a candidate to higher-priced fixed time by claiming that preemptible time is "sold out" if a commercial advertiser in that same situation would be given the chance to pay a slightly increased preemptible rate in order for their spot to air.

Other Rate Issues

National and Local Rates

"National" and "local" rates are not different classes of time for lowest unit charge purposes. Thus, if a station's card rates (or its actual rates) are different for national and local buys, qualified candidates are entitled to the lowest rate regardless of whether the buy is made nationally or locally. A station may not charge "national" rates to candidates for national offices if local rates would yield a lower lowest unit charge.

Package Deals

A station may not treat package deals as separate classes of time for lowest unit charge purposes. **Instead, stations must assign a rate to each spot within a given package.** These rates are then compared to other rates for the classes of spots contained in the package to determine if the rates, as allocated, affect the lowest unit rate for each class of time. Thus, package plans that include multiple dayparts can end up setting the lowest unit rate for candidate purchases of individual dayparts.

However, the prices listed on ad contracts need not control the lowest unit rate. Stations are free to allocate the individual rates in packages in any reasonable way on "internal" documentation, so long as the total cost of the spots does not exceed the total package price. Some price must be assigned to each spot, including bonus spots.

If a station decides to allocate the rates differently from the contract for lowest unit rate purposes, **it must document the allocation at the time the package is sold.** The allocation can be noted on the face of the contract or invoice or in a separate internal document that is prepared contemporaneously with the contract. The internal document need not be placed in the political file, nor must it be provided to the advertiser, but it must be signed and dated by a station representative and made available to the FCC upon request. The document will also be subject to discovery if a complaint is filed. The rate recorded on the internal documentation is the rate that controls for lowest unit rate purposes.

Package Spot Prices May Vary Over Time

One of the variables stations may use in their internal package plan allocations is time, meaning the week, month, or even season in which the spot runs. **Long-term contracts can be written up and billed to provide even cash flow throughout their terms, while internal documentation can assign higher values to spots that run during weeks or months of higher audience or demand, provided that the assigned values are reasonable and justified by outside factors and are not merely an attempt to raise rates during political periods.** Particularly in situations in which periods of higher audience or demand coincide with the pre-election period, it is important for stations to anticipate such changes when long-term contracts are sold, to allocate the prices accordingly, and to document their rates when the contract is entered into and not later. This procedure can help stations avoid being forced to sell political advertising in September at what is effectively the lowest unit rate for January.

Treatment of package plans requires extreme care in the way custom packages are sold and scheduled. Unrealistically low rates in less desirable dayparts or programs that are sold as part of a package to secure price integrity in dayparts or programs of higher demand, or to dress up and close deals, can set the lowest unit charge for that daypart. Similarly, discounted prime time spots that are tied to purchases of higher-priced spots in less desirable dayparts can set a station's lowest unit charge for prime time purchases by candidates. For spot packages containing different classes of spots that are sold at a flat package rate, a station must make an allocation of the package cost among the spots included. Otherwise, the Commission might determine the station's lowest unit charge by simply dividing the number of spots into the total cost, with no consideration given to the relative values of different classes or time periods.

Because of this policy, **sales contracts must be written with extreme care to avoid unrealistically low rates in each daypart**, particularly in time periods of lower demand or broad rotations, where bargain-priced spots are often placed. Stations should take care to place realistic prices on all spots sold in a package. Stations may wish to put any unrealistically low units that are tied to higher priced spots exclusively in the class with the lowest level of preemption protection, or in classes with the broadest flexibility as to spot placement.

IMPORTANT NOTICE: If a station has any long-term package contracts currently on the books, the station should immediately review those contracts to determine the values of the spots within the packages and their impact on the station's lowest unit rate. If the prices listed on the face of the contracts do not reflect the real value of the spots, or if no allocation at all is set out among different classes of spots within the package, please contact counsel to discuss the allocation of the package spot values.

Non-cash merchandising and promotional incentives need not be offered to candidates if (1) they are of minimal value (coffee mugs, tee shirts, etc.) or (2) if they may reasonably imply some relationship between the candidate and the advertiser (such as joint bumper stickers). Any other non-cash promotional incentives must be made available to candidate advertisers on the same basis as they are offered to commercial advertisers.

On-air billboard liners and program sponsorship liners need not be offered to candidates. Billboards less than ten seconds in length are recognized as being too short to permit the required sponsorship identification, and program sponsorships imply a relationship between the station and the candidate. Such on-air identifications ("mentions" or "liners") of commercial advertisers need not be included in lowest unit rate calculations.

Public Service Announcements ("PSAs")

Stations that give or sell PSAs at discounted prices to nonprofit entities in connection with the purchase of normal advertising need not give or sell PSAs to candidates, and such free or discounted PSAs may be excluded from the lowest unit charge calculation. However, paid PSAs purchased by commercial advertisers must be treated as "bonus" spots in making lowest unit charge calculations. As with package plans, a station may allocate the price of commercial schedules that include PSAs using the same procedure used for package plans. PSAs which are not associated with a commercial contract do not affect lowest unit charge.

Trade-outs, per inquiry, noncommercial sustaining announcements ("NCSA") or PEP announcements, and network spots do not affect a station's lowest unit charge.

Rebates

Stations must conduct periodic audits to determine whether rebates are due and must make every effort to provide rebates before the election. Rebates must be made more expeditiously as the election approaches.

Use of Production Facilities

Lowest unit charge applies only to the sale of broadcast time. If a candidate also wishes to use production facilities, they may be charged normal commercial advertiser rates for doing so.

Changing Rates During the Pre-Election Period

Stations may increase their lowest unit charges during the pre-election period as a part of a general rate increase when justified by seasonality or improved ratings. If the ratings for a program improve, ad rates in that show, including the lowest unit charge, may increase. Candidates buying spots to run before the rate increase get the rate in effect at the time of purchase, and those purchasing time to run after the increase pay the higher rate. If spots sold to run before the rate increase clear after the rate increase, they will continue to set the lowest unit charge for programs in which they clear.

A station's lowest unit rates may change during the political window if the station is selling on a demand or "auction" basis, if the station takes into account ratings changes in its prices, or when a pre-existing contract which established the lowest unit charge expires during the window. It is important to remember that the price is set by when a spot runs, not necessarily when it was sold. This means that the lowest unit charge for spots to be run in a particular week is set by the lowest price paid by an advertiser for a spot of that same class run during that week, even if the purchase of new spots by an advertiser at the time the spot runs would be at a higher price.

Obviously, a station may reduce its rates during the pre-election period, too. However, a candidate who has purchased a long-term contract at the higher rate will be entitled to a rate adjustment for any spots run after the rate decrease. If a station anticipates that a rate increase will occur during the pre-election period, it is not required to lock the station into a pre-increase lowest unit charge by selling a long-term contract to a candidate with a rate fixed at the pre-increase rate. Instead, the contract may indicate that the rate charged will not exceed the lowest unit charge on the date being contracted for. Of course, if a station sells a long-term contract to a commercial client that would effectively establish the lowest unit charge through all or part of the pre-election period, the station must sell a similar contract to a candidate who requests it.

Rate Changes and Equal Opportunities

The Equal Opportunities provision of the Communications Act causes some unique lowest unit charge problems. The Equal Opportunities provision requires that all candidates for the same office be treated similarly. Assume that Candidate A buys time that is scheduled to run before the pre-election period. He is entitled only to the "comparable use" rate, not the lowest unit charge. Candidate B makes a timely Equal Opportunities request within seven days, and her spots will run in the pre-election period to which the lowest unit charge provisions apply. Though the Commission's rules prohibit discrimination between candidates, B will pay the lowest unit charge, even if it is less than what A paid. The difference is caused by law, not by the station's discrimination.

On the other hand, if rates increase between a use by Candidate A and the time Candidate B makes an Equal Opportunities request, B will be entitled to the same, pre-increase rate paid by A. In this case, Candidate B's spots, run at the pre-increase rate, do not set the lowest unit charge after the increase. The interplay of Equal Opportunities and lowest unit charge is complicated. For specific situations, consult legal counsel.

Lowest Unit Charge Traps

A few quirks of the convoluted lowest unit charge system have locked many broadcasters into lowest unit charge levels they would rather have done without. Four of the most common traps are: (1) failing to account for agency commissions; (2) giving bonus spots or selling excessively discounted spots during the pre-election period; (3) running low-priced "make goods" during the pre-election period; and (4) circulating outdated rate cards.

Agency Commissions on Political Buys

Except for spots sold by a station's rep firm, the lowest unit charge is based on the net to the station. Commissions paid to the station's rep firm will not be netted out of the spot price, as the rep is considered a station employee or agent, while an ad agency is the representative of the spot buyers. Assume that the commissionable lowest unit charge for a drive time news adjacency is $100. A recognized agency books a news adjacency on behalf of a legally qualified candidate who is entitled to the lowest unit charge. The station bills the agency $100, of which the station nets $85. The station's new lowest unit charge for drive time news adjacencies is $85, at least for candidates who wish to make a "direct" buy. To avoid this problem, stations should recognize that the net to the station sets the lowest unit charge, even for non-agency buys.

Bonus or "No Charge" Spots and Discounted Spots

Stations should be careful about giving bonus spots, "no charge" spots or selling excessively discounted spots as part of a package during the pre-election periods. Such practices can reduce a station's lowest unit charge. The FCC does not believe any spot is truly "no charge," and treats it as a discount to all spots in a package sale. For example, if an advertiser receives one free run-of-schedule ("ROS") spot for every nine drive-time spots purchased, the lowest unit charge will be the total paid for the package divided by ten, rather than nine. If the drive time spots in this example were $10 each, the advertiser would get 10 spots for $90. Thus, the lowest unit charge would be $9 for single spot purchases. To avoid this, every spot in a package should be given a value, at least on an internal memo, as discussed earlier in this Advisory. If the ROS spot were priced at $2, the price for the drive time spots in the package would be $88 divided by 9 spots, or $9.88, for the purpose of computing the station's lowest unit charge on the drive-time spots.

Excessively discounted spots can cause the same problem. Stations often write contracts to show unrealistically low rates for some dayparts or programs in a package to induce clients to purchase spots in more expensive programs or dayparts. Formerly, a station could require a candidate to buy all parts of a package to get the package rates. Now, candidates may "cherry-pick" only the parts of the package they want, so it is essential to make realistic allocations of spot values in all packages sold, either on the face of the contract, or in an internal station allocation of the package plan purchase price made at the time that the package arrangement is entered into.

Make Goods

Make goods that run in the pre-election periods can set the floor for a station's lowest unit charge. For example, assume a television station has raised its rates during the pre-election period because of the increased fall viewing. If a lower-priced spot that was preempted before the pre-election period is made good during the LUC Window, the price paid for that spot can set the lowest unit charge for that class of spot. Stations can avoid this trap by running all make goods that sold at rates below the current lowest unit charge before the LUC Window begins.

Make goods can also obligate a station to run free spots under certain circumstances. This situation arises out of a station's Equal Opportunities obligation and is unrelated to lowest unit charge. If a station runs a candidate's spot in the wrong time slot and runs a "free" make good, a competing candidate who makes a timely demand for Equal Opportunities treatment would be entitled to a comparable free spot. However, if the make good is run because of a technical failure of the paid spot, so that the paid spot is substantially interrupted or unintelligible, this type of make good would not create a windfall for the competing candidate, as the competing candidate would not be entitled to a free spot.

Outdated Rate Card

Candidates pay the lower of the station's actual lowest unit charge or the price specified on its published rate card. If a station's published rate card shows rates that are lower than those actually being offered by the station, the station should withdraw or update the rate card. If the station must distribute a rate card that shows more than one "grid," it should make sure that cards distributed immediately prior to and during the period leading up to the election clearly indicate what grid is current. A station may not implement a blanket rate increase or move to a higher grid prior to or during the pre-election period to circumvent the lowest unit charge provisions. However, a station may raise rates as part of normal business practice if justified by seasonality or changes in ratings.

Disclosure Statements

The Commission has made full disclosure of rates and sales practices to candidates an important element of regulatory compliance. Stations must disclose to candidates all classes of time, discount rates, and privileges given to commercial advertisers that affect the value of spots. The Political Advertising Disclosure Statement ("Disclosure Statement") must include, at a minimum: (1) a description of each class of time available to commercial advertisers sufficient to allow candidates to understand and differentiate between the classes; (2) complete disclosure of the lowest unit charges for each class and time period; (3) a description of the station's method of selling time, (e.g., grid, demand-driven "current selling levels," auctions, fluctuating levels, etc.); (4) an approximation of preemption likelihood for each class of preemptible time sold; (5) sales practices that affect rates (including audience delivery arrangements and preemption priorities); (6) the station's make-good policies; (7) discount and value-added privileges; (8) the availability of packages; and (9) rotations.

Individually negotiated packages need not be separately disclosed, since those rates must now be used to calculate the lowest unit charge. Stations may provide information in outline format. All rotations need not be disclosed if it is clear that other rotations are available on request.

These disclosure obligations require that stations adopt comprehensive political advertising policy statements. While the FCC's rules do not explicitly require that such statements be in writing, prudence dictates that they be written to ensure that all necessary disclosures are made to all candidates. Candidates must be informed of all available rates and all sales practices affecting rates, even those occurring outside of the LUC Window. The only way to assure that consistent, accurate, and complete disclosure is made to every candidate is to carefully craft a written Disclosure Statement and to have a practice of routinely making it available to candidates and their agents. Candidates have the right to be fully informed of the rates and sales practices of a station.

Stations should attach their current political rate card to the Disclosure Statement. For stations with many different classes of spots, it may be impractical to list the lowest unit rate of every alternative. In such cases, all major categories should be listed and a footnote included indicating that other alternatives are available and that the candidate or the candidate's representatives should inquire as to such alternatives. It is vital that the listing include a broad variety of options so candidates cannot later argue that the station attempted to steer them into buying fixed position, non-preemptible time or other more expensive categories of advertising.

In cases where rates may fluctuate rapidly for certain classes of time (such as when supply and demand vary rapidly), stations must provide their best, good-faith estimates of the lowest unit charges for such classes at the time of disclosure. By implication, those rates need not be guaranteed.

Confirmation of full disclosure should be documented and signed by station personnel **each time** the station receives an inquiry regarding political advertising and the Disclosure Statement is sent out. Once full disclosure is made to a regular time buyer, such as an agency, that buyer need only be given updated information for subsequent orders.

Rep Firms

Each licensee is responsible for making full disclosure to all candidates inquiring about time purchases. Thus, it is the station's responsibility to educate its rep firm about its political policies and rates and to provide the rep firm with adequate numbers of copies of its current Disclosure Statement. Stations should immediately notify rep firms of any changes in rates, policies, classes, availability, etc., when political sales are being made. If a station provides an outdated rate card to a candidate's representative, the station will be bound even if the station's current rates are higher than those shown on the rate card distributed by the rep firm. A station should maintain detailed records of the station's efforts to keep the rep up to date. Similarly, stations must obtain from their rep firms information about requests for political time and must place that information in their political file.

Sponsorship Identification

When a station broadcasts a political advertisement, the station must be sure that it contains a proper sponsorship identification. That identification must indicate: (1) that the announcement is "paid for" or "sponsored by" a particular candidate or organization; and (2) the name of the candidate or organization that paid for the time. Nothing less than the language "paid for" or "sponsored by" will do, and the name of the paying entity must be specifically identified. The public must be informed that the sponsor is a specific person or entity. For example, the tag: "Paid for by people who want Jim Bob elected Dog Catcher" is insufficient.

Moreover, the person or entity being identified as the sponsor in a candidate or issue advertisement must be the one that is truly purchasing the ad time. The FCC has ruled that an issue advocacy spot identifying the "Fairness Matters to Oregonians Committee" as the sponsor did not identify the "true sponsor" where the facts showed that the "Fairness to Oregonians Committee" was merely a front for the Tobacco Institute. This case is significant because it stands for the proposition that, in certain circumstances, a station may be required to look behind the named sponsor and identify the party with true financial and editorial control over the message.

This does not mean that broadcasters must be private investigators; they need only exercise "reasonable diligence" to obtain the information necessary to assure that a proper sponsorship identification is made. Nonetheless, the FCC held in the Oregon case that where a challenger "makes so strong a circumstantial case that someone other than the named sponsor is the real sponsor," reasonable diligence requires that the broadcaster inform the named sponsor that the true sponsor must be identified. In that case, the challenger presented facts showing that essentially all of the "Fairness Matters to Oregonians Committee's" funding was provided by the Tobacco Institute, and that editorial control of the Committee's campaign rested with a tobacco company that was the Tobacco Institute's single largest contributor. A rebuttable presumption that should be employed is this: the name of the sponsor should be the same person or entity whose name is on the payment check. If the sponsorship of an issue ad is challenged, treat the matter as a high priority and consult with counsel to determine whether the sponsorship identification should be altered.

For television spots, visual identification in letters equal to four percent of the picture height must be broadcast for at least four seconds. Aural identification is optional for television spots. There is no specific length requirement for radio. Sponsorship identification announcements must be made at both the beginning and the end of political material that runs five or more minutes.

Stand By Your Ad Requirements

BCRA requires that federal candidates be identified in their campaign spots and state that the spots have been authorized or approved by the candidate. As discussed above, where a federal candidate fails to provide the station with a certification to this effect, BCRA provides that the candidate will **not** qualify to receive the lowest unit charge for the remainder of the LUC Window. For television, these statements can be made through:

1. A full-screen view of the candidate identifying themselves and stating that they approved the ad, or

2. A candidate voice-over in which the candidate identifies themselves and states that they approved the ad, accompanied by a clearly identifiable "photographic or similar" image of the candidate. FEC rules indicate that a picture is "clearly identifiable" if it occupies at least 80% of the vertical screen height.

Television spots must also contain, at the end, a clearly readable **written** "disclaimer" stating that the candidate approved the ad and that the candidate's authorized committee paid for the ad. The statement must be broadcast for at least four seconds and occupy at least four percent of vertical picture height. The disclaimer must have a reasonable degree of color contrast between the text and the background so that it is "clearly readable."

For radio spots, this requirement is met by an audio statement by the candidate identifying themselves and the office being sought, and stating that they approve of the broadcast.

Third-Party Spots

BCRA also imposes identification requirements on third-party spots. Third-party spots that advocate the election or defeat of federal candidates, or which solicit campaign contributions, must contain the following:

1. A statement that the spot is not authorized by any federal candidate, and
2. A statement identifying who paid for the broadcast, any organization connected to the payor, and a permanent street address.

For television, such statement must be made in an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such committee in a voice-over, together with the text of the information in a clearly readable format for at least four seconds and occupying at least four percent of the screen height.

FCC Enforcement of BCRA Requirements

The FCC takes the position that the responsibility to enforce BCRA rests with the FEC, not the FCC. Accordingly, it is not clear that stations have any independent duty to ensure that a candidate, a candidate's committee, or a third party has complied with the requirements of BCRA.

However, as to federal candidate advertising, particularly where a candidate's opponent is mentioned, we do advise stations to monitor ads to determine if the BCRA identifications are contained in the ads. A station giving lowest unit rates to a federal candidate who has not observed the BCRA identification requirements may, at a minimum, be subject to a complaint from an opposing candidate who did observe those requirements and who asserts that the station improperly granted lowest unit rates to their opponent. This is a question that remains unresolved. Furthermore, if the station does discover a BCRA-related problem with an ad, most candidates would appreciate being informed of the issue.

In *Citizens United*, the Supreme Court struck down the BCRA prohibition against corporations and unions independently purchasing advertising time to support or oppose the candidacy of federal candidates. If a corporation or union pays to air a spot that contains the positive appearance of a legally qualified candidate whose voice or image is identified or readily identifiable, then the spot is a "use" for purposes of triggering Equal Opportunities treatment, even if it is not controlled or otherwise authorized by the candidate or the candidate's campaign committee. Such a "use," however, does not qualify for lowest unit charge, and a third-party requesting Equal Opportunities rights in response to such a use is only entitled to purchase airtime at the same prices as the entity placing the ad.

Material Provided by Candidate

If a candidate or their supporting organization provides the station with scripts, copy, tape, film, or other material, but not payment, as an inducement to broadcast the material, the station must indicate that the material was "provided" or "supplied" by the candidate or organization if and when the station uses it. The Commission has ruled that, with respect to the use of candidate-supplied material in *bona fide* newscasts, it will apply the rule only to audio or video supplied by the candidate or the candidate's committee.

Ordering Deadlines, Prepayment, and Credit

Stations may not discriminate against candidates in the extension of credit. However, if the station's credit policy is such that it does not extend credit to transient organizations with no established credit history, it may demand payment in advance of the start of the candidate's ad schedule. Federal candidates may not be required to pay more than seven days in advance of a flight's start date regardless of credit history.

This does not mean that a station can demand across the board that no political advertising be sold to run with less than a week's notice. Generally, ordering and production deadlines for candidate advertising must correspond to the deadlines applied to commercial advertisers. Genuine requests by candidates for Reasonable Access or Equal Opportunities rights should be accommodated without regard to normal ordering or prepayment deadlines.

Recordkeeping

Candidate Ad Recordkeeping

All broadcast stations must keep in their political file records of all requests for paid and free time made by or on behalf of political candidates, along with a notation indicating whether or not the station granted the request. The file should indicate what, if anything, was actually broadcast and what rates were charged. The file should also indicate when the spots contracted for actually ran. This can usually be done by keeping "actual times" as a station would for an agency or co-op buy. Gifts of time must also be indicated. A "use" by a candidate (even one that is inadvertent or otherwise occurs outside of the sales process) should also be noted in the files. **Under normal circumstances, the FCC expects stations to update political files with new information immediately.** Files must be updated to reflect the dates and amounts of any rebates to candidates as well as the contract to which the rebate applies. Oral agreements for sales of time must be memorialized in the political file.

While stations need not update exact times of political spots immediately, they must provide some method for opposing candidates to ascertain the exact time an opponent's spot aired. If a station does not update its political file immediately to indicate exact times, then the file should contain a notation that the station will provide the actual airtimes upon request.

If a station retains scripts or recordings of political broadcasts or other candidate "uses," **such scripts or recordings should not be placed in the political file or provided to competing candidates.**

We recommend that a station maintain a separate file folder in their online political file for each political candidate, commencing when the candidate or their representative inquires about airtime.

Each file should contain:

1. for each order, a completed NAB-type political advertising request form (which should include the disposition of the request, as well as the name of the Treasurer of the candidate's authorized committee);

2. a copy of the contract for each order;

3. a copy of the invoice (showing the dates and times of airings) for each order, as soon as it is issued; and

4. any information concerning rebates made to the candidate.

These documents should contain the information required by the FCC's political file rules for each candidate purchase.

Sponsoring Organizations

The FCC's sponsorship identification rule requires stations to keep records in their public inspection files of the names of all of the chief executive officers or members of the executive committee or board of directors, as applicable, of any entity seeking to purchase political advertising time or that sponsors or provides material used in any program involving a political matter or matter involving the discussion of a controversial issue of public importance. Stations may find it challenging to identify all such individuals, but if a station has a "reasonable basis" to believe the sponsoring organization or third-party buyer of advertising time acting on the organization's behalf has provided incomplete information (such as when the name of only one officer has been provided), the station will be deemed to have satisfied its disclosure obligation by making a single inquiry to the sponsoring organization or third-party buyer as to whether the sponsoring organization has any additional officers or members of its executive committee or board of directors. Stations should maintain contemporaneous documentation of such inquiries in order to respond to any questions that may later arise regarding the completeness of their disclosures.

The FCC's rules also require stations to *properly* identify an ad's sponsoring organization. As noted in a 2019 FCC Order, disclosure of the sponsoring organization's acronym in place of its full name is insufficient if the acronym is broadly unfamiliar to the general public. Stations are therefore advised to disclose the full name of each sponsoring organization rather than to assume widespread familiarity with sponsors' acronyms or nicknames.

Third Party Ad Recordkeeping

BCRA has also established station political file requirements for third-party ad time requests for ads that communicate a message relating to "any political matter of national importance." Content that must be disclosed under this standard includes: (a) all legally qualified federal candidates (and the offices to which they are seeking election); (b) any election to federal office; and (c) national legislative issues of public importance, including issues raised in legislation that is pending before Congress in any bill or proposed legislation at the time the request for air time is made. The FCC has clarified that this is not an exhaustive list; therefore, any ad that communicates a message relating to "any political matter of national importance" will trigger disclosure obligations regardless of whether it falls into any of these three named categories, making it particularly challenging for broadcasters to ensure their disclosures will be deemed complete by the FCC if challenged.

To determine whether an issue ad triggers disclosure obligations as a "political matter of national importance," the FCC will consider the context surrounding an ad's message and whether the message sufficiently relates to the such a political matter. For example, the FCC determined that an advertisement for power-operated wheelchairs that briefly mentioned that the vehicle's cost was covered by Medicare *did not* communicate a political matter of national importance even though Medicare legislation was pending at the time the ad aired. The FCC reasoned that while Medicare itself may be a "national legislative issue of public importance," the ad only mentioned Medicare peripherally to help sell a commercial product. In contrast, the FCC determined in a different context that Medicare should have been disclosed as a political matter of national importance (even though there was *no legislation pending* at the time) where the ad claimed that a candidate running for federal office supported "a plan that would end Medicare as we know it." There, the FCC reasoned that the issue triggered disclosure obligations because the ad referenced the possible introduction of legislation that would alter an existing law of national significance subject to ongoing debate. We recommend that stations promptly contact FCC counsel if questions arise concerning whether a particular issue ad triggers disclosure obligations.

Where an advertisement includes a combination of matters that trigger disclosure, a station must be sure to disclose *all* matters in its political file. For example, a station that airs a message that relates to multiple

legally qualified candidates and multiple national legislative issues must disclose *each* candidate and *each* national legislative issue referenced in the ad.

The FCC's political file requirements for federal issue advertising essentially mirror those applicable to candidate advertising. With respect to such federal issue advertising, the following information must be uploaded to the station's political file:

1. A statement that a request to purchase time was made and as to whether the request to purchase time was accepted or rejected;

2. The rates charged for the broadcast;

3. The dates and times the ads aired;

4. The class of time purchased (e.g., fixed, preemptible with notice, etc.);

5. The names of the candidates to which the spot refers, along with the offices the candidates seek and in what election (e.g., primary or general election); as well as identification of the issues involved;

6. The complete name of the person or entity buying the time, with the name, address and telephone number of a contact person for such person or entity; and

7. A list of all of the chief executive officers or members of the executive committee or Board of Directors, as applicable, of the entity buying the airtime.

In the case of issue advertising where the station can confirm that the advertisement does NOT contain a reference to a political matter of national importance (i.e., a third-party ad that only references candidates for local office or political matters of only local significance), the station is not required to upload the price and schedule information discussed above to its political file. The station still must upload to the political file the complete name of the entity purchasing the ad time, the name, address, and telephone number of a contact person, and a list of all chief executive officers or members of the executive committee or Board of Directors, as applicable.

Inspection and Downloading

Political file material may be inspected, downloaded and copied like any other part of the online Public Inspection File. As long as the Public Inspection File is kept up to date, the public has the required access to inspect and download political file materials. Any portion of a station's political file still located in its local Public Inspection File must be available for inspection by members of the public during normal business hours, including lunch time, without any requirement for an appointment. Stations may avoid this requirement by uploading their complete political file to the online database. Stations do not have to provide political file information by telephone, but should they elect to do so, they must do so in a non-discriminatory manner.

Note that stations are required to always maintain a backup copy of their political file and make it available at times when the FCC's Public Inspection File database is not available to the public (e.g., during a government shutdown or as a result of a technical failure). To assist stations in meeting this obligation, electronic "mirror" copies of the political file may be requested from the FCC from time to time to ensure that the station always has an up-to-date copy.

Retention of Political File Materials

Political file materials must be kept available for public inspection for two years. If the materials become the subject of an investigation or litigation, no steps should be taken to destroy them, whether the materials are in hard copy or electronic form, without prior consultation with counsel. If there are no pending investigations or litigation, we recommend that a station remove all political file material from the political file promptly upon passage of the two-year retention period.

Internal Recordkeeping

For a station that broadcasts a significant amount of political matter, recordkeeping can become an onerous burden particularly if a system is not established early and adhered to faithfully. Such a system might include a list or database of lowest unit charges with a separate sheet or entry for each class of spot offered. This system gives the station an easy reference source that can be quickly checked or updated. With respect to each candidate inquiring about airtime, a station's internal records should include evidence that the station made the requisite disclosure to the candidate or his/her representative. This kind of internal information should not be placed in the station's political file.

Recordkeeping Enforcement

In recent years, the FCC has responded to a number of complaints from election watchdog organizations alleging that various broadcast stations failed to include necessary information in their political files. In response, the FCC clarified ambiguities in its rules, admonished stations for various shortcomings in their political recordkeeping, and cautioned that it would consider more severe sanctions going forward since stations could no longer assert the rules lack clarity. However, the FCC has been asked to reconsider these rulings on the grounds that it has set the recordkeeping bar too high, with stations potentially liable despite good faith efforts to discern what content in political ads needs to be reported in the political file. Unless and until the FCC grants reconsideration, however, the heightened recordkeeping requirements will continue to apply, emphasizing the importance of understanding the political advertising rules and associated recordkeeping requirements. As a result, any questions about these rules or the recordkeeping requirements they create should be raised with counsel.

Conclusion

This Advisory discusses some of the more important aspects of federal political broadcasting law. While this Advisory may provide quick answers to some general questions, it would be a mistake to rely on it or any summary for a definitive answer to a complicated question. Moreover, political broadcasting is a volatile area of FCC regulation, and some information in this Advisory will certainly be outdated before long. Accordingly, stations are advised to proceed in this complicated area with the close support of communications counsel.

Lastly, we remind clients and others that the rules for calculating political rates should be kept in mind every time a station is considering accepting an advertising order, even in non-election years. Since internal allocations must be made at the time a schedule is sold, the immediate pre-election period will be too late to correct any rate errors made months earlier. If a broadcaster would like assistance in structuring multiple levels of preemptibility, scheduling, and pricing long-term contracts and packages, or needs other help to avoid expensive mistakes resulting in unnecessarily low political rates, please contact any of the lawyers in the firm's Communications Practice Section.

If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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