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## 2010 Mid-Term Elections Are Coming - Is Your Station Ready?

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Although 2010 mid-term elections are still three months away, *now* is the time for broadcasters to review their systems to assure that they will be in compliance with the FCC's political advertising requirements. A little advanced planning can go a long way in making this, or *any*, election season run smoothly for your station.

The FCC's political broadcast rules generally cover: (1) who is entitled to access to broadcast advertising time; (2) how much they pay for that time; and (3) disclosure and recordkeeping requirements. Although we will briefly review each of these areas, we highly encourage stations with questions to contact their communications counsel. The FCC's political broadcast rules are fairly complicated and the answers to many questions tend to be highly dependent on the specific facts at hand.

One concept that affects several areas of the FCC's rules is the idea of a candidate's "use" of a broadcast station. As further described below, the "use" of a broadcast station by a candidate triggers several potential obligations, so it is important to know when a candidate is considered to have made a "use" of a station.

In general, a "use" is any positive appearance of a candidate whose voice or likeness is either identified or is readily identifiable. The appearance in question does *not* need to be approved by the candidate or the candidate's committee to be considered a "use" – third party ads may trigger a "use", as can appearances in entertainment programming (*e.g.*, Governor Schwarzenegger's bravura performance in *Kindergarten Cop*). The candidate's appearance on the station, however, must be "positive", so a third party attack ad against a candidate would not be considered a "use" by that candidate. Likewise, an appearance by a candidate on a "bona fide" news or news interview program is not considered a "use".

When a legally qualified candidate for office makes a "use" of a station, the station is *not* permitted to censor the candidate's message *in any way*, and the station is protected from any liability that may result from the candidate's message. This "no censorship" provision, however, applies only to candidate advertising and not to third party

advertising. Thus, stations need to take potential liability into account when deciding whether to accept such third party ads.

**Access.** The FCC's rules provide that "legally qualified" candidates for federal offices (*i.e.*, Presidential/Vice Presidential, House and Senate) can demand "reasonable access" to commercial broadcast stations for the broadcast of advertising. This means that commercial broadcasters are generally obligated to sell time to candidates for federal offices. Third party advertisers and "issue advertisers" do *not* have reasonable access rights and, as discussed below, neither do candidates for state and local offices.

Although a federal candidate's reasonable access rights ensure access to a broadcast station's airtime, federal candidates do not have the right to demand time during specific programs or day-parts. In addition, stations may choose to exclude political advertising from news programming. Otherwise, the station must offer "reasonable" access to the station's full schedule. Stations cannot set flat limits on the total amount of time available to candidates. Stations, however, should do some advanced planning about the amount of time they think they will need to reasonably accommodate political advertising. Questions about what is "reasonable" in any given circumstance may need to be referred to counsel.

Candidates for state and local offices (*e.g.*, mayor, county council, school board, etc.) are not entitled to "reasonable access". Stations may refuse to sell time for local campaigns, although candidates for state office *are* entitled to "equal opportunities" (as further described below). Thus, a station can choose not to sell time for state and local elections BUT if the station does sell time to one candidate for a particular office, it must sell to all candidates for that particular office. As a result, stations should consider, in advance, which political races will be open for the purchase of advertising. Once that determination has been made, any restrictions should be included in the stations' disclosure statements (see below).

The FCC's rules also require that all candidates for the same office be treated in an equal manner. The "equal opportunities" (or "equal time") rule is triggered by a "use" of a station by a legally qualified candidate. The rule applies to both federal and state candidates and is *not* restricted to a limited period of time before the election. Once a legally qualified candidate for a given office makes a "use" of a station, all other legally qualified candidates for the same office are entitled to the opportunity to make equal use of the station. That is, the station must make the same amount and kind of time available at the same cost. This can become a serious issue when on-air talent wish to run for office. All of their appearances on the station after becoming "legally qualified" count as free uses of the station, obligating the station to give equal amounts of free time to all opposing candidates.

A candidate claiming equal time must make a request for it within seven days of the opposing candidate's triggering "use" of the station. Stations are not obligated to notify opposing candidates when a "use" is made but, as described below, stations must document all uses in their political files and make those files available for inspection.

***Lowest Unit Charge.*** The most troublesome question for many stations is the question of what rates may be charged for political advertising. In general, all legally qualified candidates for political office (state, local or federal) are entitled to the "lowest unit charge" (LUC) (or "lowest unit rate") during the 45 days before a primary election and the 60 days prior to a general election. For the 2010 federal general election, the LUC "window" opens on September 3, 2010.

In general, the LUC is the lowest rate charged to any commercial advertiser for the same class and amount of time for the same time period, including all discounts and bonus spots. As a practical matter, political candidates are to be treated as the "most favored" advertiser during the "LUC windows". Only candidate ads are entitled to the lowest unit charge.

Determining the exact amount of the lowest unit charge can be tricky – stations must account for different classes of time (*e.g.*, preemptible vs. non-preemptible), different day parts, discounts given for large purchases, the value of "bonus spots", etc. Most stations will have more than one lowest unit charge depending on the various classes of time sold on the station during the LUC window. Because the calculation of the lowest unit charges can be complex, stations should begin considering the issue well in advance of the LUC window.

***Disclosure Statements.*** In addition to planning for their lowest unit rates, stations should ensure that they have an up-to-date disclosure statement to provide to political advertisers. Although the FCC's rules do not technically require written disclosures, every station should have one to ensure compliance and limit disputes. A written disclosure statement should cover the classes of time available to advertisers, the lowest unit charge for each class, any make-good policies, policies on the preemption of ads, and any other sales practices or information that would be relevant to advertisers. Stations should provide the disclosure statement to any candidate, agency or group requesting political time (inside or outside of the LUC window).

***Sponsorship Identifications.*** All political advertising must include some form of sponsorship identification. Specifically, when a political ad is run there must be a statement that the ad was "paid for" or "sponsored by" the group or person purchasing the ad time. If the advertiser did not include the statement, the station must add this

language on its own (if necessary, it can do so over the content of the spot – no free time need be provided). For television ads, the statement must be visual, run for at least four seconds, and occupy at least four percent of the screen.

Ads for federal candidates also must meet a variety of additional requirements imposed by the Bipartisan Campaign Reform Act (BCRA). BCRA requires a statement, spoken by the candidate, which identifies the candidate, asserts that he or she approves the broadcast, and that he or she (or his/her campaign committee) paid for the ad. If the ad refers to an opposing candidate, then the statement must also include the office being sought. Television ads must show the candidate making the statement in a full-screen (80% or more), unobstructed view, or as a voice-over while displaying a clearly identifiable image of the candidate.

BCRA also requires that federal candidates or their authorized committees provide a broadcast station with a written certification stating whether or not the programming refers to another candidate for the same office. If the programming refers to another candidate, the certification must state that the programming will comply with the “stand by your ad” announcement requirements described above. This certification must be provided to the broadcast station when the programming time is purchased. If the certification is not provided, the station is not obligated to give the candidate the lowest unit rate.

If the ad is paid for or sponsored by a third party, the ad must clearly indicate whether it was or was not authorized by a candidate. The sponsor identification statement must include both the “paid for” or “sponsored by” language *and* “authorized by” or “not authorized by” a particular candidate or campaign committee. If it is not authorized, there must also be an audio statement that the name of the entity purchasing the ad “is responsible for the content of this advertising.” This is in addition to relevant state law, which may require more.

***Recordkeeping.*** The FCC’s political file rule requires stations to maintain, and allow public inspection of, records of all requests for political time. These records must include details of the nature and disposition of the requests, the schedule of time provided or purchased, the classes of time involved, the rates charged and contact information of the purchaser. In addition to the FCC’s political file requirements, BCRA requires that the broadcaster’s political file contain all requests for time by anyone (including non-candidates) who seeks to communicate a message that refers either to a legally qualified candidate, or to any election to federal office, or to a national legislative issue of public importance. Because the political file is often reviewed by parties seeking “equal opportunities” it is important for stations to keep the political file up-to-date at all times.

As noted above, this is a thumbnail overview of the rules applicable to political advertising. In the coming weeks, stations should review the rules in detail and ensure that they have their disclosure statements and station policies in place and up-to-date. In particular, station management should take care to ensure that sales personnel are well-informed about what the rules require and the recordkeeping tasks that they will need to fulfill. And don't hesitate to call your friendly neighborhood communications counsel for help.