POLITICAL BROADCASTING 2020

Questions and Answers on the FCC Rules and Policies for Candidate and Issue Advertising

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Background

Even in today's fractured media marketplace, broadcasting plays a central role for nearly every candidate for office. In turn, many broadcast stations count on the political advertising revenues that come from candidates and issue advertisers who recognize the value of the mass audience that broadcasting can deliver. But many stations also approach the area with trepidation, fearing that they will be caught in some nuance of some FCC regulation that they somehow overlooked. This Guide is designed to help to allay a few of those fears.

While, like any guide to legal issues, this one should not be relied on to answer all of your questions, it should at least start you on the path to understanding the issues that arise with candidate advertising and other candidate appearances on your stations, as well as the those that arise in connection with advertising from non-candidate individuals and groups on political matters and other controversial topics. These "issue advertisers" have been increasingly active since the Supreme Court issued the *Citizens United* decision in 2010, which authorizes essentially unlimited electioneering advertising by individuals and corporations – as long as they are acting independently from the candidate.

The advent of online public files for all broadcast stations has changed the compliance landscape. Now that information about the political sales by broadcasters is available 24/7 to anyone with Internet access, it is far easier for competitors, public interest groups, and the FCC to monitor political ad purchases by candidates and issue advertisers. This easy access brings with it a new level of regulatory scrutiny to station activities.

Meanwhile, the substantive FCC rules have, for the most part, been unchanged for almost 30 years. There are also occasional clarifications and interpretations of the rules that are made either in connection with specific cases, or by informal statements of FCC staff. In fact, an apparent clarification of the disclosure requirements for issue ads has been pending at the FCC since May 2018, so we may see that decision at any time. There have been some broader changes since the basic rules were substantially overhauled in the early 1990s, particularly in connection with sponsorship identification and the political file, that arose as a result of the Bipartisan Campaign Reform Act of 2002. This guide looks at the basic rules, and addresses some of the changes and clarifications that have arisen in the years since that last major review.

Even though the basic rules have been in place for almost 30 years, broadcast sales practices have evolved considerably. So application of the rules remains complicated, and every interpretation is one that is very much dependent on the facts of a particular case. Thus, in the case of any controversy, be sure to check with a lawyer familiar with these rules to discuss the specific facts involved, as a few details can make a big difference in the legal analysis of any issue. While this guide can't answer all of your questions, it should at least give you information to help to spot issues and to ask the right questions about any of these issues as they arise.

Most broadcasters are focused on the pricing of political spots. The rules require that broadcasters sell spots to candidates priced at rock-bottom rates during certain pre-election periods. Many times the candidates and their buyers are the least familiar with broadcast sales practices (especially when dealing with state and local candidates), yet they can demand the most time and attention from station sales representatives. On the other hand, some political ad buyers

for more high profile races can be very familiar with the rules, and will attempt to bend them to their advantage. Consequently, broadcasters may end up getting the least money for spots that take the most time to sell. These spots also often cause the most heartache, since there is always the threat of FCC enforcement action or, at least, the cost of attorneys to help avoid getting the rules wrong.

Broadcasters have been fortunate that the FCC authorities currently enforcing political broadcast rules recognize that they can be confusing and have generally sought to mediate disputes between broadcasters and political advertisers, rather than resorting to a formal adversarial process that could result in penalties to the broadcaster. Such negotiations have led to quick and mutually satisfactory resolutions of most political complaints in recent decades.

However, significant fines (including one for $540,000 in 2016) are still possible under FCC rules relating to political and issue advertising. In addition, where violations are discovered after the fact, stations have had to explain possible misconduct, perform audits, and issue rebates to settle candidates' claims. In connection with issue advertising, there can even be the threat of civil liability. And there is no guarantee that current FCC procedures of mediating all issues will continue, or that problems discovered after an election by a determined (and possibly disappointed) candidate would not result in an enforcement action by the FCC. In fact, in recent months there has been an indication that the FCC may be turning to a more enforcement-oriented approach, particularly with respect to online political file irregularities. So stations must still follow the rules carefully.

This guide will provide you with an introduction to the language of the political broadcasting world. It will talk about how your normal business practices can have an impact on your activities during the political broadcasting season. It will also discuss the specifics of the political broadcasting rules – addressing questions including which candidates get access to the advertising time sold by stations; how candidates must be treated fairly; the limits on editing political speech on stations; how much stations can charge political advertisers; what kind of disclosure must be made to political advertisers; and what kind of public records must be maintained (and where to maintain those records). It is intended to provide the basics - so be mindful that there are always wrinkles that demand additional attention from the experts. Develop lines of communication with your attorney throughout the political broadcasting process, as a little preventative effort may save a lot of trouble in the long run.

Note that this guide does not address the growing area of state regulation of political advertising. Particularly in connection with online advertising, a number of states have adopted sponsorship and disclosure obligations that are different, and in some cases more onerous, than those required by the FCC. Sometimes, these rules, though aimed at online ads, are written broadly and can have some applicability to broadcasters as well. If you operate in one of the states that has adopted such rules, be sure that you are familiar with their requirements, and carefully observe the obligations that they set out.

The Basics - Speak the Language

Like any set of rules devised by lawyers, the political broadcasting rules have their own language. It is often essential to know the terms that are used to be able to fully understand the rules that apply. These questions help define some of those basic terms.

Who is a "legally qualified candidate"?

A legally qualified candidate is one who has fulfilled all of the requirements to run for a particular office. That usually means filing certain papers with state or local election boards, and may, in some cases, require the gathering of signatures on a petition or the payment of a filing fee. These requirements vary by jurisdiction. Once a potential candidate has done the things necessary in that jurisdiction to qualify, he or she is considered a "legally qualified candidate." As set forth below, most of the political rules apply once you have a legally qualified candidate.

In presidential elections, there is also a special rule on who is a legally qualified candidate. Once a candidate is legally qualified in 10 states (or 9 states and the District of Columbia), the FCC considers the candidate to be qualified in all 50 states for purposes of the political broadcasting rules. For purposes of determining who is a legally qualified presidential candidate in a particular state, FCC rules provide that a substantial showing of a candidacy (e.g., an active campaign) may be sufficient in and of itself to make a candidate legally qualified in a state. This is particularly important in caucus states where, unlike in most other elections, there may be no formal filing of papers to mark the legal beginning of a campaign.

Note that, in certain cases, the rules can even apply to persons who did not meet all the requirements for a place on the ballot. Most commonly, this would occur when a write-in candidate decides to seek a political office. The definition of a legally qualified candidate may include write-in candidates, where such candidates are eligible for election under state or local law. For a write-in candidate to be considered "legally qualified" for purposes of the FCC's political broadcasting rules, the candidate must have made a public statement that they are running for an office and make a substantial showing that they are engaged in the types of activity normally associated with an active political campaign, e.g., opening campaign offices, providing campaign literature, giving speeches and otherwise actively campaigning for the office they are seeking. The burden is on the candidate to make this showing. In an informal ruling about a decade ago, the FCC found a purported write-in candidate for the US Senate to have not met that threshold where the candidate had a single office and made appearances only in one corner of the state, and had made no overt efforts to get votes outside of his home area. Simply saying, "I am a write-in candidate for office" will not entitle an individual to all of the benefits of a legally qualified candidate under FCC rules.

Determining if a candidate has made a sufficient showing of his or her candidacy to be entitled to FCC protections can be a tricky analysis, so if you have a potential candidate looking to advertise on the station, and it is not clear that they are a legally qualified candidate, ask counsel for advice on how to proceed.

Who is a "federal candidate"?

In many cases, candidates for federal offices have rights and responsibilities that do not apply to candidates for state and local offices. Federal candidates are those running for President, the US Senate, or the US House of Representatives.

What is a "use" by a political candidate?

A "use" is just what it sounds like - the appearance on a broadcast facility by a candidate. For FCC purposes, to be a "use," the appearance must contain the image or recognizable voice of the candidate. Also, the appearance must be a "positive" one, i.e. the appearance of a candidate in an attack ad by an opponent is not a "use."

Similarly, the FCC has determined that the appearance of a candidate in a "bona fide news or news interview program," in a news documentary (where the candidate's appearance is incidental to the subject of the documentary so documentaries about the candidates themselves are likely not exempt), or during on-the-spot coverage of a bona fide news event is not a "use." These are referred to as "exempt programs."

What is a "bona fide news or news interview program"?

Obviously, news programs and news interview programs, like "Meet the Press" or "Face the Nation," are bona fide news interview programs. But the FCC has gradually liberalized the definition of a news interview program to include programs that may be primarily entertainment, but which regularly feature discussions with newsmakers. The Tonight Show, Politically Incorrect, and even Howard Stern's radio program have all been declared by the FCC to be bona fide news interview programs when there was an interview with a candidate, controlled and directed by the station. Most TV talk shows have similarly been deemed to be bona fide new interview programs. Any local program may fit within this definition if it regularly features discussions with newsmakers and if it is not overtly partisan. Stations do not need to ask the FCC to declare that the program is a bona fide news interview program – if it reasonably fits within the definition, then the station can rely on the expanded FCC definition for an exemption from equal opportunities obligations – subject of course to challenge by an opposing candidate. This is discussed in more detail in the Equal Opportunities section of this guide.

What are "lowest unit rates"?

During the political window, sales of broadcast time to candidates for "uses" must be made at lowest unit rates – the lowest rate given to any other advertiser for a purchase of the same class of time. Complete details as to how the lowest unit rate is computed can be found in a later section of this guide.

What is a "political window"?

The political window is the period 45 days before a primary election, or 60 days before a general election. During the political window, candidates can purchase time at lowest unit rates.

What is "reasonable access"?

Federal candidates (and federal candidates only) are entitled to purchase reasonable amounts of time on all commercial broadcast stations. Details on the reasonable access requirements are set

out below.

What is meant by "equal time" or "equal opportunities"?

Essentially, broadcasters must treat candidates for the same race in the same fashion. If one candidate is given free time on the air, an opposing candidate who requests it must be given an equal amount of comparable free time. If one candidate buys time, the opponent must be given an opportunity to buy an equal amount of time with an equivalent audience size. Details are provided below.

What is the difference between "federal" candidates and "state and local" candidates?

A federal candidate is one running for an office in Washington, DC. Thus, federal candidates would be those running for President, Vice President, or either of the Houses of the United States Congress - the Senate or the House of Representatives.

All other candidates for public elective office, whether it be for governor or state legislature, mayor, city council, school board or any other elective office in state or local government, are considered "State and Local" candidates.

For certain purposes, these distinctions are important. For instance, reasonable access and, in most instances, the requirement for candidate statements that they have "approved" a political ad, apply only to federal candidates. As set forth in more detail below, however, once you decide to sell time to state and local candidates, most other rules - including equal opportunities, the no censorship requirement, lowest unit rates, and the public file rules - all apply to state and local candidates with essentially the same force as they do to federal candidates.

What is an "election"?

The political rules apply to contests for public elective office. The FCC has previously stated that most rules apply to state, federal, and municipal elections. Tribal elections on Native American reservations are not subject to these rules. For presidential elections, caucuses are treated like primary elections if they are generally open to participation by the public.

Preparing for an Election – What to Worry About in Pre-election Periods

In the months before an election - before the candidates have even fulfilled the requirements to become legally qualified, what a station does can affect the treatment that it must give to candidates during the election period. Some of the pre-election issues that you should consider are covered in the following questions and answers.

Do advertising rates for spots run at the beginning of the year have an effect on how much I can charge candidates later in the year?

With limited exceptions for long-term contracts that run throughout the year (including within the windows), the rates you charge for spots that run outside of the political windows (45 days before a primary and 60 days before a general election when candidates can only be charged lowest unit rates) generally are irrelevant to the prices charged within the political window.

Do I need to consider the political rules when I sell advertising packages early in the year with spots that may run for long periods of time, including during political windows?

Yes. When selling a package with spots that may run during election periods, the station is allowed to allocate the total price of the package over the different periods of time covered by the package sale to reflect the actual value of the spots contained in the package. This allocation is to be done at the time the order for the package is written. See Lowest Unit Charges section of this guide for more details on the allocation of a package price for purposes of determining lowest unit rates, and how this kind of allocation can actually, at times, be beneficial to the station.

When do I need to worry about equal opportunities and reasonable access?

While the lowest unit rates are applicable only during the 45 days before a primary and the 60 days before a general election, reasonable access, equal opportunities, no censorship and all the public file requirements are triggered as soon as a candidate is legally qualified. So the reasonable access, equal opportunities, no censorship, and public file rules apply even outside of the political windows.

Before the political windows when lowest unit rates are effective, why should I care about appearances on my station by legally qualified candidates?

As stated above, equal opportunities become available to opponents if a legally qualified candidate - federal, state or local - appears in a positive "use" on your station. So if one of your on-air staff decides that they want to run for school board, once they become a legally qualified candidate, their opponents are entitled to equal opportunities - in this case, free time as the employee did not pay for the time that they appeared on the air. Or if a politician running for reelection appears in a PSA, their opponents are entitled, upon request, to equal time - again for free if the PSAs were furnished for free.

In addition, during the period after a candidate becomes legally qualified, and before the political window opens, the political file rules also apply. If you sell a spot to a candidate, or if the candidate otherwise appears in a non-exempt program, then you need to put the appropriate information into the station's public file on an immediate (i.e., same day) basis. Information about the public file is provided in a later section of this guide.

Where do I find out if a candidate is legally qualified?

You can ask the candidate if they are legally qualified, i.e. if they have completed the requirements applicable to that jurisdiction (see discussion above). You can also check with local election authorities. In most states, the secretary of state or an equivalent office administers statewide elections. Local elections may require filings with county or city officials who administer local elections.

Reasonable Access – Deciding Which Candidates Can Buy Time

"Reasonable access" requires that a station sell reasonable amounts of time to *federal candidates* for elective office. As detailed below, it does not require that a federal candidate be able to buy

all the time that they want, nor does the doctrine dictate that candidates get exactly the times that they request. Instead, it requires only that *reasonable* access to all "classes and dayparts" be provided to federal candidates during the course of an election. The factors to look at in determining whether access is reasonable are set out below.

In considering reasonable access, stations are governed by the obligation that they give federal candidates access to all classes and dayparts of a station (with the limited exception of news programming). All *commercial stations* are obligated to provide access. The FCC has also required that, before determining what access is reasonable, a station must consider the needs of the candidate. Thus, stations cannot set numerical limits on the number of spots that a federal candidate can buy in rate cards, political disclosure statements or other written materials. Instead, stations must at least consider the candidate's plans for the advertising time before setting the limits on candidate buys. These concepts are defined in more detail below.

To what candidates does the reasonable access requirement apply?

Reasonable access applies only to federal candidates. Access must be provided to federal candidates who are running in districts that are within the station's service area. In a case decided during the 2012 presidential primary season, the FCC determined that a TV station had to give access to a candidate where the station's noise-limited service contour covered more than a "de minimis" portion of the district in which the candidate was seeking office. Three percent of the district was found to be more than de minimis, so access had to be provided.

Does it apply to all stations - commercial and noncommercial?

No. Reasonable access only applies to commercial stations. Noncommercial stations do not need to provide reasonable access.

Must I give free access to candidates?

Reasonable access only applies to purchases of time by federal candidates. Stations have no obligations to give free time to candidates (except possibly in connection with equal opportunities, as discussed below).

Must I give a federal candidate all the time that they want?

No. The obligation is only to provide "reasonable" access. There is no requirement that you provide a candidate with all the time that he or she wants to buy, and there is no obligation to pre-empt all of your commercial advertisers just to make room for political spots.

To what time periods must a candidate be given access?

The rules say that access must be given to all classes and dayparts on a station. So, effectively, you cannot restrict federal candidates to buying only certain stations in a local cluster of stations. Nor can you limit federal candidates to buying spots only in certain time periods.

Are there any time periods in which I don't have to sell a candidate time?

The FCC has stated that you have the option to not sell time within news programs. You can decide if you want to ban candidates from the entire news program, or just parts of it (e.g., you can ban access during the "hard news," but allow candidates to buy spots in the weather and

sports coverage). However, this cannot be exercised so as to preclude all access to a station by federal candidates. For instance, an all-news station cannot completely ban access to political candidates but instead it must make some access available in all dayparts.

In another decision from the 2012 election, the FCC determined that special one-time events where stations have limited commercial inventory may be another exception to the reasonable access obligation. That decision was in the context of the Super Bowl, where the FCC indicated that because the audience was so unique, and that providing equal time to an opposing candidate after the fact would be almost impossible, candidates could be excluded from that particular game. We think that this is a very limited exception that will rarely be invoked by stations. If you have a situation where you want to deny reasonable access to a federal candidate in such a unique program, consult with your attorney to decide if this precedent would apply.

Do I have to sell program-length time or time in other units of time that I do not usually sell to commercial advertisers?

Yes. Cases have established that federal candidates can require access to program length time, or even odd lengths of time (e.g., 7 minutes), even if your station does not sell such blocks of time or sells it only during dayparts other than the daypart to which the federal candidate is requesting access (e.g., on weekend mornings). A station does not need to make program-length time available often – but if a candidate insists on a purchase of such time, a station must find some way to make an accommodation. And if the candidate demands the time in prime time, at least some program-length time in prime time must be made available.

Charges for program length time or odd lengths of time that are not otherwise sold by the station can be priced at a reasonable rate. For example, a station could charge a multiple of their 30 or 60 second rates, and add a reasonable amount to take into account lost listeners/viewers and any diminution of value of advertising in subsequent time periods due to the candidate's lengthy message.

How do I determine how much time to give to a federal candidate? How much time is reasonable?

While there is no exact formula, the FCC has suggested that you review a number of factors in determining how much time is reasonable. The factors include:

- How many federal candidates are running in the political races in the area served by your station, and the likelihood that these candidates will be seeking to buy time (if there are many candidates, you need to sell fewer spots to each one).
- The expressed needs of the candidate for fulfilling his or her campaign objectives.
- The potential disruption to commercial advertisers and other programming priorities (you don't need to become a wall-to-wall political ad station, and don't need to excessively pre-empt commercial programming to meet reasonable access requirements).
- How much time the candidate has previously purchased (if a candidate has bought substantial amounts of time already, further sales may be more limited).
- When the request is made (obviously, a request for a large buy late in the campaign will be harder to fill than one made early, before other demands on your time arise).

Each of these factors should be considered and discussed with federal candidates or their representatives when making a determination of how much access is reasonable.

Can I put limits on how much time a federal candidate will be able to buy?

Because of the need to engage a candidate in the discussion about how much time to sell and the factors listed above, the FCC has said that you should not establish up-front limits on how much time you will sell to a federal candidate. Thus, your political rate card or disclosure statement should not have specific limits on the amount of time that you will sell to federal candidates.

Of course, stations will internally, for planning purposes, have their own ideas of the amount of time that they will sell to political candidates. As long as the station engages in a reasoned discussion with the candidate, and provides some access to all classes and dayparts, the FCC will give the station discretion to determine how much access is reasonable. It is when stations are unreasonable in providing access that the FCC is likely to get involved.

Are there situations where I should consider selling a federal candidate *less* time than they want to buy?

As noted above, you do not need to sell a federal candidate all of the time that they request, as long as you provide reasonable access to all classes and dayparts that the station sells. While you may be tempted to take their money and sell them as much time as the candidate requests, there are times when you should resist the temptation and commit to selling less than the candidate wants. In recent years, we have seen situations where a federal candidate approaches a station early in the campaign and asks to buy a significant amount of ad time in the final weeks before the election. Stations should resist that temptation, especially during busy election seasons or for primaries with many competing candidates, as the equal opportunities rules described below may obligate you to sell equal amounts of time to competing federal candidates in those final weeks of the election. As there are likely to be many political advertisers who want to get on the air just before election day, a station's ad schedule can become very tight. If you have to provide equal opportunities to opposing candidates to respond to a big flight of ads purchased by the candidate who bought early, you may well end up preempting commercial advertisers to fit in all your required political ads in the final weeks of the election. So plan for these late election-period jams – consider selling the early-arriving candidate only some of what they want, with a promise to sell more time closer to the election if there is still inventory available.

If reasonable access applies only to federal candidates, how do I treat state and local candidates?

A station can decide whether or not to sell time to state and local candidates. The only requirement is that, once you decide to sell time to one candidate for a particular elected position, you must sell it to all candidates in that same race. But that does not mean that, by selling time to candidates in one local race, you must sell to candidates in all other local races. For instance, you can decide to sell time to candidates for governor, but not to those running for state attorney general. Or you can sell time to candidates for mayor, but not those running for city council or school board.

You can even decide that you will make available spots to state and local candidates only on

certain stations in a multi-station cluster in a given market. Or you can restrict state and local candidates to buying advertising time during certain dayparts. For instance, you can decide to sell candidates for sheriff spots only during the overnight hours when you have plenty of inventory, but decide to sell advertising during the entire broadcast day to candidates for mayor. And you can decide to limit state and local candidates to buying time on your AM talk station, but you of course have to provide access to federal candidates on all of your stations, including your FM music station.

However, you cannot restrict candidates by class within a given daypart. Once you decide to let candidates for a particular state or local race into a given daypart, you cannot force them to buy your most expensive class of time within that daypart. Instead, you need to make available spots of all classes and rotations that run in that daypart.

If I do not want to provide access to state and local candidates at lowest unit rates, can they buy time at full rates?

No. During the 45 days before a primary, or the 60 days before a general election, if you sell time to a state or local candidate, it must be at your lowest unit rate. You cannot condition access on their paying a higher rate.

Equal Opportunities – Treating Competing Candidates Alike

The "equal opportunities" doctrine (sometimes referred to as "equal time") requires that a broadcaster treat all candidates for the same office in the same way. Stations must provide equal amounts of time for candidates for the same office, and otherwise treat candidates for the same office in the same way. While the idea sounds simple, there are a number of confusing issues that can arise - including appearances by candidates on news programs, as well as the case of the broadcast employee who decides to enter politics by running for elective office. Specific issues on the equal opportunities requirements are discussed below.

Do equal opportunities apply to state and local as well as federal candidates?

Yes. Equal opportunities apply to *all legally qualified candidates*, whether or not they are running for federal office.

When in the election season does the equal opportunities doctrine apply?

Once you have more than one legally qualified candidate competing for the same office, the equal opportunities rule applies. Thus, *equal opportunities rights **do** apply to times before the "political window"* (45 days before a primary and 60 days before a general election).

What triggers an obligation to provide equal opportunities?

If the recognizable voice or likeness of a legally qualified candidate appears in a broadcast, and that program is not an "exempt" program (as defined below), then equal opportunities apply. Such an appearance is referred to as a "use" by the candidate. But if the candidate appearance is not positive, e.g., if it is an attack ad on the candidate by an opponent or issue advertiser, the ad is not considered a "use" by that candidate so it would not trigger equal opportunities.

There is some precedent that a "fleeting" image of a candidate on a TV station might not be a use requiring equal opportunities. For example, Barack Obama's brief appearance during the cold opening of "Saturday Night Live" during the 2008 election was likely a fleeting image. But such images would need to be on the screen for a very short period of time (less than 4 seconds) to qualify as "fleeting." Check with your attorney if you contemplate running some programming in which a candidate may appear very briefly to determine if the "fleeting image" precedent might apply to your situation.

Does the appearance have to be in connection with the campaign in order to trigger equal opportunities?

No. Any positive appearance of a candidate on a station can trigger equal opportunities. Thus, equal opportunities can be triggered by the candidate's on-air appearance as an on-air station employee, at a sporting event, in an entertainment program, or in an ad for a business - even if the candidate never mentions his or her candidacy. There have been cases where actors have run for political office, and the airing of their old movies or TV shows have been deemed to give rise to equal opportunities. Similarly, the decision to run for office by a local advertiser who appears in his own commercials can give rise to equal opportunities and force a station to sell time to competing candidates for the office that the advertiser is seeking, even though these candidates are seeking a local office for which the station had previously decided to not sell advertising.

Must the appearance be in a program controlled by the station?

No. The appearance of a candidate in a network or syndicated program can trigger obligations for the local station broadcasting that programming. For example, if a network chose to air a rerun of "The Apprentice" featuring Donald Trump, a competing candidate could ask an individual station running the program for equal time.

What happens when a candidate appears in one of these non-exempt programs? How does the opposing candidate get their equal time?

The opposing candidate must send a formal request to station requesting equal time, and this request must be made within seven days of the opponent's appearance on the air. The opponent gets as much time as the initial candidate received, and he can use it for any purpose he wants, as long as his voice or picture is used. For instance, if your weatherman runs for county commissioner and appears in your local news for three minutes while doing the weather, his opponent would be entitled to three minutes of airtime to present any message that opponent wants, in a comparable time period. The opponent does not need to appear in the news, and does not need to present the weather.

Do you have to notify a candidate of the use of a station by his or her opponent?

No. The station does not need to notify a candidate of a "use" by his opponent. Instead, the station needs to note the use in its online public file, and note whether the use was in a paid spot or in a program for which the station received no payment. A candidate finds information about uses by his opponent in the public file. So if your weatherman becomes a legally qualified candidate, there is a "use" of the station each time that he does the weather, and each use should be noted in the station's public file.

There has been some suggestion in informal comments made by FCC officials that, if you do not make a note in your public file of the use of your station by a candidate, then the seven-day period for requesting equal time does not start running until a disclosure in your public file has been made - so get the information in your file promptly (i.e., on a same-day basis).

How long can an opponent wait to make a claim for equal opportunities? When must he make use of his equal time?

A candidate must make a request for equal opportunities within seven days of the appearance on a station by the first candidate (with the caveat noted above that this period may be extended if the use is not timely noted in the public file). The candidate must use the equal opportunity within a reasonable period of time and cannot store the time up for use just before the election.

Who is an opposing candidate who has the right to request equal opportunities?

An opposing candidate is one who is running for the same position as another candidate. During the primaries, a Democratic candidate for nomination for a particular office is an opponent of any other Democratic candidate for the nomination for the same office. That candidate is not an opponent of a Republican who is running for the Republican nomination. They do not become opponents until they have each secured their party's nomination.

Is it a "use" if the candidate's likeness is in an attack ad?

The appearance must be a "positive" or "neutral" appearance to trigger the equal opportunities obligations. Thus, if the likeness of a candidate appears in an ad where that candidate is being attacked, it would be unfair to give the attacker equal time.

During the California governor's race several years ago, some broadcasters took the position that the use of a candidate's voice or picture in a comedic fashion - to make fun of the candidate - was not a positive use and hence not subject to equal opportunities. The FCC did not issue any formal ruling on this question, though informally FCC staffers agreed with this interpretation. As there has been no formal ruling on this matter, if this situation arises at your station, you should check with counsel to see if any updated policy has been issued.

Which programs are "exempt" where the appearance of a candidate does not trigger equal opportunities?

Exempt programs are bona fide news or news interview programs, or on-the-spot coverage of a news event. Also, a news documentary program about a subject other than the candidate, where the candidate's appearance is incidental to that program, is also exempt.

What is a "bona fide" news or news interview program?

A bona fide news interview program is one where the candidate appears because of the news-worthy nature of his comments or participation, and not for some partisan purpose. To be exempt, a candidate's appearance on such a program should be solicited not for partisan purposes, but instead based on good-faith journalistic discretion. For instance, if you had a "news interview program" that only invited candidates from one party, where the discussion was all centered on electing candidates of that party and defeating the other party, it might well not fit within this exemption.

What if an employee of the station who appears on the news becomes a candidate? Is his appearance exempt?

In order to be entitled to the exemption, the candidate must be the object or subject of the news or news interview. The exemption does not apply where the candidate is the interviewer or the one presenting the news. Station news employees who run for office trigger the requirement for equal opportunities, even if the program in which they appear is usually considered an exempt program.

To be exempt, does a news interview program have to be a standard public affairs program that always discusses political issues?

No. The FCC has held in a number of cases that any program that deals with political or other topical issues on a regular basis can be a bona fide news interview program. As discussed above, the selection of the candidate for appearance must not be made for partisan purposes, and the interview should be in the control of the station or program personnel, not in the hands of the candidate. Using these tests, the FCC has declared interview portions of programs as diverse as the *Howard Stern Show*, *Entertainment Tonight*, the *Today Show*, *Politically Incorrect*, *Tom Joyner*, and *Crime Watch Daily* to be bona fide news interview programs. Most late night talk shows rely on this doctrine to avoid equal opportunities issues when they interview candidates, as do many radio morning shows that regularly feature politicians or other discussions of political issues.

Does the FCC have to issue a ruling that a program is a bona fide news interview program?

No. If a program on your station is of the type approved by the FCC in these cases, you can rely on the exemption without getting prior FCC approval. However, to avoid being challenged on any decision, some stations have asked the FCC in advance of an election to issue a "declaratory ruling" that their program is exempt.

Do equal opportunities apply to both paid and free time?

Yes. If you sell time to one candidate for an office, you must be willing to sell an equal amount of time to the opponent. Thus, as noted above, be careful of committing to sell too much time to one candidate, as you may have to provide an equal amount of time to the opponent. Especially in the last few weeks before an election, selling a large schedule to one candidate can create significant scheduling difficulties if an opponent requests equal opportunities, as that request must be honored before the election.

No Censorship and Third-Party Ads - What Responsibility Do Stations Have for the Content of Political Spots?

Once a legally qualified candidate has bought time on a station for a "use" (an ad by his campaign containing the candidate's recognizable voice or picture), a broadcaster cannot censor the candidate's message. Because a broadcaster cannot censor the message a candidate presents, the station has no liability for the contents of the ads.

Note, however, that this immunity only applies to *broadcast* material – if a station chooses to

stream its signal online, the "no censorship" rule does not apply, and thus the station potentially would have liability for the content of a streamed candidate ad, even though the station would be protected for broadcasting the same ad.

Third-party ads, such as attack ads bought by various interest groups or political parties, are not subject to the "no censorship" provisions of the rules. Thus, a station can choose whether or not to run an ad by a third party and, because it can reject these ads based on their content, the station does not have a shield against liability. Questions below explore these topics.

What happens if one candidate claims that an ad by his opponent makes false claims? Can I stop running the ad?

No. You are not allowed to censor the ad of a political candidate so, even if you get a complaint from an opposing candidate, you cannot restrict the message of the first party.

What happens if the candidate's ad attacks an opponent, and the opponent can show the ad is false, and threatens to sue the station if the ad continues to run?

Stations still must run the ad as delivered by the candidate and cannot restrict the message of that candidate, as long as it is a "use." The courts have held that, because the station's hands are tied, the station cannot be held liable for the content of the candidate's ad. So, if an opponent comes to the station and threatens to sue it for running the ad of another legally qualified candidate based on the content of that ad, a station's attorney should be able to point to the court cases holding the station harmless from civil suit over the content of a candidate ad.

What is the remedy for the candidate who is being attacked?

They can sue their opponent based on the content of the opponent's ad, but they cannot sue the station.

What if a third-party claims that a candidate ad contains copyrighted material, and demands that the station stop airing that ad?

The same rule applies – the station cannot refuse to run a candidate ad (as long as it is a "use") based on that ad's content. The person that holds the copyright that may be infringed by the content of the candidate and can sue the candidate, but the station is not responsible for the content of that ad.

What if the candidate ad contains foul language or disturbing images? Can I reject it, or direct it to "safe harbor" hours?

No. You cannot censor an ad, and a court case even forbade stations from restricting the times at which a spot runs. The station can put a disclaimer immediately preceding the ad warning viewers that the following message is a paid political ad that the station is legally obligated under federal law to broadcast (and such disclaimers probably should then be run with opponent's ads as well, even if they are not objectionable). But unless the ad is legally obscene, indecent or otherwise violates a criminal statute or another FCC rule (such as the inclusion of a fake Emergency Alert System sound), stations must run the advertisement. If these issues arise,

consult counsel to determine how best to insulate the station from what might otherwise present a public relations problem for the station. Also consult counsel if the ad appears to be obscene or if it contains an EAS alert or other similarly egregious material.

Does the "no censorship" provision apply to state and local candidates?

Yes. The statute provides that a broadcaster shall not censor any candidate ad - whether the candidate is running for local, state, or federal office. Of course, a station could refuse to accept any advertisements from a particular state or local race. But once a station decides to accept advertising from candidates in a particular state or local race, it may not censor any ads run by any candidate for that office.

What if the candidate's ad fails to include sponsorship identification?

There is an exception to the "no censorship" rule for candidates - if the candidate's ad does not contain appropriate sponsorship identification, the station can alter the ad to include sponsorship identification or refuse to run the ad. Consult with counsel before taking either of these steps. See the Sponsorship Identification section below for more details.

What if I get a complaint about the content of a political ad that is bought by a group other than a candidate's campaign committee? Can I refuse the ad based on its contents?

The "no censorship" rules apply only to ads by candidates and their authorized campaign committees. Thus, a station's sale of an ad to a third-party group is purely voluntary. If you get a complaint about a third-party ad, you can pull that ad unless the advertiser substantiates any disputed claims made in the ad. In fact, you do not need to run any third-party ads if you do not want to.

Can I have liability for running an attack ad from a third-party group?

Yes. Because a station has the right to decide whether or not it will run an ad, it can be held liable for the content of that ad. If an issue ad contains an attack on a candidate that the station knows to be false, or the station is told that the ad is false and the station continues to broadcast the ad and does nothing to investigate whether the ad is in fact false, liability to the station could arise if the claims are in fact false. Similarly, if an issue ad contains other illegal content (e.g., the illegal use of copyrighted material), the station could be liable.

How do I know whether or not a third-party ad is true or not?

The station must do a reasonable review of an ad - especially if the truth of the ad has been challenged. If you receive a challenge to the truth of a third-party ad, ask the committee or organization that is sponsoring the ad for information backing up its claims. Review that information for accuracy and reliability, and check with counsel to assess whether the substantiation materials are likely sufficient to avoid liability for defamation or other torts.

Do I need to stop running the ad while I investigate whether it is true or not?

That really is a question to be discussed with counsel based on the particular facts. In some cases, where the claim that is being challenged is an opinion or the characterization of a voting record of a candidate (e.g. "Mr. Jones is a big spending liberal who will send this country into bankruptcy" or "Ms. Smith voted 12 times in Congress for measures that would raise her own

pay") are less likely to be found to be defamatory. In the case of an opinion, the opinions themselves are not defamatory, unless they clearly convey some factual assertion. In the case of voting records, there usually is some basis for the assertions made, even if the allegation is based on one sentence in a 100 page Congressional bill.

But where the attacks are on the candidate's personal qualities – e.g., that he or she violated the law, had an affair, stole or embezzled money or similar claims – you are more likely to face liability if you keep airing the ad after receiving notice of the falsity of the ad if the ad in fact proves to be untrue.

So, when you get a claim that a third-party ad is false, quickly assess the content of the ad, seek immediate verification of the claims being made, and discuss with your counsel whether or not you should immediately pull the ad while the investigation is ongoing.

Lowest Unit Charges - How Much Money Can You Charge for Political Spots?

The real day-to-day issue for most broadcasters during political season is ad rates. With the complicated selling practices that have developed since the FCC last did a comprehensive review of its political advertising rules, the law has not kept up with the industry. As it has now been almost 30 years since the FCC issued any significant update or clarification of its rules on political rates, many common modern selling practices were not covered by the rules that were adopted so long ago.

Nevertheless, broadcasters must deal with the rules as they are. The idea behind the FCC policies is that the political candidate should get the best possible rate for their ads run on the station for the same class of time on the same day as the candidate's message. Essentially, the candidate gets all the benefits that the best advertiser gets – including all volume discounts – without having to buy the same volume of ads as the best advertiser does, and even though the political candidate will vanish as an advertiser right after election day. The rules adopted to ensure this treatment for candidates are explained by the questions set out below.

How does the FCC define "lowest unit charge"?

During the 45 days before a primary, or the 60 days before a general election, all legally qualified candidates are entitled to the lowest rate that any commercial advertiser paid for a spot of the same class which runs during the same time period as the candidate's spots.

Do I have to give lowest unit rates to state and local candidates?

Yes. While stations are not obligated to sell time to state and local candidates (reasonable access applies only to federal candidates), once a station agrees to sell time to these candidates, the time must be sold at lowest unit rates during the political window.

Once a political window opens for one race, are candidates for all political offices entitled to lowest unit rates?

No. Only the candidates who have an election at the end of the window get lowest unit rates. Thus, especially for primaries during years where there is a Presidential election, there may be different windows for state and federal races. While these windows may overlap, candidates are entitled to lowest unit rates only during the window 45 days before the primary in which voters will select them, and 60 days before the general election in which their race will be decided.

Do all federal candidates get lowest unit rates?

Under the Bipartisan Campaign Reform Act (BCRA), in order to qualify for lowest unit rates, a federal candidate must supply a certification signed by the candidate or his authorized representative. The certification must state that, if the candidate makes a direct reference to an opponent, then the spot will include a sponsorship identification tag where the candidate specifically takes responsibility for the ad. For radio, the candidate must, in his own voice, identify himself and the office that he is seeking and state that he approved the ad. For TV, the candidate must appear in a full screen view, or in a still picture taking up 80 percent of the screen height, and state his name and that he has approved the ad (and that identification must be accompanied by a clearly readable textual statement that the candidate approved the ad and that the ad was paid for by the candidate's authorized committee). More information on these requirements is provided in the Sponsorship Identification section below.

Under other provisions of BCRA, federal candidates must make this enhanced identification in any election ad, whether or not such spots refer to an opponent, so most candidate spots that stations receive from federal candidates should comply with these identification rules.

Since BCRA was adopted, a number of states have adopted similar requirements for state and local candidates. Check locally to see if such obligations are required in areas within your coverage area. Even if the local law does require that state and local candidates have such tags on their ads, the failure to have these tags may not affect the station's obligations to give these ads lowest unit rates, as the lowest unit rate obligation is a federal one which cannot be taken away by state legislation.

Do third-party, non-candidate groups get lowest unit rate in connection with their support of or attacks against a political candidate?

No. Lowest unit rates only apply to candidate ads. However, there may be isolated situations where political parties may be entitled to the lowest unit rate. In most cases, political parties are not entitled to that rate. But, once in a while, parties may purchase time in coordination with a candidate's campaign committee, using "hard" money (money subject to campaign contribution limits to a particular candidate). If a party tells you that is the case, and the candidate confirms that the purchase is an "authorized expenditure" on his behalf (and that is acknowledged in the spot), then the party may be entitled to lowest unit rates. In those cases, the sponsorship identification will usually have a tag saying that the candidate approved the message.

Does each station have one lowest unit rate?

No. Virtually every station has many lowest unit rates - depending on the number of "classes" of time sold by the station. Each class has its own lowest unit rate.

What is a class of time?

A "class" is a type of spot that has unique rights and characteristics. For instance, spots that run in different dayparts which have different rates are of a different class, e.g. morning drive for radio is a different class from mid-day, which is different from afternoon drive. Each of those classes would have its own lowest unit rate.

Even within a given daypart, a station may have spots of many different "classes." Basically, a spot is of a different class if it has different rights. Thus, in any daypart, there may be multiple classes of time, each with its own lowest unit rate. For instance, a preemptible spot would be of a different class than a fixed position spot - each with a different lowest unit rate even if they both run during the same daypart. Different rotations can also be different classes with their own lowest unit rate, e.g. a spot which could run anytime between 6 a.m. and midnight would be a different class from one that can run between 6 a.m. and 6 p.m. If a station sells these rotations, and sells them with differing rates, rights of preemption, or make-good privileges, then each would be of a different class and each would have a different lowest unit rate. A candidate can buy spots of any of those classes at the lowest unit rate for that class, and he gets the same rights that commercial advertisers who buy that spot get (e.g. if the candidate buys spots in a 6 a.m. to midnight rotation, his spots are treated just like those of a commercial advertiser who buys those spots - and they can run anywhere between those hours).

What commercial spots do you look at in determining the lowest unit rate for a given class of time?

You look at the spots of that class running at the same time as the candidate's spots. You need not look any further than those spots running (or being offered on a published rate card) during the 45 days before a primary or the 60 days before a general election except in the situation described in the next question.

What if the station has an annual contract at a very low rate – if the station stops the spots before the political window and picks them up after the window, are they considered in assessing lowest unit rates?

The FCC has informally said that annual contracts that are in effect during the window should be considered in assessing the lowest unit rate – even if the station does not run spots during the window. You cannot avoid the impact of the rates in that contract by keeping spots out of the window if the contract is otherwise in effect before and after the window. If you have a similar situation, consult your attorney.

Can rates change during a political window?

Yes, even within the 45 and 60 day periods, the rates can change. If, for instance, a long term package sets your lowest unit rate for a particular class of time, and the last spot from that package is run midway through the political window, After the last spot from the package runs, the rates for that class of time can go up for the rest of the political window. Similarly, if spots are sold on a demand basis, the lowest unit rate can change on an almost daily basis. If there are "fire sales" of spots during particular periods within a window, the lowest unit charge for the period of the fire sale does not set the rates for periods outside of the fire sale.

Do candidates have to buy in volume to get volume discounts?

No. Candidates get the benefit of all volume discounts, even if they do not buy in volume. For instance, if spots are $10 each, or 12 for $100, the candidate can buy one spot for $8.33 (100 divided by 12) even though a commercial advertiser would have to spend $100 to get the volume discount.

How do bonus or no charge spots affect lowest unit rates?

Bonus spots of the same class are treated just like frequency discounts discussed above. If a commercial advertiser gets two bonus spots for every 10 spots he buys, the FCC considers it as if the advertiser bought 12 spots. Thus, as in the example above, the candidate can buy one spot at one-twelfth of the price paid by the commercial advertiser - getting advantage of the frequency discount without having to buy with the same frequency.

If the bonus spots are of a different class, for lowest unit rate purposes, they are treated as a package plan - as described below.

Does a candidate need to buy a package to take advantage of package rates?

No. In its revisions of the political advertising rules in the early 1990s, the FCC concluded that forcing candidates to buy a package in order to take advantage of package rates was too confusing, and that requiring candidates to buy a package forced them to buy spots that they did not want. So the FCC said that broadcasters needed to break packages down by the class of spots within those packages, so that candidates get full advantage of the discounts such packages offer, but they only have to buy the spots of the classes that they want.

The FCC requires that stations do the work for the candidate by taking the package price and breaking it down by allocating the price to the various classes of time within the package. Once this allocation of the package price has been made, the prices allocated to the various classes of spots within the package are compared to other spots of the same class sold in other contracts to see if the spots from the package affect any of the station's lowest unit rates. The broadcaster first allocates a portion of that package price to each spot within the package, so that each spot is assigned part of the package price, and the total assigned value adds up to the price the commercial advertiser paid for the package. After making such an allocation, the broadcaster then compares the rates assigned to the spots of each class in the package to other spots of the same class sold in other contracts to the same or other advertisers, to see if the spots from the package have any impact on the lowest unit rate for the classes of time included in the package.

For instance, if you sell a commercial advertiser a package that contains 10 drive-time spots and 10 overnight spots for $100, you must allocate the $100 purchase price among the two classes of spots in the package: drive-time and overnight. If you allocate $95 of the package price to the drive-time spots, then the unit rate from this package is $9.50 for the drive-time spots. Compare this price for a drive-time spot with other drive-time spots you have sold in other contracts to determine if this package affects the lowest unit rate for drive-time spots on your station. In this example, the remaining $5 would be allocated to the overnight spots, meaning that their per unit rate is 50 cents each, which you would then compare to other overnight spot sales to determine if the package had an effect on the lowest unit rate for the overnight class of time.

When do I make the allocation of the package price and who do I need to notify?

The FCC has said that you need to make this allocation at the time you write up the package. Thus, *if you are writing up packages today that may run in the primary or election windows, you should be allocating the purchase price of those packages now!*

The allocation should be in writing, and kept in the station's *internal* files. The allocation need not be shown to candidates, nor put into the online public file. The allocation of value of the purchase price for the spots in a package may be different than the allocation shown to commercial advertisers on their invoices (e.g., in the example above, if the overnight spots were shown as no charge or bonus spots, you should still allocate part of the package purchase price to those spots in your internal allocation, as no spot should have an assigned value of zero). The written allocation will ordinarily be seen only if the FCC requests it, either in some sort of audit or in response to a complaint.

Do I need to break out the price of spots in a package if the package contains multiple stations?

No. The only exception to the requirement for allocation of the value of spots within a package recognized by the FCC is for packages that contain buys on multiple stations. Multi-station packages do not need to be broken down by individual classes of spots contained in those packages. Instead, the candidate can only be forced to buy the lowest unit of the multi-station package to qualify for the package rate. For example, if you sell a package where a commercial advertiser gets10 spots on the morning show on each of your three radio stations for $300, a candidate can buy one spot on each of the three stations for $30. The package would not have any impact on the lowest unit rate for any of the individual stations. Note, however, that a candidate should be able to buy spots on each station separately through other rates (i.e., all of the spots on a station cannot be sold exclusively as part of a multi-station combination rate), as each station has its own political obligations.

Do network spots affect a station's lowest unit rate?

No. As discussed above, the sale of time on multiple stations does not affect the lowest unit rate on a single station. So the sale of time by a network does not affect the lowest unit rate on a single station in that network. The network itself, however, may have lowest unit rate obligations.

How do spot sales through an online service that sells remnant inventory affect lowest unit rates?

This is one of the unanswered questions facing broadcasters. Many years ago, the FCC asked for public comment on that question, but it never released any official guidance. As set forth above, if the online service sells packages of stations, it probably will not affect a single station's rates. But if an advertiser can use the online service to buy spots on a particular station, it may have an impact. Consult with counsel if you are faced with this issue.

How do programmatic sales affect lowest unit rates?

This is the 2020 version of the question above – except that programmatic sales for the most part deal with a station's normal inventory, not just with remnant spots sold by many of the online

services that arose years ago. While the FCC has not specifically addressed programmatic sales techniques, it would seem that if an advertiser can buy time in a station's normal classes and rotations through a programmatic platform, the spots would be treated like any other spots sold on the station. If special rights or restrictions are attached to spots sold through a programmatic platform, then such spots may be in their own class of time with their own lowest unit rates. In any case, these spots need to be monitored for their potential implications on political rates, and potentially disclosed to candidates. As stations sign up for programmatic sales platforms, they should ask about political broadcasting implications and, like in so many other areas, this is a good subject to discuss with your attorney, as the manner in which the platform operates may determine the implications for political rates.

Can a station allocate the price of a contract that runs over a long period of time, or does each spot in that contract have the same value?

Informal statements by the FCC have indicated that a long-term package can also be allocated over time to reflect the different values of spots in the package over the course of time. This allocation can be beneficial to a station, as it allows for the allocation of the purchase price for spots, even of the same class, if the spots are to be run over an extended period of time, so as to take into account their true value. For instance, if you sell a major advertiser a year-long contract for spots at the price of $12,000, that price does not need to be allocated $1000 a month, even if it is billed to the advertiser at $1000 per month. Instead, you can make a reasonable allocation of the $12,000 purchase price over the term of the contract to reflect the actual value of the spots (e.g., you could allocate $500 to January when demand and rates are low, but $2000 to December when the opposite is true), as long as the allocations add up to the total package price. Also, remember that the allocation is supposed to be made at the time the contract is initially written, and should be reasonably based on selling values during the course of the contract (you cannot allocate it just so as to place a high allocation during lowest unit charge periods). Again, make the allocation in a written, *internal* document which does not need to be provided to advertisers, the public file or political candidates, but is instead used internally to determine the impact of spots included in the package on the lowest unit rate for spots of the same class. These internal documents could, of course, need to be provided to the FCC if an audit of your political practices arises as a result of a complaint.

How do I treat per-inquiry spots for lowest unit rate purposes?

Per-inquiry spots have no effect on a station's lowest unit rates. This type of spot does not need to be offered to political candidates.

My station sells multiple levels of preemptible time. How do I deal with these for lowest unit rate purposes?

If each level of preemptibility has differing rights, e.g., one can be preempted with notice, while another does not require notice, or one must be made good within seven days, while another has no make-good rights, each of those levels would be a separate class with its own lowest unit rates.

However, stations must be sure that varying levels of preemptibility are strictly observed. For example, if you have three levels of preemptibility, with Class A the least preemptible and Class C the most, Class A must always preempt Class B, and Class B must always preempt Class C.

If, instead of strictly observing these levels, the station just uses the levels as selling guides, and the advertiser who gets on the air is determined simply by who pays the most money regardless of the Class, then the FCC considers the station to have a single class of preemptible time. In that case, a candidate can buy at the highest rate to ensure carriage, and you must give him a rebate for the difference between the price at which he bought the spot and the cheapest spot that clears in the same time period.

The FCC has also made clear that a station must disclose to candidates the likelihood of preemption for each class of preemptible time so that a candidate can make a reasoned decision as to the level at which the candidate wants to buy. By disclosing the likelihood of preemption, the candidate can make a buying decision by assessing the risk of preemption the candidate is willing to accept in return for receiving a lower price. For instance, if you disclose to a candidate that 90 percent of a particular class of preemptible spots will run – candidates may be willing to take their chances on buying at that level. Conversely, if you disclose that 90 percent of spots at that level will be preempted, then they almost certainly will not buy at that level.

What are the rules about rebates if we sell spots to a candidate at a preemptible rate and a lower priced spot of the same class clears during the same time period?

As noted above, if you sell spots to a candidate who buys spots at a high price in a preemptible class of time in which a lower priced spot clears in the same time period, you must rebate the difference in price to the candidate. Rebates should be done promptly (within a week), as candidates are especially sensitive to cash needs during the relatively short election windows. Rebates should be noted in the online public file.

Can we avoid all the issues with preemptible time by offering a special, candidate-only class of time?

A station can offer a special candidate-only class of time, at a discount off of the lowest unit rate for fixed (i.e., non-preemptible) time, to try to avoid the many issues that come up with trying to explain and sell preemptible time to candidates. The FCC has said that such a candidate-only class should be priced at the "effective selling level" of the station. By that, the FCC means that these non-preemptible spots should be priced at a rate that is comparable to a class of preemptible spots that bears a real risk of preemption. However, even by offering such a special candidate only-rate, the station cannot stop the candidate from buying a preemptible class time at a lower rate if the candidate elects to do so and accept the risk of preemption.

How do I treat agency commissions?

Lowest unit rates are based on "net" to the station. Thus, if your lowest unit rate for a class of time is $100, and you sell a spot at that price to a candidate using an agency, and you give the agency a 15 percent commission from that $100 price, you have effectively dropped your lowest unit rate to $85 - and a candidate buying directly would pay only $85. To avoid this trap, recognize that your lowest unit rate is set by what the station receives. If you make it clear in your disclosure statement that the station will not pay any commission on political spots sold at lowest unit rates, and you observe that restriction in practice, you can avoid the issue entirely. Note that a station rep firm is considered to be a station employee - so any amounts paid to the rep firm are part of the "net" received by the station.

Do bonus spots given to charities or government agencies affect lowest unit rates?

In the past, the FCC had said that bonus spots given to nonprofit organizations or government agencies do not need to be considered in lowest unit rate computations. In recent informal statements (which are not binding on the FCC but are indicative of their probable outcome of any case), FCC officials have expanded that holding to state that all spots sold to charities and governmental agencies can be excluded from lowest unit rate computations. The rationale is that candidates are supposed to get the same rates as "commercial" advertisers, and charities and government agencies are not commercial entities. However, spots promoting a charity or public interest cause, but sold to and sponsored by a commercial advertiser (e.g., a spot telling people not to drink and drive, sponsored by a beer company), do get factored into your lowest unit rate calculations.

Do I need to extend credit to a candidate for the advertising that they buy?

The FCC has said that a station can apply its normal credit policies to political candidates. Thus, if a station does not extend credit to organizations that have a temporary existence and that will effectively cease operations after a specific event (i.e., the election), stations do not need to extend credit to candidates and can instead require "cash on the barrel." State and local candidates can be required to pay for their spots before the spots will be scheduled. Federal candidates, however, cannot be made to pay more than seven days in advance of the running of their schedule.

Sponsorship Identification and BCRA Requirements

Any advertising spot dealing with an election or with any other political issue must contain a sponsorship identification tag, letting listeners know who is trying to convince them to act in a particular manner. This same rule applies to all advertising run on a station although, for most commercial products, the FCC assumes that the audience can figure out the sponsor of the ad from the product being advertised. But even in the case of a non-political ad, if it is not clear who is really sponsoring the ad, there must be a sponsorship tag. For example, a station was fined for advertising several stores in a town, without disclosing that it was the local chamber of commerce that paid for the ad.

But for political and other issue ads, whether or not bought by a candidate, the FCC requires that the ad contain a sponsorship identification providing the full, legal name of the sponsor. In a

case only a few years ago, a radio group agreed to pay $540,000 to settle an FCC investigation for apparently failing to identify the legal name of the company that paid for ads supporting an electrical transmission line project (and was behind the project). The case highlights the importance of ensuring that all political and issue advertising is properly tagged with the true sponsor of the ad and the words "paid for" or "sponsored by."

In the political advertising world, the true sponsor must be named, and information about that sponsor must be retained in the station's online public file (see the discussion in the following section). For federal candidates, and federal issues, the rules are more stringent. Some of the issues that arise in these areas are discussed below.

What does the FCC require in a Sponsorship Identification?

All political spots must have a sponsorship identification referencing who paid for the spot. This is true whether it is a candidate spot or a third-party spot dealing with candidates or other political issues or other controversial issues of public importance.

If an ad does not contain the Sponsorship Identification, what do I do?

If a spot does not have the required "paid for" or "sponsored by" language, the station can edit the spot to include the tag before airing it. This is true for both issue ads and candidate ads, regardless of whether the candidate is a federal, state or local candidate. For candidate ads, this is an exception to the "no censorship" rules discussed in a previous section of this guide. The requirement to have the sponsorship tag is a station obligation, not one of the advertiser. For candidate ads, if the candidate (or candidate's committee) does not agree to add a sponsorship tag, the station needs to add that tag or the station can be found in violation by the FCC. For issue ads, the station can pull the ad if the advertiser refuses to identify itself with an appropriate tag. Make sure that your advertising sales materials make clear that you have the right to pull ads if they do not comply with the law, including the rules regarding sponsorship identification, so that your decision to pull a noncomplying ad does not result in any contractual issues with the advertiser.

What is the "I'm X and I approved this message" all about?"

Under BCRA, an ad by a federal candidate must not only contain the "paid for" or "sponsored by" language, but there must also be a statement of approval by the candidate. If the proper BCRA language is not included, and the spot mentions the opposing candidate, the candidate forfeits his right to lowest unit rates (though it is still an open question as to whether a station may voluntarily give the candidate that low rate).

Under FEC rules, a federal candidate's spots must contain similar disclosures whether or not the spot mentions an opposing candidate. So most spots for federal candidates should already contain the appropriate language when they arrive at the station. The failure to have that language is not the station's responsibility (the candidate is the one who will get fined if it is missing), so a station cannot refuse an ad that does not containing the BCRA language, nor can the station on its own edit the spot to put the language in. However, if the spot does not contain the BCRA language, and the spot mentions an opponent, the station is not required to charge lowest unit rates. And, while the station cannot edit the ad to include the BCRA language, it may also end up fielding complaints from other candidates about the missing tags, and requests

for the station to withdraw lowest unit rate eligibility from the sponsoring candidate. If you get these calls, it is a good time to talk to your attorney about how to respond.

The exact language of the BCRA tag differs slightly for radio and television, and the FEC and the FCC also have slightly different requirements. However, the requirements are essentially as follows:

For television:

- A verbal statement by the candidate that he or she approved the ad (required by FEC for the candidate, but not by FCC); *and*
- Either:
    - A full-screen view of the candidate, *or*
    - An image of the candidate (80% of screen height); *and*, in either case,
- A clearly readable written statement of the approval and the name of the sponsoring committee (4 of height, 4 seconds, sufficient color contrast to be readable).

For radio:

- An audio statement by the candidate in which the candidate identifies himself, *identifies the office for which he is running* (the name of the office is not required in the TV ad), and states that he or she approves of the broadcast.
- The ad must also state that the candidate's committee has paid for the spot.

Note that in the radio ad, the candidate must state the office for which he or she is running. That does not need to be part of the audio for the television ad.

Do these enhanced identification requirements apply to state and local candidates?

Not under BCRA, which applies only to federal candidates. But check state laws, as a number of states have adopted election reform measures that require similar disclosures for state and local candidates. Some states also require additional disclosures - most often the name of the treasurer of a campaign committee. Check your local laws for requirements that might apply to your elections. While the requirements of Federal law cannot be changed by state laws, additional obligations like the need to name the treasurer can be added by these state laws.

What needs to be disclosed for issue ads?

As with political ads, for FCC purposes, you must have the "paid for" or "sponsored by" tag identifying the actual buyer of the advertising spots.

What if someone questions the identity of the sponsor named in the sponsorship identification tag?

From time to time, especially in connection with ads addressing ballot issues or attacking a candidate for office, questions are raised as to the true sponsor of an ad. Groups that oppose the message conveyed in the ad often allege that the identified sponsor is a front for another group who, often for political reasons or because it might detract from the message being conveyed,

wants to remain hidden. The FCC in one case suggested that stations have a duty to investigate the true sponsor of an ad if there is reason to believe that the named sponsor is not the true sponsor of the ads. If the named group is not paying for the spots, or if the named group seems to have no independent existence (if it is staffed completely by employees of another entity and run from the offices of that entity or entirely financed by that entity), the station may have an obligation to identify the other entity sponsor for the advertising. Check with counsel should such issues arise.

There are currently pending at the FCC several complaints against TV stations arguing that, when the stations run ads sponsored by a Political Action Committee (PAC), and the PAC is exclusively or predominantly funded by a single individual, that individual should be named as a true sponsor of the ad rather than the name of the PAC. The complaints have suggested that such an obligation is heightened when the station has knowledge (e.g., through its own news reports) of the source of funding for such a PAC. Watch for updates on these cases to see if the FCC will adopt any official changes to political advertising disclosure requirements.

Public File and Disclosure Statements

In a hot political race, a station's public inspection files may be in demand, as the online public file is supposed to be the place where candidates and the public can determine what advertising time other candidates and issue advertisers are buying on your station, and learn about other "uses" of your station by candidates outside of exempt programs. In addition, public interest organizations are getting more and more active in monitoring the online public file to get ideas about who is trying to persuade the public about a candidate or issue. Thus, the political file is very important.

The NAB's political broadcasting forms are not mandatory for collecting information about candidate or issue buys. But these forms are very good in gathering all the information needed from candidates and issue advertisers, so stations should strongly consider using them or similar forms published by other organizations. Completing the forms will help ensure that you have collected all of the information required under FCC rules. The current version of the NAB's form is PB-18 and is available to NAB members.

All broadcasters are required to keep their political files online, in an FCC-hosted public inspection file.

In addition to posting required political files online, stations are obligated to disclose their sales practices to legally qualified candidates. The FCC has expressed concern that candidates generally lack sufficient knowledge about station advertising sales processes. The FCC is concerned about the possibility that candidates, through lack of understanding of the process, may end up purchasing schedules that they do not need or paying more than they need to pay to ensure that their spots will air. Thus, stations are supposed to provide a disclosure to candidates before they buy time, setting out all of the information candidates need to know to make an informed buying decision. Details of the information to be provided by the public file and the disclosure statement are provided below.

What information about candidate ad purchases do I need to place in my public file?

The political section of the online public file should contain the following information:

- Whether a request to purchase time was accepted or rejected.
- If the request was accepted, the rate charged to the candidate.
- The date and time the spots are scheduled to be aired.
- The class or classes of time (daypart or program) purchased.
- In the case of a candidate request, the name of the candidate, authorized committee, and treasurer of the committee.
- After the spots have run, the specific times at which the spots were actually aired.
- If there were unpaid (i.e., free) "uses" by a political candidate outside of an exempt program, information about the time, date and length of time the candidate appeared on the station.

If there is a "use" of a station other than in a purchased advertising spot (e.g., if an on-air employee of a station becomes a candidate), the date and time of that use, its duration and the fact that there was no consideration paid by the candidate should be noted in the file.

When does information need to be placed in the public file?

As the public file is the source of all information for candidates, the information should be placed in the file "immediately", i.e., as quickly as possible - as soon as orders are placed or a "use" is made of the station, within a day, so that opposing candidates have access to up-to-the-minute information. The FCC has recognized that the specific times at which spots ran can be placed in the file at a somewhat more relaxed pace - whenever your traffic system normally generates information for affidavits of performance - as that information is not really necessary, given that information about the class of the spot and the date and time at which the spots are to run is already in the file. However, if specifically requested, information about exact times at which a spot ran should be provided to legally qualified candidates as quickly as possible.

Do I need to provide information about a candidate's uses of the station to his opponent over the phone?

No. Candidates can be directed to the online public file for that information. However, if you do provide information over the phone about one candidate's buys to his opponent, you need to provide that same type of information over the phone to all candidates in the same race. You need to treat all candidates for the same office in the same way. Hopefully this issue will slowly go away as candidates and buyers recognize that they can get complete information from the political files that are now available online.

Do I need to put any information in the public file about third-party political buys?

For groups buying time about state and local issues (e.g., bond issues, zoning matters or legislative actions in the state legislature), the FCC requires that you place in the public file information about the group who purchased the time. You do not need to disclose the rate charged for such state and local issue buys.

For all issue ads, you must also provide in the public file the name of the group, as well the

names of its executive officers or directors. In a recent decision, the FCC has suggested that, if the buyer only lists one officer or director, the station needs to make an inquiry as to whether there are additional officers or directors. While that decision is under review, we suggest that stations make that inquiry now if only a single officer or director is identified – and keep records showing that you made the inquiry.

For third-party groups buying time in connection with a federal election (e.g., attacking or supporting a candidate) or dealing with a federal issue (i.e., one that will be decided by Congress, a federal agency or the President), in addition to providing all the information that you would provide for any state or local issue, you need to specify the name, address and phone number of a contact person. You also essentially need to provide all the information that you would provide about a candidate's buy. That would include:

- A record of each request to purchase time
- Whether the request was accepted or rejected, in whole or in part.
- The rate charged to the third-party group, if the request was accepted.
- The date and time the spots are scheduled to be aired.
- The class or classes of time (daypart or program) purchased.
- Name of candidate to which the spot refers, the office sought, or the issue to which the spot refers.
- The name of the sponsor of the ad, along with the name, address and phone number of a contact person for the sponsor, and a list of the sponsor's chief executive officers/board of directors.
- After the spots have run, the specific times at which the spots were aired.

Note the requirement that you must identify in the public file the issue to which the issue ad refers. In a recent decision, FCC staff suggested that the station needs to identify *all* of the issues in the spot. Thus, even if the primary purpose of the ad is to attack or support a political candidate, if it also addresses very specific issues in a meaningful way (such as health care, abortion or climate change), those issues should also be identified. Sometimes, the buyer will not readily identify the issues being addressed in the ad. It is a station's obligation to make the disclosure, so review the ads carefully, and make sure that the issues addressed in the ad are being properly disclosed.

What information do I need to disclose to candidates about my sales practices?

Stations must disclose to legally qualified candidates the information necessary for the candidate to make an informed decision about what to buy on a station. This would include:

- The classes of spots and the dayparts sold by the station.
- The principal rotations sold by the station (not every rotation needs to be listed, if the most frequently used ones are disclosed and it is made clear that information about additional rotations can be provided on request).
- How the time is sold (e.g., preemptible or non-preemptible, using some sort of grid or on-demand system, etc.).
- To the extent that a station offers preemptible classes of time, the likelihood of preemption for each class.

- Specific selling practices that may affect buying decisions, including make-good rights, notice provisions before preemption, and other discounts or practices that may apply and affect the decision to buy time.

How do I make disclosures about information that may change?

As set out in the discussion of rates above, rates may change during the course of the political window. Other factors involving the decision to buy, including the likelihood of preemption, may also change. Thus, a station needs to do its best to estimate the rates and likelihood of preemption in the written materials. The disclosure should note that in fact estimates are estimates as of the date of disclosure. As estimates change, information about the change should be provided to the candidates and their representatives.

Does the disclosure need to be in writing?

The FCC's rules do not require that the disclosure be in writing. However, the disclosure is supposed to be made each time a station offers time to a candidate, and it needs to be made equally to all candidates. And the same disclosure should be made by all station employees or agents including station rep firms. Thus, to ensure uniform disclosure, and to have evidence of a station's particular sales practice in case it becomes an issue, it should be made in writing.

How long do I need to keep these political records in my public file?

Stations must retain political records for two years. After two years, the station can purge the relevant records from their online public files, or retain them in a non-public file until the applicable statute of limitations for written contracts in your state has passed.

Conclusion - Questions and Resources

While we have provided lots of questions, and almost as many answers, the political broadcasting rules are murky enough that any station will no doubt have new issues arise throughout the political season. Broadcasters should rely on this or other political broadcasting guides as just that - a guide to help you spot these issues. But know when to ask for more help from counsel or the FCC as you face complicated or novel issues.

Also, stations should be sure that a reliable and trusted person is responsible for the supervision of *all* political broadcasting activities. Because these rules can be complex, you do not want inexperienced sales representatives providing uninformed or contradictory information to candidates or their agencies. Not treating all candidates alike is the most certain way to get a station into trouble.

And, as with any area of FCC regulation, watch for new developments. Throughout the election season, political broadcasting issues may arise and you will need to adapt to any new rulings. Keep an eye on the trade press or check out our Blog at www.broadcastlawblog.com for the latest developments.