Pillsbury Winthrop Shaw Pittman LLP

Communications Broadcast Advisory

Special Advisory to Broadcasters
November 2006

Political Broadcasting Advisory

This Advisory provides a review of political broadcasting rules of the FCC.[1]

In this Advisory, of particular note are new regulations imposed on political broadcasting by the Bipartisan Campaign Reform Act ("BCRA") of 2002, popularly known as "McCain-Feingold." BCRA contains several provisions that affect the way stations handle their political advertising. On December 10, 2003, the Supreme Court reviewed BCRA, and left intact all of the provisions of the law that apply to broadcasters.

Despite the passage of BCRA, the regulation of political advertising and enforcement of the rules remain sensitive subjects in Congress. The topic should likewise be of prime importance to broadcasters. In addition to fines of up to $25,000 per violation of the political rules, a broadcast station's license can be revoked for willful failure to provide federal candidates with reasonable access. As BCRA has seemingly not affected the amount of money spent in the political process, bipartisan pressure for additional campaign reform, coupled with a more enforcement-oriented FCC and the complexity of the current political broadcasting rules, has led to increasing support by many members of Congress for requiring broadcasters to provide reduced or free advertising for political candidates. Numerous public interest organizations continue to agitate for such reforms. With upcoming elections, and recent financial scandals in Congress, the call for additional campaign reform may well grow in the near term.

In this environment, it is critical that all stations adopt and meticulously apply political broadcasting policies that are consistent with the Commission's rules, including the all-important requirement that stations fully disclose their rates, classes of advertisements, and sales practices to candidates. Stations should carefully prepare their Political Advertising Disclosure Statement to be provided to candidates. Such memoranda contain the required disclosures and if routinely provided to candidates, provide proof for stations that these disclosures have been made.

[1] Previous editions of this Advisory contain outdated information and should be disregarded.

Many of the political broadcasting obligations stem from the "reasonable access," "equal opportunities," and "lowest unit charge" sections of the Communications Act. These elements of the law ensure that broadcast facilities are available to candidates for federal offices, that broadcasters treat competing candidates equally, and that stations provide many of the political broadcasting obligations stem from the "reasonable access," "equal opportunities," and "lowest unit charge" sections of the Communications Act. These elements of the law ensure that broadcast facilities are available to candidates for federal offices, that broadcasters treat competing candidates equally, and that stations provide candidates with the rates they offer their most-favored commercial advertisers during specified periods prior to an election. As a general rule, you must not discriminate between candidates as to the use of your station, the amount of time you give or sell, or anything else. While this Advisory will outline some of the general aspects of the political broadcasting rules, there are dozens of possible variations on any one issue. Accordingly, you should contact legal counsel with any specific questions or problems you encounter.

Introduction

There are two concepts that are basic to an understanding of the laws, rules, and policies governing political broadcasting. These are the concept of a "legally qualified candidate" and the concept of a "use" of a broadcast facility.

A person seeking the benefits afforded candidates by the political broadcasting rules must prove that he or she is a legally qualified candidate. A determination of whether and when a candidate has made that showing is a matter of the good faith judgment of the station, applying the rules set forth below.

"Legally Qualified Candidate"

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

(1) must have publicly announced that he or she is a candidate; **and**

(2) must meet the qualifications prescribed by the applicable laws for the office he or she seeks; **and**

(3) must meet additional requirements, which vary depending on the office sought and the type of election. These criteria are:

For primary, general, or special elections

A person seeking election to any office, or nomination to any office other than President or Vice President of the United States, by means of a primary, general or special election, in addition to (1) and (2) above, must meet the following additional criteria as to each state in which he or she seeks "legally qualified" status:

(a) he or she must have qualified for a place on the ballot; **or**

(i) must have publicly committed himself or herself to seeking election by the write-in method; **and**

(ii) must be eligible under applicable law to be voted for by sticker, write-in, or other method **in the state where he or she seeks election; and**

(iii) must make a substantial showing that he or she is a **bona fide** candidate for nomination or office.

For conventions or caucuses

A person seeking nomination to any public office except President or Vice President by means of a convention, caucus, or similar procedure, in addition to (1) and (2) above, must also make a substantial showing that he or she is a **bona fide** candidate for the office sought. This method of showing legal qualification only applies during the ninety days before the beginning of the convention or caucus.

For Persons Seeking Nomination for President or Vice President

A person seeking nomination for these offices must, in addition to (1) and (2) above:

(a) show that he or she, or proposed delegates on his or her behalf, have qualified for the primary or presidential preference ballot in the relevant state; or

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

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

The Concept of "Use"

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

As there is a “use” even if a candidate has not authorized an on-air appearance, equal opportunities issues and other problems may occur even when the broadcasts are involuntary and not authorized by the candidates themselves. Spots by an independent political group promoting a candidate, or even appearances of a candidate in old movies or TV shows, are considered “uses.” Stations must also be careful about employee candidates, as the appearance on the air by an employee who is also a candidate for public office could trigger free time to his or her opponents. However, an ad attacking a candidate, even if it contains the candidate's voice or picture, is not considered a "use" by the candidate being attacked, as it is not a “positive” broadcast.

Exemptions from "Use" Rules

The use of a candidate’s voice or picture in four kinds of programming never constitute a use:

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

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

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

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

These four classes are **not uses at all**. The distinction is important, since a broadcaster may not censor a use by a candidate.

Note, however, that this exception applies only to candidates who are the subject of a report, interview, or other coverage. If the station employee who reads the news, conducts the interview, or otherwise appears is himself a candidate, his appearance will be considered a "use."

Equal Opportunities

When a legally qualified candidate for public office "uses" your station, that use will trigger "equal opportunities" rights. "Equal opportunities" requires that each opposing candidate be permitted an equal opportunity to buy time at the same rates paid by the first candidate, if the first candidate bought time, or to receive free time, if the first candidate received free time. The equal opportunities requirements apply whether the candidate is running for federal, state, or local office. Contrary to a common misperception, "equal opportunities" rights **do not** arise only during the pre-election "lowest unit rate" periods. They apply whenever a legally qualified candidate "uses" a station.

Time for Making Demand

Any candidate who is entitled to equal opportunities must make his or her demand within seven days of the first prior "use" by the competing candidate. After seven days the equal opportunities privilege as to any use expires, though subsequent uses may trigger more equal opportunities rights. This "seven-day rule" protects stations from facing unreasonable demands for time by candidates who have "sandbagged" equal opportunity claims.

Equal opportunity responses cannot be "daisy-chained." Suppose candidates A, B, and C all are legally qualified candidates for the same office, and candidate A broadcasts a use to which B makes a timely equal opportunity request. C does not make a timely request based on A's use. C may not then respond to B within seven days of B's responsive use. C must respond to the first prior use triggering the right of response. In this case, the first prior use was A's use.

What Qualifies as "Equal"

"Equal opportunities" does not mean precisely the same time period, but rather a "comparable" time period. The audience share a must be comparable, and it would avoid controversy to provide an audience that is demographically similar to that of the prior use. Also, if you allow one candidate to use your facilities beyond just the microphone (e.g., using your production studio), you must do the same for that candidate's opponents, if requested.

No Notification to Competing Candidates

You have no obligation to notify opposing candidates when a "use" has occurred on your station. It is up to those candidates to monitor your station and check your public inspection file's political records to determine whether they have a right to equal opportunities. There is no duty to notify a candidate about requests for

time by an opponent. If you do notify one candidate about uses by an opponent, however, you must do the same for all that candidate's opponents. Recall that you may not discriminate between candidates. Similarly, once you give political file information telephonically to one candidate, all candidates in the same race must be accorded the same treatment. As the public file is the principal place where candidates should gather information about uses by a competing candidate, the recordkeeping requirements discussed in a subsequent section of this guide are very important.

Limitations. Remember, the equal opportunities provision applies only to "uses." If no use has occurred, then there is no right of equal opportunities. An issue which regularly arises is the appearance by a candidate on a station before they have become "legally qualified." If they have not completed the steps necessary to become a legally qualified candidate, equal opportunities do not apply.

The "Zapple Doctrine," or Quasi-Equal Opportunities

Under the "Zapple Doctrine," if a station sells time during a campaign to supporters of a legally qualified candidate (such as political action committees or spokespersons) who urge their candidate's election, discuss campaign issues, or criticize a competing candidate on the air, the station must afford comparable time to the opponent's supporters or spokespersons, if requested. This doctrine applies only during campaign periods.

As an initial matter, the FCC does not require that you afford any opportunity for an independent supporter of a candidate to use the station's airwaves. However, once the choice is made to allow the supporters of one candidate to broadcast on the station, the opponent's supporters also must be allowed, under the "Zapple Doctrine," to use the station.

The "Zapple Doctrine" does not afford candidates or their supporters the right to free, equal time in response to the broadcast of paid announcements by supporters of opposing candidates. A station need not give free time in response to an assertion of quasi-equal opportunities if the supporter of the opposing candidate paid for the quasi-use. The "Zapple Doctrine" applies only to spokespersons/supporters of *major* political party candidates. The four "**bona fide**" exemptions discussed above apply here as well, so quasi-equal opportunities rights will not arise in response to these types of news programs.

While the "Zapple Doctrine" is very similar to the equal opportunities section of the Communications Act, it is really based in the Fairness Doctrine. As discussed below, most applications of the Fairness Doctrine have been rejected by the FCC as unconstitutional. However, because no one has directly challenged the "Zapple Doctrine's" constitutionality since the FCC began rejecting Fairness Doctrine complaints in 1987, the Commission is still accepting "Zapple" complaints. As the rejection of the Fairness Doctrine may someday be revisited, "Zapple" requests should be taken seriously.

Reasonable Access

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

"Reasonable access" applies only to commercial stations. In order to qualify for reasonable access, the candidate must be requesting a "use." Again, this means that the candidate's image or voice must appear as part of the broadcast, *and* that the image or voice be identified or identifiable. The reasonable access requirement begins once a candidate is legally qualified, and thus is not limited to the 45 days before a primary or 60 days before a general election.

Charges for Reasonable Access

Commercial stations are *not* required to make free time available to federal candidates by virtue of the reasonable access clause. However, if you make free time available to one candidate, the equal opportunities requirement may obligate you to similarly accommodate his or her opponents.

How Much Time Must be Devoted to "Access"?

"Reasonable access" does not give candidates rights to any particular programming. Nor must a station make all of its advertising time available to candidates, or make so much time available that it is forced to preempt an excessive amount of other programming.

However, you may never set limits in advance on how much or what type of time you will make available to federal candidates. Each request for access by a federal candidate must be evaluated individually.

In responding to a candidate's request for time, a broadcaster must weigh such factors as:

(1) the individual needs of the candidate, as expressed by the candidate;

(2) the amount of time previously provided to the candidate;

(3) potential disruption of regular programming;

(4) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and

(5) the timing of the request.

How Much Access is "Reasonable"?

As noted above, when deciding how much access you will provide to a particular federal candidate, you must consider the candidate's individual needs, the amount of time previously supplied to the candidate, the potential disruption of regular programming, and the number of competing candidates likely to invoke “equal opportunities” privileges. **Because each response to a request for reasonable access must consider these factors, the FCC's political advertising staff warns that a station should not set a blanket policy in advance as to how much "reasonable access" it will allow.** Thus, your political disclosure statement or rate card must not restrict federal candidates to a certain number of spots per daypart, or per week. Instead, your station must weigh each request on the merits at the time it is made, and must negotiate and discuss with the candidate or his/her representative the candidate's needs and the station's circumstances. If a complaint making a reasonable showing of a violation of these rules is filed, the broadcaster will have the burden of proving that it gave due consideration to all of these factors.

Access to News Programming

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

News Adjacencies

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

Non-Standard Length Spots

In a September 1999 ruling, the Commission stated that requests for non-standard length times by federal candidates must be evaluated under the same criteria as all other requests for reasonable access. Specifically, the Station must consider: (a) the individual needs of the candidate, as expressed by the candidate; (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and (e) the timing of the request. Stations may not flatly prohibit non-standard programming lengths or commercial lengths, even if such non-standard lengths have never been programmed on or sold by the Station.

The rates to be charged for program length time, if not otherwise sold by the station, can take into account lost revenue, including any diminution of revenue due to lost ratings in immediately following programs.

Weekend Access

Stations that have provided weekend access to any commercial advertiser in the year preceding the pre-election period must provide access to federal candidates the weekend before the election. However, stations need only offer candidates the kinds of weekend services that previously have been made available to commercial advertisers. Thus, if a station has provided weekend access only for deleting copy or canceling spots, as opposed to selling and scheduling new spots, the station is only required to provide the same pre-election weekend services to federal candidates. However, even if a station has not been open on the weekend in the year prior to the election, giving candidates access to station personnel over the weekend before the election may still be necessary to allow a candidate to effectively make use of his or her equal opportunity rights.

Ordering Deadlines

Stations may hold candidates to the same ordering deadlines that are applied to commercial advertisers, so long as the deadlines do not interfere with reasonable access or equal opportunities rights. Thus, when a federal candidate requests access or when any candidate makes a valid equal opportunities demand, ordering deadlines and other matters of procedure should be waived when necessary to ensure that reasonable access and equal opportunities are provided in a timely manner.

Only Federal Candidates Qualify

Reasonable access is a personal privilege that applies only to federal candidates; it does not apply to their spokespersons or any other entities. Thus, you do not have to provide time to a political action committee, a political party which is not acting directly on behalf of a candidate, or to any other non-candidate advertiser – even if their message deals with a federal election.

Access for Non-Federal Candidates

Only candidates for **federal** office have a right of access to your station. You are not required to provide "reasonable access" to non-federal candidates. However, it would not be judicious to completely ignore state and local elections in your programming. The Commission has interpreted stations' broad public interest obligations to include being responsive to the needs and interests of their communities and providing some coverage of local or state elections. A station whose programming does not even acknowledge important elections may be accused at renewal time of failing to meet its community's needs. Remember, though, that if you allow one non-federal candidate a "use," the equal opportunities requirement would apply and you would have to allow equal opportunities to his or her legally qualified opponents for the same office. Furthermore, once access is granted to a state or local candidate, all other political rules, such as lowest unit charge, non-discrimination and no censorship apply to that election.

However, as reasonable access does not apply to state and local candidates, you need not sell them advertising time or, if you decide to sell time to candidates for a state or local office, you can restrict sales to particular dayparts, and put upfront restrictions on how many spots these candidates can buy within that daypart. This is in contrast to Federal candidates, who must have access to all classes and dayparts offered by a station, and with whom you must engage in a reasoned discussion of how much time they can buy. Note, however, that once you sell spots to one state or local candidate for a particular office, you must make available the same opportunities for all candidates for that same office – though races for other state and local offices can be treated differently.

The Fairness Doctrine

Ballot Issues

Under current law, broadcasters need not honor demands for air time under the Fairness Doctrine to promote competing sides of ballot issues. However, it is conceivable that the Commission may revisit this issue down the road. It should be noted that if your station allows advertising regarding ballot issues, lowest unit charge does not apply. Furthermore, as noted below, the protections afforded stations broadcasting “uses,” such as protection from defamation suits, do not apply.

“Zapple Doctrine”

As discussed above, the status of the "Zapple Doctrine," or quasi-equal opportunities, is unresolved. Pending a resolution, stations should assume that the doctrine is still on the books.

Content of Political Broadcasts

Censorship

A licensee may not edit or censor the content of a candidate's "use" of its station. Even if the ad is of poor quality, contains an outrageous message, is part of a "smear" campaign, or is a "negative ad," it must be run as submitted. You may not edit out libelous material, though you are immune from a civil action for libel based on statements made in a "use" by a candidate.

The Commission's staff has indicated that a "use" that is in conflict with another federal statute, such as a use that is legally obscene, may be censored. However, this situation should arise rarely, if ever. The Commission has not made clear what a station can do about spots containing disturbing or indecent, but not obscene, material. In 1996, a federal appeals court reversed an FCC declaratory ruling that would have allowed broadcasters to "channel" political spots containing depictions of aborted fetuses to times in which children are not in the audience. **Counsel should be consulted before attempting to edit or censor any "use," or before using disclaimers in connection with such spots.**

A station *may* censor non-"use" political broadcasts, including broadcasts by supporters or opponents of legally qualified candidates. Because stations have the power of censorship in these circumstances, they are *not* immune from liability for libelous or slanderous statements contained in a spots that are not "uses" by candidates. Thus, stations need to carefully review the contents of third-party ads and should, especially if the accuracy of the content is challenged, request supporting data for any claims mad in the spot. Where there are questionable allegations made in a spot, especially allegations that could be found to be libel or slander, the station should decline the non-"use" spot. **This is a very sensitive area in which counsel should be consulted.**

Subject of "Use" Irrelevant in Equal Opportunities Context

A candidate who appears pursuant to an equal opportunities request may use the time as he or she sees fit, and is not required to discuss his or her candidacy. This is an application of the no-censorship provision. However, an advertisement which does not involve a candidate's campaign, e.g., is for the candidate's car dealership, while a "use," does not qualify for lowest unit charge.

Sponsorship Identification

Sponsorship identification is always required. See discussion of Sponsorship Indemnification below.

Prior Review

You may ask to review material in advance to ensure that it constitutes a "use" by the candidate and contains the necessary sponsorship identification (see discussion below), or to make sure that the broadcast will stay within the agreed length. When asking for a tape or script for advance review, you must inform the candidate that you are prohibited from censoring the material. However, if the spot does not contain the proper sponsorship identification, you must add the identification, even if that requires overdubbing a portion of the spot. A candidate may be charged the station's normal production rates for the cost of correcting a sponsorship identification.

Rates

Charges to Candidates

Legally qualified candidates are always entitled, at a minimum, to purchase time for a "use" at rates comparable to what other advertisers pay. You may never discriminate against a candidate or charge more than what you would charge any other advertiser for any station services. Services you make available to commercial advertisers must be made available to candidates on the same terms.

Only candidates and their authorized campaign committees are entitled to the lowest unit rate. Over the last few years, political parties have sought to skirt federal campaign finance restrictions through "soft money" advertisements -- i.e., spots which depict and support a specific candidate, but which are purchased by the party rather than by the candidate or the candidate's authorized committee. Many of these types of advertisements are "independent expenditures" under FEC Rules. The FCC staff has stated that such spots are entitled to the lowest unit rate only if they are authorized by a federal candidate. As a practical matter, however, such advertisements will rarely, if ever, be authorized by a federal candidate, as doing so would result in the advertisement losing its "independent expenditure" status under FEC Rules.

State and local candidates are entitled to the lowest unit charge. As set forth above, reasonable access requirements do not apply to state and local candidates. However, if the station chooses to sell to such candidates during the pre-election windows, lowest unit rates apply.

Pre-Election Period and Lowest Unit Charge

For "uses" broadcast during the 45 days before a primary or primary runoff election and 60 days before a general election, you may charge candidates no more than your "lowest unit charge" for the same class (rate category) of advertisement, the same length of spot, and the same time period (daypart or program). If you sell spots on election day, those spots must also be sold at the lowest unit rate. The candidate must be sold spots at the lowest charge you give to your most favored advertiser for a spot running during the window that is of the same class, length of spot, and time period. If your lowest unit charge is commissionable to an agency, you must sell to candidates who buy direct at a rate equal to what the station would net from the agency buy.

Candidates get the benefit of any volume discounts you offer to other advertisers even if they purchase only one spot. Thus, if you charge $20 for a single one-minute spot and $150 for 10 one-minute advertisements (or $15 per ad), you must charge a candidate only $15 for a one-minute ad even if the candidate buys only one spot.

Any station practices that enhance the value of advertising spots must be disclosed, and most must be made available to candidates. These include, but are not limited to, discount privileges that affect the value of the advertising such as bonus spots, time-sensitive make goods, preemption priorities, and other factors that enhance the value of the advertisement. Under the rules, if you have provided any commercial advertiser with even a single time-sensitive make good for the same class of spot during the preceding year, you must provide time-sensitive make goods for all candidates before the election.

Who is Entitled to the Lowest Unit Charge?

Only "uses" by legally qualified candidates for public office are entitled to the lowest unit charge. The candidate must appear personally in the spot by voice or image, and the appearance must be in connection with

his or her campaign. If the owner of the general store runs for sheriff, he or she is not entitled to the lowest unit charge for spots promoting the store's weekly specials. A candidate's appearance in his business advertisement would trigger equal opportunity rights, and, if within the lowest unit charge window, the lowest unit charge for the opponent requesting equal opportunities. Outside the lowest unit charge window, a candidate making a valid equal opportunity claim in response to his or her competitor's spots will be entitled to the same rate the competitor paid, and may use the time any way he or she sees fit.

Candidate Certifications

BCRA, as stated in the introduction to this Advisory, has added new requirements for candidates who seek lowest unit rates. Federal candidates, in order to qualify for lowest unit rates, must provide stations with a certificate, certified by the candidate or the candidate's authorized committee. This certification must set out that the candidate will not make any direct reference to an opposing candidate in the advertising unless, for television, at the end of the spot, there is a clearly identifiable image of the candidate, and clearly readable printed statement, stating that the spot was authorized by the candidate, and paid for by him or his authorized committee, or, on radio, the voice of the candidate identifying himself and the office that he is running for, making the statement that he approved the spot. A federal candidate who does not provide the station with such certification, or whose spot does not contain the required statements, is not entitled to lowest unit charge. More details about the required Sponsorship identification are found later in this Advisory.

What is a "Class of Time?"

This is an important question, since each "class" of time or spot can have its own lowest unit charge. "Class" refers to rate categories such as fixed position, preemptible, and run-of-schedule ("ROS"). Your lowest unit charge for fixed position spots can be different than the lowest unit charge for preemptible spots, even if both spots run in the same time period.

Stations have broad discretion in defining different classes of time for lowest unit charge purposes. The classes must be clearly defined, distinguished on the basis of real differences (other than simply price or the identity of the advertiser), disclosed, and made available to candidates. You may not create a special, premium-priced class of time that is sold only to candidates.

Preemptible Spots as Distinct Classes

The Commission now allows stations to treat meaningfully different levels of preemptibility as distinct classes of time. However, all classes of preemptible time must be disclosed and made available to candidates, including the lowest-priced class that has a likelihood of clearing. Candidates must be told what the likelihood of clearance is for each class. Salespersons may not inflate the price of a spot beyond the minimum necessary to clear by falsely claiming that all preemptible time has been sold out.

Defining Classes of Time

The Commission has always held that price alone is not sufficient to distinguish classes of time. But a distinct class will be recognized when a higher price buys some demonstrable benefit, such as a specific projected lower risk of preemption or more favorable make-good privileges. Differing time parameters can also distinguish classes of spots. Thus, a preemptible spot purchased to air between 8:00 pm and 11:00 pm may be considered to be of a different class than a preemptible spot purchased to air between 6 am and 12 midnight.

Previous Commission policy held that all preemptible time must be treated as a single class. A candidate who bought a higher-priced preemptible spot that had a better chance of clearing was entitled to a rebate if **any** lower-priced preemptible spot actually cleared in the same time period. Under the present rule, stations may establish multiple levels of preemptibility with various attributes, the most significant of which will usually be differing risks of preemption. If these levels of preemptibility are strictly observed, each level would have a different lowest unit rate. Thus, the Commission has recognized that certainty of airing is a valuable element of the advertising purchase.

However, stations that sell preemptible time solely by the auction method, in which any advertiser can preempt another by paying a higher rate, will be unable to take advantage of this new policy, since all "auction" spots will be distinguished only by price, and thus will be in the same class.

Stations with enough spot volume to define separate levels of preemptibility may find it worthwhile to adopt such a system. For example, a lower class (Level 1) of preemptible time might be distinguished by the lowest degree of preemption protection -- **all** spots of this class are "bumped" before any spots are bumped from any superior, higher-priced class. In this system, Level 2 preemptible spots would have a higher clearance priority (and perhaps a make good feature) and could command a higher price. A candidate buying a Level 2 spot would not be entitled to a rebate to the Level 1 lowest unit charge just because a Level 1 spot happened to clear in the same time period.

Of course, it is likely that spots will be sold at different rates even within a single class of preemptible time. In such cases, candidates will be entitled to rebates if any preemptible spot **of the same preemptible class** clears in the same daypart at a lower rate than the candidate paid. Thus, each level of preemptibility will be distinguished by a range of rates, in addition to the varying levels of clearance priority and other factors. When such a system is in place, spots may still be sold essentially by the auction method within each class while reducing the station's exposure to excessively large rebates.

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

Moreover, all separate levels of preemptibility must be fully disclosed to candidates. This includes a description of each preemptible class sufficient to give candidates an understanding of the differences between them (including the make good privileges associated with each); the station's best, good-faith estimate of the lowest unit rate for each class; and a best, good-faith estimate of the likelihood of clearance for each class.

Special Candidate-Only Class of Time

While the establishment of multiple classes of preemptible time can help reduce the size of rebates to candidates, it cannot eliminate rebates altogether. One way to eliminate rebates, and possibly to simplify the complexities raised by multiple classes of preemptible time, is to establish a special candidate-only class of non-preemptible time. This may be done only if the special class is sold below the prevailing rate (the “effective selling level”) for preemptible time. In other words, the commercial, preemptible class that is priced comparably with the candidate-only class must run a genuine risk of preemption, *i.e.,* it must not be the functional

equivalent of fixed time. Of course, the station cannot adopt a candidate-only class of non-preemptible time and then refuse to sell preemptible time to candidates. It must still disclose and sell all commercially available classes of time to candidates.

Sold Out Time

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

This burden is lessened when a station structures multiple levels of preemptibility. When more than one level of preemptibility is offered, a candidate chooses his or her rate based on the level of preemption protection he or she demands. The candidate will never earn a rebate beyond the lowest-priced spot *of the same class* that clears. Moreover, when multiple levels of preemptibility are offered, a station *can* be "sold out" of certain classes of preemptible time: if so many spots have been sold in Preemptible Class 2 that no spots in Preemptible Class 1 will clear even at the highest Class 1 rate, then Class 1 is "sold out." If the candidate wants a chance of clearing, he or she must buy the more expensive Class 2.

The Commission has repeatedly stressed that a station may not steer a candidate to higher-priced non-preemptible time by claiming that preemptible time is "sold out" if it would give a commercial advertiser the chance to clear at a slightly increased preemptible rate.

You may not decline an equal opportunities or reasonable access demand because the station is "sold out." But remember that you have some flexibility in determining what constitutes "equal" opportunities and "reasonable" access.

National and Local Rates

"National" and "local" rates are not different classes of time for lowest unit charge purposes. Thus, if your card rates (or your actual rates) are different for national and local buys, qualified candidates are entitled to the lowest rate regardless of how the buy is made. You cannot charge "national" rates to candidates for national offices if local rates would yield a lower lowest unit charge.

Package Deals

You can no longer treat package deals as separate classes of time for lowest unit charge purposes. **Instead, stations must assign a rate to each spot within a given package.** These rates are then compared to other rates for the classes of spots contained in the package to determine if the rates, as allocated, affect the lowest unit rate for that class of time. Thus, under this rule, package plans that include multiple dayparts can set the lowest unit rate for candidate purchases of individual dayparts.

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

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

Package Spot Prices May Vary Over Time

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

This treatment of package plans requires extreme care in the way custom packages are sold and scheduled. Unrealistically low rates in less desirable dayparts or programs that are sold as part of a package to secure price integrity in dayparts or programs of higher demand, or to dress up and close deals, can set the lowest unit charge for that daypart, even for candidates who do not buy the more expensive dayparts. Similarly, discounted prime time spots that are tied to purchases of higher-priced spots in less desirable dayparts can set your lowest unit charge for prime time purchases by candidates.

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

For spot packages containing different classes of spots that are sold at a flat package rate, you must now make an allocation of the package cost among the spots included. Otherwise, the Commission might determine your lowest unit charge by simply dividing the number of spots into the total cost, with no consideration given to the relative values of different classes or time periods.

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

Non-Cash Merchandising and Promotional Incentives need not be offered to candidates if (1) they are of minimal value (coffee mugs, tee shirts, etc.) or (2) if they may reasonably imply some relationship between the candidate and the advertiser (such as joint bumper stickers). Any other non-cash promotional incentives

must be made available to candidate advertisers on the same basis as they are offered to commercial advertisers.

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

Public Service Announcements (PSAs)

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

Trade-outs, Per Inquiry, and Network Spots do not affect your lowest unit charge.

Rebates

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

Use of Production Facilities

“Lowest unit charge" applies only to the sale of *broadcast time*. If the candidate also wishes to use production facilities, he or she may be charged normal station rates for doing so.

Charging Rates During the Pre-Election Period

Stations may increase their lowest unit charges during the pre-election period as a part of a general rate increase when justified by seasonality or improved ratings. Thus, if the ratings for "*The West Wing*" improve, rates in that show, including the lowest unit charge, may be increased. Candidates buying spots to run before the rate increase get the rate in effect then, and those purchasing time to run after the increase pay the higher rate. But if spots sold to run before the rate increase clear after the rate increase, they will continue to set the lowest unit charge for programs in which they clear. Remember, the candidate is entitled to the lowest unit charge for spots of the same class and length that run during the same daypart or program as his or her spots.

In fact, stations’ lowest unit rates may change throughout the political window for some classes of time if the station is selling on a demand or auction basis, or to take into account changes in the prices of weekly rotations, or even when a particularly low priced, long-term contract which establishes the lowest unit charge runs out during the window. However, it is important to remember that the price is set by when a spot runs, not necessarily when it was sold. This means that the lowest unit charge for spots to be run in a particular week is set by the lowest price paid by an advertiser for a spot run during a particular class of time during that week, even if the purchase of new spots by an advertiser at the time the spot runs would have been at a higher price.

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

Rate Changes and Equal Opportunities

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

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

Lowest Unit Charge Traps

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

Agency Commissions on Political Buys. Except for spots sold by the station's rep firm, the lowest unit charge is based on the net to the station. Commission to the station's rep firm will not be netted out of the spot price, as the rep is considered a station employer or agent, while an agency is the representative of the spot buyers. Assume that the commissionable lowest unit charge for a drive time news adjacency is $100. A recognized agency books a news adjacency on behalf of a legally qualified candidate who is entitled to the lowest unit charge. You bill the agency $100, of which the station nets $85. Your new lowest unit charge for drive time news adjacencies is $85, at least for candidates who wish to make a "direct" buy. To avoid this problem, recognize that the net to the station sets the lowest unit charge, even for non-agency buys. So if your lowest unit charge is not commissionable to an agency, you can avoid reducing it further by refusing to commission it.

Bonus Spots. Be careful about giving bonus spots or selling excessively discounted spots as part of a package during the pre-election periods. They can reduce your lowest unit charge. For example, if an advertiser receives one spot free for every nine spots he buys, the unit price will be decreased by 10% for computing your lowest unit charge. If the spots in this example were $10 each, the advertiser would get 10 spots for $90. Thus, the lowest unit charge would be $9.

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

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

Make goods can also obligate you to run free spots under certain circumstances. This arises out of a station's "equal opportunities" obligation and is unrelated to lowest unit charge. If a station runs a candidate's spot in the wrong time slot and runs a "free" make good, a competing candidate who makes a timely demand for equal opportunities would be entitled to a comparable free spot. However, if the make good is run because of a technical failure of the paid spot, so that the paid spot is substantially interrupted or unintelligible, a make good would not be a windfall for the candidate and a competing candidate would not be entitled to a free spot. Of course, he could still buy a comparable spot at the same price.

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

Rate Disclosure Statements

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

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

These obligations require that stations adopt comprehensive, political advertising policy statements. While the Commission's rules do not require that such statements be in writing, prudence dictates that they in fact be written to ensure that all necessary disclosures are made to all candidates. Candidates must be informed of all available rates and all sales practices affecting rates, even outside of the pre-election lowest unit rate periods. The only way to assure that consistent, accurate and complete disclosure is made to every candidate is to carefully craft a written political advertising disclosure statement.

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

If a station adopts a special, candidate-only non-preemptible class of time, it must still disclose the availability and associated features of all other classes of time, even those that are higher-priced or less desirable.

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

Rep Firms

Each licensee is responsible for making full disclosure to **all** candidates inquiring about time purchases. Thus, it is the station's responsibility to educate its rep firm about its political policies and rates and to provide the rep firm with adequate numbers of copies of its political disclosure statement. Stations should immediately notify rep firms of any changes in rates, policies, classes, availability, etc. when political sales are being made. Detailed records of the station's efforts to keep the rep up to date should be maintained. Similarly, stations must obtain from their rep firms information about requests for political time and must place that information in their public files.

Sponsorship Identification

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

Moreover, the person or entity being identified as the sponsor in a candidate or issue advertisement must be the one that is *truly* purchasing the air time. In a recent decision, the FCC ruled that an issue advocacy spot identifying the "Fairness Matters to Oregonians Committee" as the sponsor did not identify the "true sponsor" where the facts showed that the "Fairness to Oregonians Committee" was merely a front for the Tobacco Institute. This case is significant because it stands for the proposition that, in certain circumstances, a station may be required to look *behind* the named sponsor and identify the party with true financial and editorial control over the message. This does not mean that broadcasters must be private investigators; they need only exercise "reasonable diligence" to obtain the information necessary to assure that a proper sponsorship identification is made. Nonetheless, the FCC held in the Oregon case that where a challenger "makes so strong a circumstantial case that someone other than the named sponsor is the real sponsor," reasonable diligence requires that the broadcaster inform the named sponsor that the true sponsor must be identified. In

that case, the challenger presented facts showing that essentially all of the "Fairness Matters to Oregonians Committee's" funding was provided by the Tobacco Institute, and that editorial control of the Committee's campaign rested with a tobacco company that was the Tobacco Institute's single largest contributor. Practically speaking, whenever the sponsorship of an issue ad is challenged, consult with counsel to determine whether the sponsorship identification should be altered.

For television spots, visual identification in letters equal to 4% of the picture height must be broadcast for four seconds. Aural identification is optional for television spots. Sponsorship identification announcements must be made at both the beginning and the end of political material that runs five or more minutes.

Stand By Your Ad Requirements

As stated in the introduction to this **Advisory**, new requirements established by BCRA are in effect. One of the new BCRA requirements mandates that *federal* candidates be identified in their campaign spots, stating that they authorized or approved the broadcast. For television, this identification can be done either by:

(1) A full-screen view of the candidate identifying himself and stating that he approved the ad or

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

In addition, the television spot must also contain, at the end a clearly readable written presentation stating that the candidate approved the ad and that his authorized committee paid for the ad, broadcast for at least four seconds, occupying at least four percent of vertical picture height. The disclaimer must have a reasonable degree of color contrast between the text and the background so as to be "clearly readable."

For radio spots, this requirement is met by an audio statement by the candidate which identifies himself or herself and the office for which he or she is running, and states that he approves of the broadcast.

Other provisions of BCRA extend these identification requirements to all federal candidate advertising, whether or not an opponent is mentioned.

Third-Party Spots

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

(1) A statement that the spot is not authorized by any federal candidate, and

(2) A statement identifying who paid for the broadcast, any organization connected to the payor, and a permanent street address.

For television, such statement must be made in an unobscured, full-screen view of a representative of the political committee of the person making the statement, or by a representative of such committee in a voice-over, together with the text of the information in a clearly readable format (as described in the section above for candidate advertising).

FCC Enforcement of New BCRA Identification Requirements

At the time of the preparation of this Advisory, the FCC has issued no formal ruling requiring that stations police third-party ads for compliance with the new sponsorship identification requirements, or to police such ads to determine if they comply with new BCRA prohibitions on ads by certain groups during specified periods prior to the election. If these issues come up, check with legal counsel for guidance on these subjects.

As to federal candidate advertising, particularly where a candidate's opponent is mentioned, while the FCC has not yet issued formal guidance, we advise stations to monitor ads to determine if the new BCRA identifications are contained in the ads. A station giving lowest unit rates to a federal candidate who has not observed the BCRA identification requirements may, at a minimum, be subject to a complaint from an opposing candidate who did observe those requirements, and may well be found to have violated the new federal campaign finance laws.

Material Provided by Candidate

If a candidate or his/her supporting organization provides you with scripts, copy, tape, film, or other material as an inducement to broadcast the material, you must indicate that the material was "provided" or "supplied" by the candidate or organization if and when you use it. The Commission has ruled that, with respect to the use of candidate-supplied material in **bona fide** newscasts, it will apply the rule only to tape or film supplied by the candidate.

Ordering Deadlines, Prepayment, and Credit

If the station's credit policy is such that it does not extend credit to transient organizations with no established credit history, it may demand payment for a schedule in advance of the start of the schedule. However, federal candidates cannot be required to pay more than seven days in advance of a flight's start date. This does not mean that a station can demand across the board that no political advertising can be sold to run with less than a week's notice. Generally, ordering and production deadlines for candidate advertising must correspond to the deadlines applied to commercial advertisers. Genuine requests by candidates for reasonable access or equal opportunities should be accommodated without regard to ordering or prepayment deadlines.

Recordkeeping

Public Inspection File

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

While stations need not update exact times of political spots immediately, they must provide some method for opposing candidates to ascertain the exact time an opponent's spot aired. If the station does not update

its political file immediately to indicate exact times, then the file should contain a notation that the station, upon request, will provide the actual air times.

We recommend that a station start a separate file on each political candidate at the time the candidate or his/her representative inquires about air time.

Each file should contain:

(1) for each order, an NAB-type political advertising request form (which should include the disposition of the request, as well as the officers and directors of the candidate's authorized committee);

(2) a copy of the contract for each order;

(3) a copy of the invoice for each order, as soon as it is issued; and

(4) any information concerning rebates made to the candidate.

Officers of Sponsoring Organizations

The file must also contain the names of officers or directors of organizations that pay for or furnish programs or announcements. Though not required, you should retain scripts or recordings of all political broadcasts or other candidate "uses" in case a complaint or controversy arises. **However, such scripts or recordings should not be placed in the public file nor provided to competing candidates.** Remember, the sponsorship identification rule requires you to keep records in your public inspection file of the names of officers or directors of groups that sponsor or provide material used in any political broadcast or program involving a controversial issue of public importance.

Third Party Ad Recordkeeping

BCRA has also established requirements for public file information for third party ads dealing with candidates for any elective office or any other federal issue. This is a very broad provision which would seem to cover issue advertising on any issue potentially pending before Congress in any bill or proposed legislation. For such advertising, public inspection file requirements have been expanded to essentially mirror those applicable to candidate advertising. The following information must now be placed in your public file with respect to any requests for the purchase of such issue advertising:

(1) A statement as to whether the request to purchase time was accepted or rejected.

(2) The rates charged for the broadcast.

(3) The dates and times the ads aired.

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

(5) The name of the candidate to which the spot refers, along with the office the candidate seeks and in what election it is sought (e.g. primary or general election); or, if not candidate related, an identification of federal issue involved.

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

(7) A list of the chief executive officers of the entity buying the time, the members of its executive committee, or its Board of Directors.

Inspection and Copying

Political file material may be inspected and copied like any other part of the public inspection file. Stations do not have to provide political file information by telephone, but must be non-discriminatory if they do provide it in that manner.

Retention of Political File Materials

Political file materials must be kept for two years. Since political file material can conceivably be used as evidence by a complainant as long as it remains accessible, stations would do well to discard political file material as soon as possible after two years have run.

Internal Recordkeeping

For a station that broadcasts a significant amount of political matter, recordkeeping can become an onerous burden if a system is not established early and adhered to faithfully. Your system might include a list or database of lowest unit charges, with a separate sheet or entry for each program or daypart and each class of spot offered. This way you have an easy reference source that can be quickly checked or updated. This is particularly important for television and larger-market radio stations, which might have dozens of lowest unit charges. Moreover, with respect to each candidate inquiring about air time, your internal records should include evidence that the station made the requisite disclosure to the candidate or his/her representative. This kind of internal information need not be placed in your public file.

Conclusion

This **Advisory** is intended only to refresh your recollection of some of the more important and fundamental aspects of political broadcasting law and to point out some of the more significant recent changes. While it may provide quick answers to some general questions, it would be a mistake to rely on this or any summary for a definitive answer to a complicated question. Moreover, political broadcasting is a volatile area of FCC regulation, and some information in this **Advisory** will certainly be outdated before long. If you are ever unsure of the current requirements or how they apply in a given case, please contact any of the lawyers in the Communications Practice Section.

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

For further information, please contact:

Clifford M. Harrington (bio)
Washington, DC
+1.202.663.8525
clifford.harrington@pillsburylaw.com