

## Political Broadcasting Questions and Answers

### Bipartisan Campaign Reform Act

*Q. Does the Campaign Finance Reform decision announced by the Supreme Court in December have any impact on broadcasters and their sale of political advertising?*

A. Yes. It may affect how much advertising you get, the sponsorship tags on the ads that you receive, and the paperwork that you must keep and place in your public file.

*Q. How will the volume of advertising be affected?*

A. The new law prohibits during the 30 days before a primary and the 60 days before a general election the broadcast on most broadcast stations of "electioneering communications" – advertising dealing with a Federal election - by for-profit corporations and labor unions. While these organizations can form political action committees that can advertise, there are limits on contributions to these committees which may restrict their ability to make up for the lost advertising. Other organizations not covered by the new law may also come into being, but whether they can organize and become sufficiently funded to make a large impact in the 2004 elections remains to be seen.

*Q. Are the rates that I can charge for political ads affected?*

A. While there was much talk in the last Congress about lowering the rates for political spots, the Campaign Finance Reform legislation made only one change to the rules that have been in effect for the last 10 years. Federal candidates, in order to qualify for lowest unit rates, must provide to a station a written certification stating that they will not make a direct reference to another candidate for office without an enhanced sponsorship identification announcement, and must in fact

provide this enhanced identification. This has been called the "Stand By Your Ad" provision.

*Q. What kind of enhanced identification is required?*

A. For television, there must be a full screen image of the candidate, or a still picture of the candidate taking up 80% of screen height, with the candidate identifying himself and stating that he authorized the ad. In addition, there must be written text, at least 4% of the screen high, with sufficient contrast to be clearly seen, which states that the candidate authorized the ad and that the candidate's campaign committee has paid for the ad. For radio, the candidate must identify himself, state the office that he is running for, and that he approved the ad, all in his own voice.

*Q. Is the broadcaster responsible for determining if a corporation's ad is prohibited during the period before the election, and for determining whether or not a candidate has met the terms of the Stand By Your Ad requirements?*

A. What the broadcaster's responsibility is remains unclear at the moment. Rules from the FCC and the Federal Election Commission may be needed to interpret many of the sections of the new law. The prohibitions on corporate and union advertising in pre-election periods seem to be a restriction on those groups, with penalties to be imposed on them if they do engage in prohibited conduct. FCC staffers have informally but publicly said that they will not look to the broadcaster to enforce those restrictions in this election cycle (note that such informal statements do not bind the Commission).

As to the Stand By Your Ad provisions, the broadcaster probably does have the responsibility to monitor candidate ads to see if they meet the requirements of that section – as competing candidates, who get attacked by ads not containing

the proper sponsorship tags, may argue that they are treated unfairly if the station continues to charge lowest unit rates to a candidate who has violated the new law. This will require that a broadcaster determine when a “direct reference” has been made to a competing candidate. Does saying “my opponent” constitute a direct reference? Does a candidate saying that he is the only candidate with certain credentials implicitly refer to the other candidate who does not have similar credentials? These questions remain to be answered by administrative decisions. Informally, the FCC has said that, until they have a chance to enact specific regulations on these issues, they will look to stations to act reasonably in interpreting this statutory provision.

Note that the FEC has adopted new identification rules for most election communications which may well make a broadcaster’s life easier. These provisions appear to require the identical enhanced identification on almost any ad dealing with a Federal election. Thus, most election ads that come to a station should already have the newly required identification language.

*Q. What are the new paperwork requirements?*

A. In addition to the certification required by the Stand By Your Ad rules, the new law requires broadcasters keep public file information not only with respect to candidate ads, but also with respect to any ad dealing with a Federal election or a Federal legislative issue. A Federal legislative issue would include a broad array of issues – anything that the Congress, the President or the Federal agencies may be considering, or may consider in the future. Stations must note in their files the disposition of any request for advertising time (i.e. whether or not you agreed to sell time to the candidate or requesting group); if you decide to sell time, how much did you sell, what class of time was it (e.g. fixed or preemptible, what daypart or rotation, etc), at what price the spots were sold, and when they are scheduled to run; the issue or candidate which the advertising addresses; and the name of the campaign committee and its treasurer for a candidate ad, or the sponsoring organization (name, address, phone number, and its executive members, board of directors or chief executive officers) for third party ads.

## Equal Opportunities

*Q. What triggers an obligation to provide equal opportunities?*

A. If the voice or likeness of a legally qualified candidate appears in a broadcast, and that program is not an “exempt” program, then equal opportunities applies.

*Q. Does the appearance have to be in a political context?*

A. No. The appearance of a candidate in an ad for an unrelated business, or as an on-air station employee, or in

an entertainment program, triggers equal time obligations – even if the candidate never mentions his or her candidacy.

*Q. Must the appearance be in a program controlled by the station?*

A. No. The appearance of a candidate in a network or syndicated program can trigger obligations for the local station broadcasting that programming.

*Q. In what context does the opponent get his equal opportunities?*

A. 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, upon timely request, would get three minutes of time to present any message the opponent wants, in a comparable time period. The opponent does not need to appear in the news, and certainly does not need to present the weather.

*Q. What if the candidate’s likeness is in an attack ad?*

A. The appearance must be a “positive” or “neutral” appearance. 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.

In the recent California governor’s race, a number of stations 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 Commission did not issue any formal ruling on this question, though informally Commission 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.

*Q. What is an “exempt” program?*

A. Exempt programs are bona fide news or news interview programs, or on-the-spot coverage of a news event. The appearance of a candidate on such a program does not trigger any equal opportunity obligations.

*Q. What do you mean by a “bona fide” news or news interview program?*

A. It must be a program where the candidate appears because of the news-worthy nature of his comments or participation, and not for some partisan purpose. 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 may well not reflect what the FCC expects. To be exempt, appearances should not be selected for partisan purposes, but instead based on good-faith journalistic discretion.

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

A. No. The Commission has held in a number of publicized 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, and Phil Donohue to be bona fide news interview programs.

*Q. Does the FCC have to issue a ruling that one of our shows is a bona fide news interview program?*

A. No. If a program on your station meets these tests, you can rely on the exemption, but you will have to defend it if challenged. Some stations have asked the FCC in advance of an election to issue a “declaratory ruling” that their program is exempt, but having such a ruling is not required for reliance on this exemption.

*Q. Who is a legally qualified candidate?*

A. One who has fulfilled all the obligations necessary for a place on the ballot – usually the filing of a required set of papers with the secretary of state or another local authority who administers the election.

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

A. Yes. If you have a legally qualified state or local candidate in a non-exempt program, then you must provide equal opportunities to their opponents if they timely request those opportunities.

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

A. No. You do not need to notify an opponent of a use. The opponent finds out about uses from your public file. A station does need to make note of the use of the station by a candidate in its political file – whether that use is in a paid spot or in a program on the station for which the station received no payment. A candidate can look for information about uses by his opponent in the file.

*Q. How long can an opponent wait to make a claim for equal opportunities?*

A. A candidate must make his request for equal opportunities within seven days of the appearance on a station by the first candidate. He must use his equal opportunity within a reasonable period of time – he cannot store the time up for use just before the election. Note that there has been some suggestion in informal comments made by FCC officials that, if you do not make note in your public file of the use of your station by a candidate, then the seven day period does not start running until a disclosure in your public file has been made – so get the information in your file promptly.

*Q. Who is an opposing candidate?*

A. Literally, one who is running for the same position as another candidate. In the primary season, a Democratic candidate for nomination for a particular office is an opponent of another 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.

*Q. Do the equal opportunities policies apply to both sold and free time?*

A. 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, be careful of committing to sell too much time to one candidate, as you may have to provide an equal amount of time to that run in the last seven days, in the same classes and dayparts, to the opponent.

## Lowest Unit Rates

*Q. What is meant by lowest unit charge?*

A. During the 45 days before a primary, or the 60 days before a general election, candidates are charged the lowest rate that any commercial advertiser paid for an advertisement of the same class and of the same length run during the same time period.

*Q. What is a “class of time?”*

A. A “class” is a type of spot that has unique rights and characteristics. For instance, spots that run in different dayparts are of a different class, e.g. morning drive 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 with different rights. Thus, in any daypart, there may be multiple classes of time, each with their 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 are also different classes with their own lowest unit rate, e.g. a spot which could run anytime between 6 AM and midnight would be a different class from one that can run between 6 AM and 6 PM. 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 AM to midnight rotation, his spots are treated just like those of a commercial advertiser who buys those spots - they can run anywhere between those hours).

*Q. What is an advertisement “length?”*

A. In the case of spot advertising, the length of time occupied by the spot, such as a :60, :30, :15 or :10. In the case of a program length spot, the length of the program, such as 5:00, 15:00, 30:00, etc. For lowest unit rate computation, you compare rates charged commercial advertisers for spots or program length commercials of the same class and period. If a non-standard length is being purchased by a political advertiser, and the station has not sold any spot or program length ad of the same length in the LUR window, then there is no real lowest unit rate limitation. The FCC has suggested that one way to compute an appropriate rate in such a situation is to divide the length of the proposed political ad by a standard spot length, such as :60 or :30, and to multiply that number by the lowest unit rate for a :60 or :30 of that class and period. In addition, the staff of the FCC has informally suggested that in some circumstances the station could request additional funding to offset the adverse ratings and other impact of a non-standard length commercial, such as a seven minute political commercial that disrupts the beginning of a prime time program.

*Q: What is a “period of time?”*

A. “Period of time” refers to the time period in which the advertisement is contracted to run. This can be a specific program, or even a particular placement within a particular break in a program. It can also be a time period, such as “morning drive,” “afternoon drive” and the like. It can also be one of a variety of rotations which can overlap, such as 5:00 am to midnight; 7:00-10:00 am, 8:00-9:00 am. For lowest unit rate computations, you must compare rates for exactly the same period of time that is purchased, not the time when the spot ran. Thus, for example, spots of the same class and length can have very different lowest unit rates if one is for a broader rotation than the other. Just because spots happen to appear in the same break does not mean that they have the same lowest unit rate. That would depend, among other things, on whether the spots were contracted to

appear in the same period of time. An ROS spot could appear next to a fixed position program specific spot, obviously they would have different lowest unit rates.

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

A. You look at the spots of that class running during the relevant 45 or 60 day period. Even within those 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 those periods do not set the rates for periods outside of the fire sale period.

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

A. 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.

*Q. Do all Federal candidates get lowest unit rates?*

A. 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 certificate must state that, if the candidate makes a direct reference to an opponent, the spot must provide an enhanced sponsorship identification. 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% 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).

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

*Q. Do candidates have to buy in volume to get volume discounts?*

A. No. Candidates get the benefit of all volume discounts, even if they don’t 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.

*Q. What about bonus or no charge spots?*

A. Bonus spots of the same class are treated just like frequency discounts discussed above. If a commercial advertiser gets two bonus spots for every ten spots that he buys, the Commission considers it as if he bought twelve 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 in 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.

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

A. No. In its revisions of the political 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 forced candidates to buy spots that they didn't want. So the FCC said that broadcasters need to break packages down into their parts so that candidates get full advantage of the discounts such packages offer, without having to buy the whole package.

In essence, what the FCC requires is that the station break down the package rate by allocating a portion of that rate to each of the spots within the package. After making an allocation, the broadcaster then compares the rates assigned to the spots in the package to other spots sold of the same classes to see if the package price has any impact on the lowest unit rate for those classes of time.

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 morning drive spots, the unit rate from this package is \$9.50 for the morning drive spots. Compare this price for a drive time spot with other drive time spots you've 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 compare against other overnight spot sales to determine if this sale had an effect on the lowest unit rate for the overnight class of time.

*Q. When do I make the allocation of the package price? Who do I need to tell about the allocation?*

A. The Commission 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 public file. It may be different than the allocation shown to commercial advertisers (e.g. in the example above, if the overnight spots were shown as no charge or bonus spots, you can still allocate part of the package purchase price to those spots in your internal allocation). The written allocation will ordinarily only be seen if the FCC requests it, either in some sort of audit or in response to a complaint.

*Q. Do I need to do this with all packages?*

A. The only exception recognized by the FCC is packages that contain buys on multiple stations. In that case, the candidate can be forced to buy the lowest unit of the multi-station package to qualify for the package rate. 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.

This allocation of a package price 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. 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. Instead, you can make a reasonable allocation of the \$12,000 over the length 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). Just remember, that allocation is supposed to be made at the time the contract is initially written, and should be reasonably based (you can't allocate it just so as to place a high allocation on the election window periods).

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

A. If each level has differing rights, e.g. one can be preempted with notice, while another does not require notice; or one must be made good within 7 days, while another has no make-good rights, each of those levels would be a separate class with its own lowest unit rates.

The rules become more difficult when stations have multiple levels of preemptible spots without different rights – other than the fact that one level preempts another. For instance, a station could have a fixed position spot that is guaranteed to run, a Class A spot that runs unless preempted by a fixed position spot, a Class B spot that is preempted by either Class A or fixed position spots, and Class C spots that are preempted by Class A, B or fixed position spots. The FCC says that, if those classes are strictly observed, each would be a different class with its own lowest unit rate. The Commission has made clear that a station must disclose to candidates the likelihood of preemption for each class so that a candidate can make a reasoned decision as to the level at which the candidate wants to buy 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% of Class B spots will run – they may be willing to take their chances on buying at a Class B level. Conversely, if you disclose that 90% of spots at that level will be preempted, then they almost certainly will not buy at that level.

However, and this is a very important caution, these levels of preemptibility must be strictly observed. 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. For instance, if you sell a Class A spot for \$50 in a long term contract, and a Class B spot for \$60, and you clear the Class B spot even though it supposedly has a lower level of protection, then the FCC would consider you to have a single class of preemptible time. In that case, a candidate can buy at the highest rate to insure carriage, and you must give him a rebate for the difference between the price at which he bought and the cheapest spot that clears in the same time period.

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

A. A station can offer a special candidate-only class of time, at a discount off of the lowest unit rate for fixed position time, to try to avoid the many issues that come up with trying to explain and sell preemptible time to candidates. The Commission has said that such a candidate-only class should be priced at the “effective selling level” of the station. By that, the Commission means that these fixed position spots should be priced at a rate 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 at preemptible time if they elect to do so.

*Q. How do I treat agency commissions?*

A. 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 give the agency a 15% commission from that \$100 price, you have effectively dropped your lowest unit rate to \$85 – and a candidate buying direct would pay only \$85. To avoid this trap, recognize that your lowest unit is set by what the station receives. If lowest unit rates are not commissionable, 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.”

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

A. 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 reasoning given is that candidates are supposed to get the same rates as “commercial” advertisers, and charities and government agencies are not commercial entities.

*Q. How do I treat per inquiry spots for lowest unit rate purposes?*

A. 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.

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