

# NUTS AND BOLTS

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## OF POLITICAL BROADCASTING

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## PREFACE

We are pleased to provide OAB members with our updated FCC political broadcasting handbook: *Nuts & Bolts of Political Broadcasting*. The handbook, current as of January 2022, is a summary of the complex body of federal law governing the broadcast of political and issue-oriented advertising material. Relevant Ohio state law is also referenced.

We hope the handbook will be helpful to station managers, account executives, news directors, public affairs directors, website managers, and other station personnel involved in the sale, scheduling, and broadcast of political and issue advertisements.

Special thanks goes to Tom Szykowny, Bruce Paige and David Hoeffel of Vorys, Sater, Seymour and Pease, LLP, OAB's Ohio Counsel, for their contributions to the sections dealing with Ohio's political broadcasting requirements.

We encourage you to keep in mind that the handbook is only a "guide" and is not intended as a substitute for qualified legal counsel on specific issues and facts. As a reminder, Brooks Pierce staffs an FCC hotline exclusively for OAB members at 888.705.0678. The OAB's Ohio counsel Vorys, Sater, Seymour and Pease, L.L.P., also offers an Ohio-specific hotline at 866.622.5785. We hope you will call on the OAB, Brooks Pierce and Vorys if we may be of assistance.

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## INTRODUCTION

2022 is a midterm election year and one that is likely to see a high volume of political advertising activity. Indeed, we've already heard from OAB members regarding various rate and placement inquiries from political advertisers preparing for Ohio's upcoming May 3, 2022, primary election, as well as the November 8, 2022, general election.

This midterm election year comes at a time when the FCC has taken significant and far-reaching enforcement actions targeting political broadcasting compliance issues. Among other things, the Commission has issued (and, as of this writing, continues to issue!) consent decrees to broadcasters addressing various political file recordkeeping violations committed during the broadcasters' respective prior license terms. Stations large and small have been affected, with many incurring considerable extra compliance responsibilities and reporting obligations as a result of the consent decrees.

These developments highlight an important juxtaposition: the opportunity for stations to bring in substantial ad revenue during the upcoming political season may be great, but making the sales required to realize that revenue while complying with the complex laws and regulations that apply to political and issue-oriented advertising is no easy task. Although the relevant laws applicable to political and issue advertising have not changed all that much since the last election cycle, the political broadcasting world likely looks much different to your stations and sales teams than it did, say, twenty or ten, or perhaps even five years ago. Political advertisers are continually evolving their buying strategies, and broadcasters' sales tactics are constantly changing as the various platforms and types of spots stations are able to offer expand to accommodate the needs of candidates and third-party issue advertisers. And, in this era of the FCC's online public inspection file, there is ever more scrutiny on broadcasters' political broadcasting practices.

This handbook, we hope, will make understanding and following the "rules of the road" that govern broadcasters' political and issue advertising sales a bit less arduous. No, this handbook does not contain all of the answers, and it is not a substitute for legal counsel when it comes to addressing particular, fact-specific questions regarding political and issue advertising. However, this handbook does provide the basic rules—the "nuts and bolts"—of political broadcasting. We hope you find it a useful resource to which OAB members can frequently turn as we enter the 2022 election cycle.

Additionally, we encourage you to reach out to the OAB's hotlines, or to your legal counsel, when questions arise about a particular inquiry or proposed buy. Please note, however, that the OAB hotlines cannot give legal advice about particular facts and circumstances.

## I. SUMMARY OF THE LAW

Before diving into the details and nuances of political advertising law in this handbook, here's a high-level summary of the bedrock principles that apply to broadcasters.

- **Equal opportunities.** Section 315 of the Communications Act of 1934 requires broadcast stations to provide “equal time,” upon timely request, to “legally qualified” candidates for the same office. The equal time requirement—more accurately referred to as the “equal opportunities” requirement—applies to appearances (or “uses”) by legally qualified candidates but, generally, not to appearances or uses by spokespersons for or representatives of candidates. Appearances by candidates on certain news programs, news documentaries, and regularly scheduled news interview shows are exempt from the “equal opportunities” provision.
- **“Lowest unit charge.”** The rates a broadcast station may charge for the “use” of the station’s facilities by a “legally qualified” candidate (whether for federal, state, or local office) are subject to federal and state regulation. During the 45-day period before a primary or primary run-off election and during the 60-day period before a general or special election, the rate a station may charge a candidate for a broadcast “use” may not exceed the station’s “lowest unit charge” (sometimes also referred to as the “lowest unit rate”) for the same class and amount of time for the same time period. This means, in short, that a station must extend to a candidate its most favorable “volume” or “quantity” discount for advertisements broadcast during these time periods, even if the candidate does not purchase time in large quantities. For “uses” outside the 45-day or 60-day periods, a station may charge a candidate a rate “comparable” to that charged other commercial advertisers. Additionally, outside of the 45-day or 60-day periods, a station cannot charge a candidate or campaign committee a rate that exceeds the charges made to other advertisers for comparable use of the station. The Bipartisan Campaign Reform Act of 2002 (BCRA) makes the availability of the “lowest unit charge” for certain kinds of ads by federal candidates subject to additional sponsorship identification requirements.
- **Reasonable access.** Section 312 of the Communications Act requires stations to afford “reasonable access” to “legally qualified” candidates for *federal* office for “use” of the station’s broadcast facilities. Candidates for federal office include candidates for President and Vice President, the U.S. Senate, and the U.S. House of Representatives. The “reasonable access” provision does not apply to state and local candidates, and stations are not required by law to sell time to such candidates. Nonetheless, when stations do elect to sell time to state and local candidates, the equal opportunities and “lowest unit charge” rules apply.
- **No censorship.** If an advertisement or program constitutes a “use” by a “legally qualified candidate,” stations may not censor the content, even if it is libelous, inflammatory, or otherwise offensive to the community—*unless* the content is legally “obscene” or “indecent.” Because stations are, in general, prohibited by law from

censoring material if the broadcast constitutes a “use” by a candidate, the U.S. Supreme Court has held that broadcasters are not liable for on-air statements—libelous or otherwise—made by candidates.

- **Sponsorship identification.** Specific, on-the-air identification of the sponsor of political ads (i.e., the entity(ies) or person(s) who paid for it), including announcements or programs that do not constitute a “use,” is required under Federal Communications Commission (FCC or Commission) and Federal Election Commission (FEC) rules, as well as Ohio law. In short, all political broadcast advertising must include a statement that discloses who paid for it and, in some instances, whether the advertising is authorized by a particular candidate.
- **Political disclosure statement.** The FCC requires stations to make certain disclosures about their rates and policies to all prospective political advertisers who express a desire to purchase airtime. The disclosure statement must include a detailed explanation of the station’s political advertising rates and policies.
- **Recordkeeping.** Stations are also required by the FCC to maintain records concerning requests by candidates for the purchase of time. Stations must make these records available for public review by uploading them into each station’s online political file.
- **Issue advertising.** “Issue advertising” involves program material that addresses controversial issues of public importance—often, but not always, involving a political candidate, an election issue, or a ballot issue. Generally, issue advertising is advertising purchased by a third-party political advertiser (i.e., someone other than a candidate or his or her campaign committee), including but not limited to SuperPACs, trade associations, political parties, corporations, unions, and certain tax-exempt organizations. Simply put, if an ad is not about a product or service or sponsored by a candidate or his or her authorized committee, then it is, in all likelihood, an issue ad. All issue advertising must comply with the FCC’s rules on sponsorship identification and sponsorship list retention, and federal issue ads must also comply with certain requirements of BCRA. However, *the “no censorship” rule does not apply to issue advertising*, so stations should take care to ensure that such advertising does not contain defamatory statements or otherwise expose the station to liability.
- **Internet advertising.** Generally, the FCC has not asserted jurisdiction to regulate political or issue advertising sold on a station’s Internet website or other digital online platforms. Thus, the equal opportunities, reasonable access, and “lowest unit charge” provisions do not apply to digital political or issue advertising on the Internet. But the election laws regarding sponsorship disclaimers apply to various political advertisements online, including laws barring corporate contributions to candidates, which could potentially apply to websites that favor one candidate over another in the purchase of political advertisements. There are also special rules regarding liability for online political advertising content. Section 230 of the federal

Communications Decency Act provides immunity to website operators in certain circumstances for content created or developed by third parties, and the Digital Millennium Copyright Act (DMCA) provides limited safe harbors for copyright liability. There are no safe harbors from trademark, false endorsement, or right of publicity claims arising from online political advertising. Moreover, certain digital platforms, including Facebook, impose their own requirements.

A more detailed discussion of these foundational political broadcasting principles follows.



## **II. OBLIGATIONS INCURRED BY A STATION FROM A “USE” BY A “LEGALLY QUALIFIED” CANDIDATE**

Whether a candidate is “legally qualified” and whether an appearance by the candidate constitutes a “use” of a broadcast station’s facilities, as those terms are defined by the FCC, are of critical importance in determining a station’s legal responsibilities. If there is a “use” of a broadcast station by a “legally qualified” candidate: (1) his or her opponents are entitled to “equal opportunities”; (2) at certain times, a station can only charge the candidate the “lowest unit charge”; (3) a station must provide “reasonable access” to candidates for federal office; and (4) a station may not censor the advertisement.

### **A. Who Is a “Legally Qualified” Candidate?**

Generally, a candidate is “legally qualified” if he or she (1) has publicly announced his or her candidacy for the office, (2) has qualified for a place on the ballot or has made a substantial showing of genuine candidacy, and (3) is qualified under the applicable federal, state, or local law to hold the office (if elected). For write-in candidates, various factors can bear on whether the candidate has made the required “substantial showing” of genuine candidacy, including the candidate’s physical and digital political activity. (Indeed, as of this writing there is an open FCC proceeding considering whether to formally adopt rules setting forth various digital activities that might “count” for purposes of demonstrating a substantial showing of genuine candidacy.) The person seeking the legal benefits created by the political broadcasting laws bears the burden of establishing that he or she is a legally qualified candidate.

Candidates for President or Vice President of the United States (or candidates for nomination for the office of President or Vice President) will be considered legally qualified in all states if they have qualified in at least 10 states. Also, except in the case of candidates for President or Vice President, a person seeking nomination to any public office by means of a convention, caucus, or similar procedure will not be considered legally qualified until 90 days before the convention or caucus is to begin.

Whether votes cast for an individual legally “count” in an election is a matter of state law. The Ohio Secretary of State’s office should be able to assist you with questions concerning whether a particular candidate is eligible and qualified to serve if elected.

### **B. What Is a “Use”?**

A “use” is generally defined by the FCC for purposes of the “equal opportunities,” “reasonable access,” and “no-censorship” provisions as:

- a non-exempt appearance (see [Section II.C.5](#) for a list of “exempt” appearances);

- a positive appearance (as distinguished from, for example, a third-party attack ad *against* a candidate);
- on the air;
- by a legally qualified candidate;
- where either the candidate's voice or picture is identified or "readily identifiable" by the listening or viewing audience.\*

In radio ads, if a candidate simply reads the sponsorship tag and is identified as the person reading the tag, or if the candidate is not expressly identified but the candidate's voice is identifiable to a substantial segment of the community, the ad constitutes a "use." In the case of television ads, a photo of the candidate in the ad is sufficient to qualify the ad as a "use." This is one of the reasons candidates will often tag their commercials with a brief appearance or voice-over.

It is not necessary for the candidate to discuss or promote his or her candidacy for his or her appearance to constitute a "use" for purposes of "equal opportunities," "reasonable access," or "no-censorship." Thus, for example, a report to constituents (not otherwise qualifying for an exemption from the "equal opportunities" requirement) by an incumbent Senator who is legally qualified for re-election would entitle his or her opponents to "equal opportunities" even if the Senator never mentions his or her candidacy during the program. Also, the broadcast of a television show, movie, PSA, or commercial advertisement featuring a candidate would be considered a "use" for purposes of "equal opportunities," "reasonable access," or "no-censorship."

For "equal opportunities" purposes, any non-exempt, *positive appearance* of the candidate is a "use," even when the appearance is not expressly authorized by the candidate. For example, an endorsement by a third party not connected with the candidate's campaign committee—even if the ad is not authorized by the candidate and is deemed harmful by him or her because of the nature of the endorsers—is a "use." On the other hand, a disparaging or negative use of a candidate's voice or picture, for example, by a candidate's opponent, would not be considered a "use."

Questions sometimes arise—particularly with third-party ads or other programming not sponsored by a candidate—as to whether an appearance of the candidate is sufficient to constitute a use. For example, a third-party ad (e.g., an ad sponsored by a SuperPAC or labor union) may contain a positive audio or video appearance of a candidate without the candidate's consent or authorization. In fact, federal and many state laws prohibit corporations, unions, and third-party organizations from "coordinating" the content of their advertisements with campaigns and political parties. Further, questions arise as to whether a "brief" or "fleeting" appearance of the candidate in such advertisements or other programming is sufficient to constitute a "use." The resolution of these questions regarding candidate appearances in third-party advertisements is highly fact-specific and should be discussed with FCC counsel.

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\* Note: A "use" for purposes of the "lowest unit charge" requirement is slightly different from a "use" as set forth above—see the discussion below in [Section II.D](#) for the distinction.

Another nuance is presented when a station's staff announcer or other on-air talent becomes a legally qualified candidate and continues regular on-air appearances in which the candidate is identified or readily identifiable. When this occurs, the announcer's legally qualified opponent may be entitled to the same amount of free air time in comparable time periods (pursuant to the "equal opportunities" requirement described below in Section II.C). If a station employee becomes a legally qualified candidate, the station has three options:

- Remove the employee from the air for the duration of his or her candidacy;
- Leave the employee on the air and be prepared to give free time to his or her opponent upon request (an opposing candidate must make this request within seven days of the employee's on-air appearance, and the station is under no obligation to inform the opponent of such appearances other than by placement of a notation of the use in the station's political file); or
- Obtain a waiver from the employee's opponents stating that the opponents waive any "equal opportunities" rights they may acquire as a result of appearances by the employee during the normal performance of his or her station duties. An opposing candidate is under no obligation to agree to such a waiver and usually will not.

### **C. The "Equal Opportunities" Requirement**

When a broadcast station permits a "legally qualified" candidate for public office to "use" its facilities, the station must afford "equal opportunities," often referred to as "equal time," to all other opposing candidates for that office. Appearances by candidates on network or syndicated programs will trigger the "equal opportunities" requirement. In such cases, complying with the "equal opportunities" rule is ultimately the station's obligation if the network or syndicator does not provide opponents "equal opportunities" upon a proper request. The specifics of the "equal opportunities" requirement are as follows:

#### **1. "Equal Opportunities" Requirement Applies to All Public Offices and Elections**

The "equal opportunities" requirement applies in elections for all public offices, including federal, state, regional, county, and municipal offices. Similarly, the law covers all public elections, including primary, general, run-off, and special elections.

#### **2. Candidates Must Be Opposing Candidates**

A candidate acquires a right to equal time only when an appearance is made by an "opposing" candidate. Thus, an appearance by a Republican candidate for sheriff

would not give rise to equal time by a Democratic candidate for Congress—the candidates are not “opposing” candidates.

Similarly, a candidate in a “primary” election for the Democratic nomination for Governor would not be entitled to equal time by reason of the appearance of a candidate that seeks nomination in the Republican primary for Governor. Because each candidate is seeking nomination by a different political party in a different primary election, they are not “opposing” candidates.

### **3. “Equal Opportunities” Means *Equal Opportunities***

Once a station adopts a policy of selling or giving time, it may not discriminate in any way among opposing candidates. A station, upon timely demand, must afford “equal opportunities” to all opposing candidates for the same office. This requirement applies to the availability of broadcast time and the desirability of the specific time period, the use of production facilities, the extension of credit, and the application of technical requirements.

For example, if a station decides during a general election to sell 30 minutes of “prime time” to X, a legally qualified candidate for Governor, then the station must, if timely demand is made, sell 30 minutes of prime time to Y and Z if they are also legally qualified candidates for Governor. While a station is not required to provide opposing candidates with time at the same time of day and on the same day of the week as the initial candidate’s use, the station must offer time segments that can be expected to reach a comparable audience.

To make ample provision for equal time where there is a large field of candidates, stations will often limit in advance the amount of time sold or given for certain state and local offices. A station’s decision to do so, provided it does not discriminate among competing candidates, will generally be upheld as reasonable.

Except in the case of federal candidates, as discussed below, there is no specific requirement that stations either sell or give time to any political candidate. The law simply requires that once time is either sold or given, each candidate for the same office must, on request, be afforded “equal opportunities” to make use of the station’s facilities.

### **4. A Timely Request Must Be Made for “Equal Opportunities”**

A candidate’s right to “equal opportunities” arises only when a timely request is made. Such requests must be made within seven days of an appearance by an opposing candidate (the request can also be made in advance of an appearance if directed to a specific future use known at the time of the request). Except for the limited exceptions discussed below, stations have no obligation to notify candidates when time has been sold or given to other candidates. However, as discussed later, stations must ensure that records of free time and notations of all requests for time are immediately

uploaded to the station's online political file, which is part of the station's OPIF. Failure to promptly place notification of a use in the political file may extend the seven-day period due to lack of proper notice.

If a station chooses to tell a candidate that it has sold time to one or more of his or her opponents, it must provide the same information to all opponents. Also, if a station initially told candidates that it would not sell time on Election Day, but then does sell or give time on that day to a candidate, the station must notify opposing candidates to give them a reasonable opportunity to request equal time. A station may not discriminate in any way in its dealings with candidates.

"Equal opportunities" rights cannot be "daisy chained"; that is, an initial "use" triggers the seven-day period in which *all* responsive "equal opportunities" requests must be made. For example, let's say that X, Y, and Z are all legally qualified candidates for Governor. X broadcasts an announcement (a "use") to which Y makes a timely "equal opportunities" request, but Z fails to do so. Z is barred from responding within seven days of Y's responsive use, because Z was required to respond to the first prior use that triggered the right of equal opportunities, which, in this example, was X's use.

The FCC has held that stations may be justified in rejecting a candidate's "eleventh hour" request for equal time. The Commission has said that if a candidate, during the closing days of an election, "sits" on his or her rights and does not make a request for equal time until a day or two before the election, a station may limit the amount of time sold if (1) granting the request would seriously interfere with the station's duty to program in the public interest, or (2) granting the request would give the last-minute purchaser an unfair advantage over opposing candidates by allowing him or her to saturate broadcast time during the last few days before an election. This FCC policy applies to both federal and non-federal candidates. Note that the rule may be applied in a slightly different manner for *federal* candidates. If a *federal* candidate "sits" on his or her rights, the Commission has indicated that the candidate may still be entitled to purchase some amount of time.

## **5. Exemptions: Some Appearances Are Exempt from the "Equal Opportunities" Requirement**

Even if the broadcast constitutes a "use" by a "legally qualified" candidate, the "equal opportunities" requirement of Section 315 does not apply to an appearance by a candidate in any of the following types of programming:

- (1) Bona fide newscasts, including specialized news shows (such as "Entertainment Tonight" and "Inside Edition");
- (2) Bona fide news interview programs that are regularly scheduled in which newsworthy guests are occasionally featured and the host controls the interview process (e.g., "Meet the Press," "Face the

Nation,” “Today,” “Good Morning America,” and even the interview portion of shows like “The Tonight Show”);

- (3) Bona fide news documentaries if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary; and
- (4) On-the-spot coverage of bona fide news events including, but not limited to, political conventions and related incidental activities.

The FCC has ruled that the broadcast of a debate between candidates qualifies as “on-the-spot coverage of a bona fide news event” provided that (1) the decision to broadcast a debate is a bona fide journalistic decision and the format of the debate is determined by the station or an independent third party; (2) there are structural safeguards to ensure that no candidate will be favored or disfavored in the broadcast; and (3) all station decisions are based on bona fide news judgments—there must be reasonable, objective standards for deciding which candidates to include and which to exclude. Reversing a previous ruling, the Commission also has made clear that political candidate debates that are sponsored by broadcast stations are exempt from the equal opportunities requirement. Therefore, stations that air debates meeting the three factors listed above do not have to comply with the “equal opportunities” requirement.

Similarly, the FCC has also ruled that special programs featuring candidate interviews and candidate discussions qualify as “on-the-spot-coverage of a bona fide news event,” provided that the decision to broadcast the special programs is a bona fide journalistic decision based on bona fide news judgments and that there are structural safeguards designed to avoid favoritism towards a candidate. The “on-the-spot” element of the news event exemption is not lost when programming is taped and shown at some later date, so long as the broadcast is of a “reasonably recent event.” Many stations use this ruling to provide “free time” to candidates for the discussion of public issues. These interviews and discussions may be aired in increments of 5, 15, or even 30 minutes.

#### **D. Rates for Political Advertisements—The “Lowest Unit Charge”**

##### **1. What Is a “Use” for Purposes of the “Lowest Unit Charge” Provision?**

In general, political candidates are entitled to the “lowest unit charge” for a “use” of a broadcast station during the “lowest unit charge” windows. Note that a “use” for purposes of the “lowest unit charge” provision is defined by the FCC as an appearance that: (1) is non-exempt (i.e., not exempt from equal opportunities obligations); (2) is by a legally qualified candidate; (3) is one in which the candidate’s voice or likeness is identified or is identifiable; (4) is purchased by the candidate or the candidate’s campaign committee or authorized agent, and (5) promotes the candidate’s election or the defeat of the candidate’s opponent(s). This differs from the definition of “use” in the

equal opportunities context because, for example, a corporate ad supporting a candidate and containing an image of that candidate would not be entitled the “lowest unit charge,” even though the ad might trigger an equal opportunities claim from the candidate’s opponent.

## 2. The “Lowest Unit Charge”

Under the “lowest unit charge” requirement, during the 45-day period preceding the date of a primary or primary run-off election and during the 60-day period preceding the date of a general or special election, the charges made for the “use” of a broadcast station by “legally qualified” candidates for federal, state, and local offices may not exceed the station’s “lowest unit charge” for the same class and amount of time for the same time period.

However, stations do not have to extend the “lowest unit charge” to *federal candidates* unless certain “stand by your ad” conditions required by federal law are satisfied, as explained below in [Section V.B.](#)

The lowest unit charge periods for Ohio’s 2022 primary and general midterm elections are as follows:

- For the primary elections scheduled for **May 3, 2022**, the 45-day “lowest unit charge” period begins on **March 19, 2022**.
- For the general elections scheduled for **November 8, 2022**, the 60-day “lowest unit charge” period begins on **September 9, 2022**.

Note: the “lowest unit charge” is also often referred to as the “LUC” for short; it is also sometimes referred to as the “lowest unit rate”—or “LUR.”

The “lowest unit charge” applies only to advertisements purchased by a candidate or by a candidate’s campaign committee on behalf of a candidate. Generally, third-party organizations that purchase advertisements advocating the election or defeat of a particular candidate are not entitled to the “lowest unit charge,” *even if the candidate’s voice or likeness appears on the spot and would otherwise qualify as a “use.”* This would include advertisements by SuperPACs, trade associations, tax-exempt organizations, and other third-party organizations funded by corporations and unions that are allowed to advocate for or against a legally qualified candidate. Such third-party advertisements are not entitled to the “lowest unit charge” because the advertisements are not purchased by a candidate or on behalf of a candidate.

The only non-candidate political advertisements that may qualify for “lowest unit charge” are spots purchased by political parties on behalf of candidates where the candidate has formally authorized the spot. FCC staff has informally taken the position that an advertisement sponsored by the candidate’s political party in which the candidate appears is entitled to the “lowest unit charge,” provided the expenditure is expressly authorized by the candidate. According to FCC staff, stations receiving a buy

from a political party seeking LUC should request evidence of written authorization that the ad is purchased on behalf of the candidate.

Because SuperPACs and other organizations funded by corporations and unions are legally prohibited from coordinating their advertisements with candidates (under federal and Ohio law), candidates cannot, by definition, “authorize” third-party ads placed by such organizations.

The FCC has interpreted the “lowest unit charge” requirement as follows:

- **Best Quantity Discount:** The term “lowest unit charge” means, essentially, that a station must extend its most favorable “quantity” discount to a candidate even though the candidate does not purchase time in large quantities. Put another way, a candidate is entitled to a station’s most favorable volume or frequency discount even if the candidate purchases only one spot announcement or only one unit of time. To illustrate, if a station charges \$100 for a one-time, fixed position 30-second spot announcement in prime time, but charges only \$80 per spot for a schedule of 1,000 fixed position 30-second spot announcements in prime time, a candidate purchasing only one fixed position 30-second spot announcement in prime time may be charged no more than \$80.
- **Same “Class,” “Amount,” and “Period”:** The “lowest unit charge” requirement does not mean that a station must sell prime time or drive time at a non-prime time or non-drive time rate. Nor does it mean that “fixed position” announcements must be sold at “run-of-schedule” or “preemptible” rates. In the case of television, the FCC has treated individual programs as separate “periods” of time. The “lowest unit charge” requirement applies only to charges made for the same “class” and “amount” of time for the same “period.” Thus, a candidate who purchases a fixed position announcement in drive time may be charged the same rate charged other advertisers for a fixed position announcement in drive time—except the candidate is entitled to the benefit of a frequency discount even though he or she might not be purchasing enough time to otherwise qualify for it.
- **Includes Election Day:** The 45- and 60-day “lowest unit charge” periods, technically, do not include election day. However, FCC staff has indicated that if a station chooses to sell time on election day, it must sell that time at the “lowest unit charge.”
- **Determined from Rate Card (or Rates Charged):** The “lowest unit charge” is determined from a station’s rate card or from the rates actually charged by a station if they differ from the rate card—whichever is lower.



- **Rate Increases:** Stations may increase their rates within the 45- and 60-day “lowest unit charge” periods preceding elections to reflect normal seasonal adjustments or increased ratings following audience surveys. For example, if a television station normally changes from lower summer to higher fall rates on October 1, the station’s “lowest unit charge” from September 9 to September 30 would be based on its summer rate, and its “lowest unit charge” from October 1 through the election would be based on its higher fall rates. The Commission also recognizes that weekly program or rotation prices may vary from week to week. Stations must calculate the “lowest unit charge” for weekly rotations solely on the basis of spots that ran during the relevant week, even if some of the spots were the result of contracts that are in effect over the course of several weekly rotations.
- **National/Local Rate Distinctions:** National and local rate distinctions for political candidates are not permitted during the period in which the “lowest unit charge” is in effect.
- **Credit and Advance Payment:** A station must extend credit to a candidate *if* the station would extend credit to a similarly situated commercial advertiser. If an advertising agency qualifies for credit under the station’s credit policies, a station may require the agency to accept legal responsibility for payment of a candidate’s account before extending credit to the agency. A station may require cash in advance from a candidate only if the station would require cash in advance from a commercial advertiser under comparable circumstances. Note that a station cannot require a candidate for federal office to pay more than seven days in advance of the time the first spot in a schedule is to run.
- **Make-Goods:** Timely make-goods should be provided to candidates if a station has provided a timely make-good to any commercial advertiser during the year preceding the “lowest unit charge” window. Also, make-goods for political spots must air before the election if the station would so treat its most-favored commercial advertiser when time is of the essence. Make-goods must be included when stations calculate the “lowest unit charge,” with the exception of make-goods furnished to meet contracted-for promises of certain audience numbers, demographics, or ratings. Thus, if a make-good runs in a normally more expensive time period, then it will become the “lowest unit charge” for that time period. Accordingly, make-goods should run within the same time slot as originally scheduled. When make-goods are provided to meet a promise of audience delivery and pertinent audience information is not ascertainable until after an election, the station should either provide a prompt rebate or offer a make-good in connection with any subsequent election in which the candidate may be running.

- **Rebates/Credits:** The charge is determined by the “lowest unit charge” in effect at the time of the broadcast. Thus, if the price of a spot or program should be lower at the time of actual broadcast than the price for which the candidate might have contracted in advance, the candidate would be entitled to a rebate or credit. If a station sells all immediately preemptible time in an auction-like manner, candidates may buy expensive spots to ensure non-preemption, but are entitled to a rebate equal to the difference between the amount paid by the candidate for his or her spot and the amount paid for the lowest-priced spot in the same class that actually ran in the same time period or day part. Stations, therefore, must review their program logs periodically during the election period to determine whether rebates are required, and they should issue such rebates or credits promptly.
- **Only for Charges Made for Purchase of Broadcast Time:** The “lowest unit charge” provision applies only to charges made for the purchase of broadcast time—it does not include charges customarily made by stations for production services, such as taping, filming, etc. For those services, candidates may be charged regular commercial rates.
- **“Pod Exclusivity” Not Required:** Even if a station supplies “pod exclusivity” for its commercial advertisers, stations are not required to supply “pod exclusivity” to political advertisers. FCC staff has recognized that “pod exclusivity” would collide with candidates’ “equal opportunities” rights and that such exclusivity would unduly shrink the amount of time available for political candidates.
- **Package Plans/Bonus Spots:** If a station sells an advertiser a package of spots, bonus spots, and other “value added” benefits at a total package price, *it must, for political rate purposes, prepare a contemporaneous written memorandum allocating a value to every component of the package.* In particular, all bonus spots provided in conjunction with a contract must be considered part of the contract and allocated some reasonable value. This will reduce the allocated value of each spot in the order.
- **Merchandising Incentives:** Merchandising items of *de minimis* value (e.g., coffee mugs) or promotional items that imply a relationship between the station and the candidate (e.g., bumper stickers including an advertiser’s name and the station’s logo) need not be offered to candidates or figured into the “lowest unit charge.” Merchandising incentives of a significant value, such as a Caribbean cruise for purchasing a specified amount of advertising, must be disclosed and offered to candidates on the same terms as offered to commercial advertisers.

- **“Billboards” and Program Sponsorships:** A station need not offer “billboards” and program sponsorships to candidates, nor must it factor them into “lowest unit charge” computations.
- **Paid PSAs:** Sponsored public service announcements (“PSAs”), such as a recycling spot which only has an advertiser logo at the end, also need not be offered to political candidates. However, if PSAs come as part of a package, as with bonus spots (and unlike billboards and program sponsorships), the station should assign some value to such PSAs when determining the value of other spots in the same contract for “lowest unit charge” purposes. A station should set forth, in a written memorandum prepared *at the same time the contract is signed*, how it assigned value to the PSAs.
- **Bonus Spots for Non-Profit Organizations:** FCC staff takes the view that “bonus” spots for non-profit groups, including charitable organizations and governmental agencies, do not count for “lowest unit charge” purposes. The full Commission has not ruled on this issue.
- **Trade Outs and Barter Arrangements:** Station trade outs and barter arrangements are not used in computing the “lowest unit charge.”
- **Agency Commissions and Discounts:** A station’s “lowest unit charge” is calculated based not on what the station charges, but on what the station receives. As a result, a station’s “lowest unit charge” will be affected (and lowered) if a candidate purchases time from a station through an advertising agency and the station gives the agency its regular commission. To illustrate, if a five-minute program costs \$100 and advertising agencies are customarily given a 15% commission, a candidate purchasing the program through an agency must pay \$100. However, the station’s payment of the 15% commission to the agency effectively reduces the “lowest unit charge” for the spot; if a candidate purchases the same time directly from the station without the agency, the station must charge only the “net” price it received for the other spot—the candidate purchasing on his or her own, without an agency, would have to pay only \$85. In contrast, though, the FCC has held that commissions that a station might pay to its outside “sales representative” or “rep firms” are not to be treated in the same manner as commissions paid to an advertising agency. Thus, a political candidate who purchased directly from the station and not through a station’s outside rep firm would not be entitled to a discount equal in amount to the commission normally paid to the outside rep firm.

- **Weekly Rotations:** The Commission will treat distinctly different rotations as separate classes of time for purposes of calculating the “lowest unit charge,” without regard to whether the rotations overlap. Rotations are “distinctly different” if they have meaningful differences in value to an advertiser, are consistent with the station’s normal selling practices, and are based upon objective criteria such as varying audience size. Thus, a 6:00 a.m. to 9:00 a.m. rotation could be treated as a separate period of time from a 6:00 a.m. to 3:00 p.m. rotation if the above criteria are met.
- **Run-of-Schedule Spots:** If a station sells run-of-schedule (“ROS”) spots to its commercial advertisers, it must make ROS spots available to a candidate upon request. However, the candidate who elects to purchase ROS time gets only what he or she buys—ROS spots—with all the uncertainties that go with that particular class of time.
- **Classes of Preemptible Time:** A station may have different identifiable classes of preemptible spots so long as (a) each class has a different associated, predictable likelihood of preemption and/or other protection against preemption (i.e., 2 days’ notice, 24 hours’ notice, 2 hours’ notice, etc.); (b) the system is applied fairly to all advertisers during both election and non-election periods; and (c) all classes of spots are disclosed to candidates.
- **Candidate-Only Class of Non-Preemptible Time:** A station may make available a special, discounted, candidate-only class of non-preemptible time which would confer a greater benefit to candidates than that afforded to commercial advertisers. Such a rate is acceptable so long as (a) a commercial advertiser who buys preemptible time at that same rate runs a genuine risk of preemption; (b) commercial advertisers cannot buy any time that is, in reality, the functional equivalent of the special candidate-only class of time; and (c) the station discloses and offers all preemptible rates to candidates, describing the likelihood of preemption for other preemptible rates. There are numerous points to consider when providing a “candidate-only” class of time. This is a very complex issue and stations should not undertake the establishment of a “candidate-only” class of time without first conferring with legal counsel.
- **News Adjacency Spots:** Stations may exclude political ads from news programming. If a station does not sell political advertising within its news but instead offers a special class of “news adjacency” spots, such spots cannot be priced higher for candidates than the lowest priced spot run within the newscast itself. If the station has no special class of news adjacency spots, a candidate who purchases time in a program or a time period adjacent to the news may be charged the regular rate applicable to that time period, even if that rate is higher than the rate charged for spots within the news.

- **Sold-Out Time:** A station may refuse to sell a *non-federal* candidate time in a particular program or day part on the ground that the station is sold out. In the case of candidates for *federal* office, the same applies so long as the federal candidate is provided “reasonable access” to the station’s overall schedule. If a particular preemptible class is not sold in an auction-like manner and is sold out, in order for a candidate to obtain clearance, the station may require the candidate to purchase a higher class of preemptible time, or fixed time if there is not a higher preemptible class. *A candidate cannot require a station to preempt a spot by paying the same price charged for the spot that is being preempted unless doing so is the only way for the station to meet its “equal opportunities” or “reasonable access” obligations.* However, if the station has a class of immediately preemptible time and sells it in an auction-like manner, the station *may not say that it is sold out* to force candidates to purchase non-preemptible spots, since a higher offer for the immediately preemptible time would enable the candidate’s spot to clear. Under this type of sales practice, candidates may buy more expensive spots to ensure non-preemption but are entitled to a refund as described above in the discussion of rebates and credits.

### **3. Uses Outside the “Lowest Unit Charge” Period: “Comparable Use” Rates**

Stations are not required to extend the “lowest unit charge” to broadcast “uses” by candidates outside the 45-day period prior to a primary or primary run-off election or 60-day period prior to a general or special election. Outside those “lowest unit charge” periods, the rates charged by stations for “uses” by candidates may not exceed the rates charged to commercial advertisers for “comparable” time.

In practice, the distinction can be confusing. For example, if Candidate A purchased and used time outside the 45- or 60-day period preceding an election at a rate based on “comparable use,” and Candidate B, for the same office, purchased and used time within the 45- or 60-day period preceding the election at the “lowest unit charge,” the FCC has held that the “equal opportunities” and non-discrimination provisions of federal law would not require that Candidate A be given a refund to the extent charges for his or her time exceeded the charges paid by Candidate B for his or her time.

Outside the period during which the “lowest unit charge” applies, a station, if it makes a similar distinction for commercial advertisers, may charge national rates to national candidates and local rates to local candidates.

Similarly, outside the period during which the “lowest unit charge” applies, a station that customarily provides an agency commission to advertising agencies is not required to extend a commission or discount to candidates purchasing time directly from the station without an agency.

#### **4. Special Ohio Rate Even When There Is No “Use”**

Ohio law (Ohio Rev. Code § 3517.13(H)) appears to extend the scope of the “lowest unit charge” requirement beyond the limitations imposed by the FCC. This statute, read literally, would require stations to extend the FCC’s “lowest unit charge” to purchases by candidates and candidate committees, even though the candidate may not appear in the ad.\*\*

At all other times outside the federal 45-day or 60-day periods, a station, under Ohio law, cannot charge a candidate or a “campaign committee” a rate that is in excess of the normal rate charged other advertisers for comparable advertising. A station in violation of the statute may be fined up to \$100 dollars for each violation.

This Ohio “lowest unit charge” requirement applies to all candidates qualified for placement on the official ballot of a primary, general, or special election. The Ohio Secretary of State (the governmental body that oversees state elections laws) has taken the position that its requirements also apply to federal candidates to the extent the Ohio requirements are not preempted by federal law.

A strong argument can be made that the “lowest unit charge” provisions of Ohio law are preempted by federal law. To our knowledge, however, the Ohio statute has not been challenged in a court case, and a more definitive answer to the question must await litigation.

#### **5. Dealing with Complaints Concerning Advertising Rates**

Candidates may complain if they suspect a station has not provided them with the “lowest unit charge.” Such a complaint may be informal (a phone call to the station or the FCC, a written demand, etc.), or it may involve a formal written complaint to the FCC. In order to invoke the FCC’s enforcement procedure, the candidate must do more than merely accuse the station of overcharging—but not much more.

To minimize the risks and burdens associated with a formal FCC complaint, stations should follow these guidelines in addressing candidate complaints:

- If a station receives a candidate’s letter demanding the rebate of alleged overcharges, the station should immediately consult with legal counsel.

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\*\* Note: We use the qualifying term “appear” because there are no definitive case rulings.

- Prompt response should be provided to the candidate, as failure to respond promptly to such a letter may provoke the candidate into filing a formal complaint with the FCC.
- In order to respond to a written inquiry or complaint concerning overcharges, the station should evaluate the specific allegations made by the candidate. The station should determine if it actually did overcharge the candidate—if so, refund the *overage* immediately with an explanation of how the mistake occurred.
- In other circumstances, usually in response to a formal complaint, a station may opt to conduct an internal audit. This should not be done without advance consultation with legal counsel to ensure that the audit is performed in compliance with legal requirements and in a manner to minimize legal risk. Recognize, however, that full internal audits can be time consuming and expensive as they involve a review of all advertising sold to the particular candidate and other advertisers in the time periods and an evaluation of whether the price charged the candidate was the “lowest unit charge.”

As part of the station’s due diligence to ensure compliance with the “lowest unit charge” requirements, ongoing review of rates charged political advertisers should be conducted throughout the election period. The FCC has suggested that a weekly review would be sufficient. These ongoing reviews will enable the station to determine if *an overcharge has occurred and to refund all overcharges in a timely fashion.*

## **E. “Reasonable Access” for Federal Candidates**

Section 312 of the Communications Act requires stations to provide federal candidates with “reasonable access” to their broadcast facilities. The “reasonable access” requirement pertains only to “uses” by “legally qualified” candidates for federal elective office—which includes candidates for the offices of President and Vice President, the U.S. Senate, and the U.S. House of Representatives. “Reasonable access” does not require stations to give free time to federal candidates—it simply means that a station cannot have a policy of refusing to sell or give a “reasonable” amount of time to federal candidates.

Stations are not required to provide “reasonable access” to *federal* candidates until the campaign has “begun.” However, it is not always clear when the campaign for a particular office has, in fact, begun. The FCC requires stations to provide federal candidates access to their facilities, *at a minimum*, during the “lowest unit charge” period—45 days before a primary or primary run-off election and 60 days before a general or special election. The FCC has also indicated that a presidential campaign may begin and “reasonable access” obligations may attach *as early as one year prior to an election.* The determination, however, depends on the facts of each campaign.

A broadcaster must make a reasonable, good-faith determination whether a campaign has begun. According to the FCC, a station should consider the following factors in determining whether a particular campaign has “begun”:

- Have other candidates formally announced their candidacies?
- Have campaign organizations been established and are they functioning?
- Are fundraising activities being held for the candidates?
- Are the candidates making speeches and otherwise engaging in traditional campaign activities?
- Has there been media coverage of campaign activities?
- Has the delegate selection process begun?

*Note:* Additionally, as of this writing the FCC is considering formally adding certain digital activities—including social media use and creation of a campaign website—as factors bearing on whether a campaign has begun. Even absent formal FCC action on this issue, stations would be well-advised to take such digital activities into account—and to contact legal counsel—when making a good-faith determination as to whether a campaign has begun.

The presence of all of the above factors would indicate that a campaign has begun. However, the absence of a particular factor does not necessarily mean that a campaign has not begun. The Commission has stated that it will consider each circumstance on a case-by-case basis. For that reason, broadcasters must be especially sensitive to their obligations to federal candidates and exercise great care in responding to their requests for time.

If a station determines that a campaign has begun, it must then “reasonably” determine whether to grant the candidate’s request for access. The FCC has provided the following guidelines for stations to consider when responding to access requests:

- The station should consider the needs of the candidate as expressed by the candidate.
- The station may consider the potential for disruption of other programming that would result from granting the request. However, the FCC has said that the fact that a station might have to make some changes in its program schedule is not a sufficient basis for denying a request unless the changes would have a “substantial disruptive impact” on the station’s overall programming.



- The station may consider the amount of time previously provided to the candidate. The greater the amount of time previously provided, the more justification the station would have for denying the request.
- The station may consider whether it wants to provide a reasonable amount of free time or whether it wants to permit purchases of reasonable amounts of time.
- The station may consider the impact that a grant of the request to purchase time may have on its “equal opportunities” obligations to other candidates.
- The station may consider the timing of the access request. The amount of advance notice given by the candidate may determine the reasonableness of the request. For example, assume that a candidate for federal office in a crowded primary (say, six opposing candidates) requested an opportunity to purchase an extensive schedule of 30- and 60-second spots only two weeks prior to the primary election, and the schedule was to run the week before the primary election. Taking into consideration the timing of the request and the multiple “equal opportunities” implications for the station, the station would likely be justified in refusing to grant the request in its entirety. The candidate might have to cut back on the amount of time he or she desired to purchase.

The Commission has interpreted the “reasonable access” requirement as follows:

- **Denials of Access Requests Must Be Well-Reasoned:** A station may not deny access to a federal candidate unless the station has a well-reasoned, well-documented explanation for denying the candidate’s request. Reasons that a broadcaster might assert include the likelihood of subsequent requests by other candidates, the potential disruption of regular programming and the amount of time previously sold or given to the candidate. It is insufficient to deny access simply because the federal candidate’s request for time does not fit into the station’s normal format.
- **Non-Standard Length Political Spots:** A station cannot refuse a request by a federal candidate for political advertising time solely on the ground that the station does not sell or program such lengths of time (i.e., in increments other than those the station either sold commercial advertisers or programmed during the one-year period preceding an election). Rather, the station must respond to each request on an individualized basis. In deciding whether to refuse a request for a non-standard length spot, a station must consider (1) the amount of time previously sold to the candidate; (2) the disruptive

impact on regular programming; (3) the likelihood of rival candidates making “equal opportunities” requests; and (4) the timing of the request. Stations should not refuse federal candidates’ requests for non-standard lengths of time without assessing these factors and conferring with legal counsel.

- **Federal Candidates Should Receive the Same Access as Commercial Advertisers:** A federal candidate must have access identical to that of commercial advertisers during the year prior to the “lowest unit charge” period. For example, stations that have made their facilities available to any commercial advertiser on weekends to arrange and provide programming at any time must provide similar services to federal candidates on the weekend before the election. Similarly, if a station remained open on a weekend to change copy but not to accept orders, that station need only make personnel available to change copy for political advertisers. If a station has not provided such services to commercial advertisers in the prior year, it need not provide them to federal candidates.
- **Dealing with Multiple Candidates:** The Commission has said that where a station is besieged by more requests for time from candidates than it can “reasonably” accommodate, the station might “meet with candidates in an effort to work out the problem of reasonable access . . . . Such conferences might cover, among other things, the subjects of the amount of time that the station proposes to sell or give candidates, the amount and types of its other programming, and the amount of advertising it proposes to sell to commercial advertisers.” The Commission has recognized that where there are multiple candidates running for federal office who would be entitled to access, spot announcements—in lieu of program time—may be adequate.
- **Specific Times or Specific Programs:** A federal candidate is not entitled to a particular placement of his or her announcement within a station’s broadcast schedule. However, a station cannot place a flat ban on the sale of time in any programming except the news.
- **Newscasts:** Federal candidates may not demand time during a regular newscast or in any other specific program as part of their “reasonable access” rights. Stations may, in their discretion, exclude federal candidates from certain news programs (for example, stations may carry political spots on noon news programs, but not evening news programs) or from certain parts of a news program (for example, during “hard news” but not during weather and sports). However, stations must make access available to news adjacencies. Candidate appearances during programs that are exempt from the “equal opportunities” requirements (e.g., newscasts, news documentaries,

etc.) do not by themselves satisfy the requirement of “reasonable access.” A federal candidate must have access to the same choices as a commercial advertiser—spots of various lengths, classes, and periods—whether the time is sold or provided by the station at no charge.

- **Prime Time and Drive Time Spots:** Stations may not have a blanket policy of refusing to sell or give prime time or drive time programming to federal candidates. Rather, federal candidates’ requests for time for their “use” must be negotiated on an individual basis, reflecting what is reasonable under the circumstances. The Commission has said that federal candidates have a right to purchase some prime time or drive time programming if they so desire.
- **Border Stations:** If a station puts a signal over two or more states, it must provide “reasonable access” to all federal candidates whose districts are at least partially within the station’s principal service contour—noise-limited contour for DTV; Grade B for analog TV; 1 mV/m for FM; and 0.5 mV/m for AM.
- **Non-Federal Candidates:** With respect to non-federal candidates, the Commission has said that stations may determine (using their own good faith judgment) which political races are of greatest interest and significance to the people in their service area and, therefore, “may refuse to sell time to candidates for less important offices.” However, the Commission has long taken the position that broadcasters have a public interest obligation to inform their audiences about important local issues. It would be prudent for any station that refuses to sell time to non-federal candidates to ensure that important state and local races are adequately covered in other programming in order to comply with its fundamental public interest obligations as a licensee. A station that decides to sell time to non-federal candidates may impose limits on the length and number of spots it will sell. However, “equal opportunities” and “lowest unit charge” requirements are fully applicable to a station’s sale of time to non-federal candidates.

## **F. Limitation on Censorship**

Where an advertisement or program constitutes a “use” by a “legally qualified candidate,” unless the material broadcast is legally “obscene” or “indecent,” a station may not censor the content of a candidate’s broadcast even if it is libelous, inflammatory, or otherwise offensive to the community. The FCC has said “the public interest is best served by permitting the expression of any views that do not involve a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” However, the Commission does permit a station to broadcast an audience advisory concerning

material in political advertisements that is potentially disturbing to children. The following advisory would be acceptable: “The following paid political advertisement contains material that may be disturbing to children. Viewer discretion is advised.”

The FCC ruled in 1994 that television broadcasters could “channel” political advertisements containing graphic abortion imagery to times when children were less likely to be in the audience, but the Commission’s ruling was reversed by a court on appeal. The court held that stations cannot channel a candidate’s “use” to later hours because doing so violates both the “reasonable access” rights in the case of federal candidates and the no-censorship and “equal opportunities” provisions of the Communications Act as to both federal and non-federal candidates. Nonetheless, a station may still precede its airing of such a program with a neutrally worded viewer advisory.

There is an obvious conflict between the no-censorship provisions of Section 315 of the Communications Act and the Federal Criminal Code (18 U.S.C. §§ 1464, 1468), which makes it a crime to broadcast obscene or indecent material over the radio, television, or on cable television. The conflict places broadcasters in a difficult position. FCC staff, in response to an inquiry from a member of Congress, has stated that a broadcaster may be criminally liable for the broadcast of “obscene” material contained in a candidate’s political advertisement. Thus, FCC staff concluded that a broadcaster may review a political advertisement to determine if it is obscene or indecent and edit or reject the announcement if it contains indecent or obscene material in order to avoid criminal liability.

The “no censorship” provision of Section 315 of the Communications Act has, in general, been held to prohibit broadcast stations from requiring candidates to submit scripts in advance of broadcast or to sign indemnification agreements. However, stations may reasonably request advance tapes or scripts for the following limited purposes: (1) in the case of a tape, to determine whether the candidate’s picture or voice appears on the tape; (2) to measure the length of time for the purpose of computing the “lowest unit charge” and/or the station’s “equal opportunities” obligation; (3) to ensure that the sponsorship identification requirements are met; and (4) to make a reasonable determination concerning whether the matter to be broadcast is “obscene” or “indecent.” In addition, a station may request a tape to determine if the tape is, in terms of its technical characteristics, of acceptable broadcast quality. However, a station may not refuse to broadcast a tape simply because its technical characteristics and quality are inadequate.

Because stations are prohibited by law from censoring libelous and defamatory material in a candidate’s appearance, the U.S. Supreme Court has held that broadcasters are not liable for defamatory statements made over-the-air by candidates. However, the prohibition against censorship—like the equal opportunities provision—applies only to “uses” by “legally qualified” candidates. Thus, a station may—and indeed could be subject to liability if it did not—censor defamatory material contained in

a political advertisement in which a candidate's voice or picture is not identified or readily identifiable. The prohibition against censorship also does not apply to statements made by a candidate's representatives or supporters, which, as a result of the Supreme Court's *Citizens United* ruling, may include corporations, trade associations, labor unions, SuperPACs, and other organizations that may engage in political speech that supports or opposes a candidate.

The question frequently arises concerning the extent to which a broadcaster may be held legally responsible by the FCC (separate and apart from defamation law) for false statements of fact contained in third-party issue advertising or political advertising that does not constitute a "use" by a candidate. While a broadcaster has a general public interest responsibility not to broadcast commercial advertising that he or she knows to be false, the FCC has given broadcasters considerable discretion with respect to issue and political advertising. The FCC has said it will not intervene in cases involving allegations of false and misleading issue or political advertising. Whether to accept issue or political advertising that does not constitute a "use," and the extent to which a station may require documentation of the factual statements made in such a spot, are all within the discretion of each station.

Programs or announcements that include appearances both by a candidate and by persons other than the candidate raise additional legal questions. In these cases, the FCC takes the position that where a candidate's appearance, either vocal or visual, is the "focus" of the program presented and the candidate's appearance is "substantial in length, integrally involved in the program, and the program is under the control and discretion of the candidate," the program is a "use" and, accordingly, a station may not censor and will not be held liable for any defamatory statements made by other persons in the program.

### III. ELECTIONEERING ADS BY “SUPER PACs,” INDEPENDENT EXPENDITURE COMMITTEES, AND OTHER THIRD-PARTY ORGANIZATIONS

Nearly a decade ago, the Supreme Court in the *Citizens United* decision held that labor unions and corporations (including trade associations, tax-exempt organizations, and LLCs and other business entities) can make unlimited “independent expenditures” at any point in an election cycle to advocate for the election or defeat of a federal candidate. (Note that the Court’s decision rendered invalid the portion of Ohio’s Electioneering Communications statute (O.R.C. § 3517.1011) that prohibits any person or entity from making a broadcast, cable, or satellite communication that refers to a clearly identified candidate during the 30 days preceding a primary or general election if the communication is financed in whole or in part by contributions received from a corporation or labor organization.)

Since the *Citizens United* decision, many corporations and unions have chosen to make contributions to third-party organizations that, in turn, purchase broadcast or Internet advertisements supporting or opposing federal, state, and local candidates. The most popular of these “independent expenditure” organizations (i.e., the organizations receiving the independent expenditures from unions and corporations and then spending them) are known as “SuperPACs” or “IE Committees.” In addition, many trade associations and certain Section 501(c)(4) tax-exempt organizations also receive significant, unlimited independent expenditure contributions for use in federal and state elections from corporations and unions.

It is important to remember that although these independent, third-party organizations may purchase advertisements that expressly advocate for the election or defeat of a candidate—and that such ads often “look like” candidate ads—such advertisements are not treated as candidate ads under the political broadcasting rules for purposes of the lowest unit charge requirement, the reasonable access and equal opportunities rules, and the no-censorship provision. However, these third-party advertisements remain subject to the FCC’s sponsorship identification and record retention rules applicable to all political and issue advertisements (which are discussed immediately below). And perhaps most importantly, stations are not immune from liability for the content of such third-party advertisements. Given that third parties are now permitted to expressly support or oppose a candidate in broadcast and Internet advertisements, the content of these advertisements can be aggressive, increasing the likelihood that their content could result in a defamation claim against a station.

In light of the evolving, fact-specific issues that may arise when third-party advertisements expressly advocate for the election or defeat of a candidate, stations should consult with FCC counsel to resolve any specific questions or concerns regarding these advertisements.

## IV. ISSUE ADVERTISING

“Issue advertising” is advertising that concerns any “controversial issue(s) of public importance” and, generally, is purchased by third parties—i.e., someone other than a candidate or his or her campaign committee.

An issue advertisement may refer to political candidates or elections, as such subjects are generally “controversial issues of public importance.” As described above, because SuperPACs, trade associations, tax-exempt organizations, and other groups funded by corporations or unions can purchase advertisements to support or oppose a legally qualified candidate or otherwise address matters relating to an election, *many third party “issue” advertisements expressly support or oppose a candidate.*

At the same time, a significant amount of issue advertising does not involve or reference political candidates or elections. An issue qualifies as a “controversial issue of public importance” if resolution of the issue will have a significant impact on the community and if substantial elements of the community are engaged in vigorous debate over the issue. Examples of “controversial issues of public importance” could include whether gambling or medicinal marijuana should be legalized, whether a public works project should be approved, or whether local property taxes should be increased.

Because issue advertising is different from political advertising purchased by candidates, it is subject to several distinct rules and disclosure requirements. As a threshold matter, issue advertising is *not* subject to the following political broadcasting rules and protections applicable to candidate ads:

- **No “Lowest Unit Charge.”** General managers and sales managers should remember that if an issue advertisement is purchased by someone other than a candidate or his or her campaign committee, the advertisement is not subject to the rules concerning “lowest unit charge.”
- **No Equal Opportunities or Reasonable Access if Not a Use.** If an issue ad is not considered a “use” by a legally qualified candidate, the advertising does not trigger an obligation for the station to comply with the rules concerning “equal opportunities” and “reasonable access.”
- **No Immunity from Defamation.** It is important to remember that stations are not insulated by law from liability for the content of issue advertising purchased by someone other than a candidate or his or her campaign committee. These ads may and should be censored or rejected by a station if they contain defamatory or other matter that may subject the station to legal liability. Stations would be well advised to consider pre-broadcast review of issue advertising by legal counsel.

Notwithstanding the differences between issue and candidate advertising, there are also several important legal similarities that stations need to understand—many of which are discussed further in other sections of this handbook. The most important of these are:

- **Sponsorship Identification Rule:** As with candidate advertising, when a station broadcasts any material concerning a controversial issue of public importance in exchange for money or services—or when other valuable consideration is directly or indirectly paid, promised, charged, or accepted by the station—the station must comply with FCC and Ohio sponsorship identification requirements discussed in [Section V](#).
- **Sponsorship List Retention:** Whenever a station broadcasts matter involving a controversial issue of public importance and a corporation, committee, association, or other unincorporated group or entity pays for or furnishes the broadcast matter, the station must upload to its public inspection file a list of the chief executive officers, members of the executive committee, or members of the board of directors of the entity that is paying for or furnishing the broadcast matter. This requirement is further discussed in [Section V](#).
- **Federal Issue Ads:** Note that the recordkeeping requirements are expanded for issue advertising that concerns any “political matter of national importance.” The determination of when an issue ad addresses any “political matter of national importance” may not always be clear. Although broadcasters are given discretion in making this determination in good faith, where it is not clear whether a particular ad addresses any “political matter of national importance,” stations may, out of an abundance of caution, wish to comply with the expanded recordkeeping requirements. Please see [Section VII](#) below for a discussion of these requirements.



## V. SPONSORSHIP IDENTIFICATION REQUIREMENTS

FCC and FEC rules, as well as Ohio law, require certain identification of the sponsor of political advertising. Below is a summary of these sponsorship identification requirements.

### A. General FCC Sponsorship Identification Requirements

The FCC's rules, adopted pursuant to the Communications Act, require any political advertisement or other sponsored material to identify (1) whether the material was sponsored, paid for, or furnished, either in whole or in part; and (2) who paid for it. An example of a proper identification is, "Paid for by the John Doe Campaign Committee." Specifically, the FCC's sponsorship identification rule provides as follows:

- **Television Spots Must Have Visual Sponsor Identification:** In the case of any television advertisement concerning candidates for public office, the sponsorship identification announcement must be visual. The visual identification must (1) contain letters equal to or greater than 4% of the "vertical picture height," and (2) have the words appear for at least 4 consecutive seconds.
- **Specific Language:** The sponsorship identification announcement must include the language of either "Paid for by . . ." or "Furnished by . . ." or "Sponsored by . . ."—whichever the case may be. Thus, an announcement that merely states "By The Committee To Elect John Doe" or "State Citizens for John Doe" would be inadequate. In television commercials and programming, the sponsorship identification cannot be abbreviated.
- **Clearly Identify the Sponsor:** The individual, committee, association, corporation, union, or other organization or group that pays for the time must be clearly identified. Thus, an announcement that only states, "This is a paid political broadcast," would be unacceptable. The name of the sponsoring group or committee identified on the air must correspond to the name of the group or committee that appears on the contract for the purchase of the broadcast time. Problems can arise when a group's name does not, in fact, identify a specific person, group of people, or entity. For example, the FCC has held unacceptable an identification that read:

"Paid for by 'A Lot of People Who Would Like to See  
Joe Doe Elected to the United States Senate.' "

or

"Paid for by 'People Who Care about Ohio.' "

The above problems may be avoided by simply inserting the words “Committee,” “Organization,” or “Group” before the name of the sponsoring entity. For example, the following announcements would be proper:

“Paid for by an organization titled: ‘A Lot of People Who Would Like to See John Doe Elected to the United States Senate.’ ”

or

“Paid for by an organization titled: ‘People Who Care about Ohio.’ ”

- **True Identity of Sponsor:** If the true identity of the sponsor of a political advertisement is a person or entity other than the named sponsor (i.e., other than the person or entity who purchased the advertisement)—and if that fact is reasonably known to the station—the station must disclose the true identity of the sponsor. FCC staff has in the past (specifically, in 1996) applied this rule to require a station to identify a third-party entity as the true sponsor where such entity both funded the advertisement and maintained exclusive control over its editorial content. More recently, however, in 2014, FCC staff stated that, “unless otherwise furnished with credible, unrefuted evidence that a sponsor is acting at the direction of a third party, the broadcaster may rely on the plausible assurances of the person(s) paying for the time that they are the true sponsor.” Various groups have filed complaints with the FCC seeking to require stations to investigate and disclose major contributors to political committees as the “true sponsors” of advertisements purchased by the political committees. To date, the Commission has not acted on those complaints and has not otherwise required stations to investigate and disclose donors to political committees as sponsors. Stations that receive similar complaints may wish to consult with their legal counsel about an appropriate response.
- **Placement of Sponsor Identification:** If the length of the sponsored broadcast is five minutes or less, only one announcement is required, and it may be made at either the beginning or the conclusion of the broadcast. If the broadcast is more than five minutes long, a sponsorship identification announcement must be made at both the beginning and the conclusion of the broadcast.

- **Computing Sponsor Identification Time:** If a station normally considers sponsorship identification announcements to be part of the time bought by a regular commercial advertiser, the time required for the sponsorship identification message for a candidate's announcement or program is treated the same—i.e., within the allotted time for the candidate's announcement or program. Thus, if in a 30-second spot announcement the requisite sponsorship identification message lasts five seconds, the remaining announcement must be limited to 25 seconds. Of course, stations may not discriminate among candidates in this respect.
- **Candidate Furnished Material for Newscasts:** If a candidate, or his or her campaign supporters, provides a station with audio or video material about the candidate for the purpose of inducing its broadcast in news or other programs, FCC rules require the station to (1) announce that the material was furnished and (2) identify the name of the person or group who furnished it. The requirement does not apply to "printed" matter, such as printed news releases or printed speeches, that might be supplied to stations by candidates or campaign workers.
- **Station's Responsibility:** It is the responsibility of the station to determine that all program material complies with the FCC's sponsorship identification rules. If the spot does not comply, the station must add or substitute the required announcement—this is an exception to the no censorship requirement for "uses." The broadcaster may not refuse to broadcast a spot if the identification is inadequate; rather, the broadcaster must run the spot and provide a proper sponsorship identification—even if the station's video slide or audio voice overlaps the content of the candidate's ad. The FCC takes sponsorship identification very seriously; in 2016, a broadcaster entered into a consent decree under which it agreed to pay to the Commission a \$540,000 fine for its station's failure to include complete sponsor identification language on 178 issue advertisements.
- **Stations Can Request Advance Submissions:** Stations can request, but cannot require, a candidate to submit spots in advance to determine if the candidate has complied with the sponsorship identification rules. If there is not sufficient time to pre-screen a spot and the station cannot add the proper identification in time, it may run the advertisement without the proper identification and make the necessary modifications by the next business day.

## **B. “Stand By Your Ad” Disclosure Requirements for Federal Candidates**

### **1. General Rules for Television and Radio Advertisements**

In an effort to reduce the use of negative advertisements by candidates for federal office, the Communications Act of 1934, as amended by BCRA, requires federal candidates to meet certain requirements in order to receive the “lowest unit charge” for advertisements referring to their opponents. To qualify for the “lowest unit charge” during the applicable 45- or 60-day political window, a candidate for federal office must provide a written certification to the broadcast station at the time of purchase stating that his or her advertisements will not mention any opponent unless the following conditions are satisfied:

- Radio and television advertisements must include a personal audio statement by the candidate that (i) identifies the candidate and the office the candidate is seeking and (ii) indicates that the candidate has approved the broadcast.
- A television advertisement must include, simultaneously at the end of the ad, for a period no less than 4 seconds, (i) a clearly identifiable photographic or similar image of the candidate; and (ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate’s authorized committee paid for the broadcast.

Stations should require federal candidates who seek the “lowest unit charge” to provide a written certification that their ads will not directly refer to an opponent unless the applicable conditions listed above are met. If a federal candidate does not provide such a certification, stations may deny a federal candidate the “lowest unit charge” for all ad buys until the candidate provides the required written certification.

Although broadcasters are responsible for obtaining the required certification, the responsibility for complying with the disclosure requirement falls on the candidates themselves. Stations should not alter ads to bring them into compliance with the “stand by your ad” requirements.

Note that the federal “stand by your ad” disclosure requirement applies when a federal candidate makes “direct reference” to an opponent in an ad. Any such reference, regardless of whether the reference is positive or negative in nature, is sufficient to trigger the disclosure requirement.

This requirement can easily create uncertainty. For example, is an ad that references “my opponent” a “direct reference” subject to the “stand by your ad” requirement? We believe that such a reference would constitute a “direct reference” under BCRA, but one could imagine a host of other, more oblique, references that are clearly intended to evoke a candidate’s opponent but which do not mention the

candidate by name. Stations will wish to consult with legal counsel before denying the “lowest unit charge” to a candidate based on a candidate’s potential “stand by your ad” violation.

*Note:* It should also be emphasized that the federal “stand by your ad” requirement does not apply to candidates for state or local office.

## **2. Effect of Noncompliant Ads on a Federal Candidate’s Entitlement to “Lowest Unit Charge”**

Stations should take special care to determine whether an advertisement subject to BCRA’s “stand by your ad” requirements satisfies the sponsorship identification requirements discussed above. There is an open, unresolved question whether, under federal election law, a broadcaster would be making an illegal, corporate in-kind contribution if the broadcaster sold advertising at the “lowest unit charge” to a candidate who failed to comply with the “stand by your ad” disclosure requirements and, therefore, was not entitled to the “lowest unit charge.” (In fact, the FEC has, in non-binding, draft advisory opinions, reached opposing conclusions twice on this issue in the past 15 years.)

Given the uncertainty and possibility for controversy in this area regarding the “lowest unit charge,” stations may wish to consult with legal counsel if they are asked to extend the “lowest unit charge” for broadcast advertisements that fail to comply with the “stand by your ad” disclosure requirements. Stations should also be sure to receive and maintain, at the time of purchase, a written certification from the federal candidate stating that the candidate’s advertisements will not directly refer to an opponent unless the appropriate disclaimers required by the federal “stand by your ad” law are included.

## **C. FEC Disclosure Requirements for Federal Elections**

Ads concerning candidates for federal office are subject to additional FEC requirements. Although federal candidates, committees, and third-party advertisers—not broadcast stations—are primarily responsible for compliance with these requirements, being familiar with these rules can help stations assist political advertisers in assessing the adequacy of sponsorship identification tags.

The FEC’s disclosure requirements apply to any communication—i.e., any broadcast spot, message, or program—that satisfies either of the following criteria:

- The communication is paid for or furnished by a “political committee.” The Supreme Court has limited the FEC’s definition of a “political committee” to encompass only those organizations controlled by a candidate (e.g., a candidate’s campaign committee) or whose “major purpose” is the nomination or election of a candidate (e.g., a political action committee, or PAC).

or

- The communication is paid for by any corporation, union, association, organization, or individual that (i) expressly advocates the election or defeat of a clearly identified federal candidate, (ii) solicits any political contributions, or (iii) refers to a clearly identified candidate for federal office and is made within 60 days before a general, special, or run-off election or 30 days before a primary election.

When either of the above criteria is satisfied, different kinds of announcements are required, depending on whether the advertising is (1) paid for and authorized by a federal candidate, (2) authorized by a federal candidate but paid for by another entity, or (3) paid for by a third-party and not authorized by a federal candidate. Below is a summary of these requirements.

- **Candidate Sponsored or Authorized Ads**

- **Ads Paid for and Authorized by a Federal Candidate:** Where the broadcast message or program is authorized by a federal candidate or his or her authorized committee, the broadcast must (1) clearly state that the broadcast has been paid for by the person or organization that paid for the broadcast, and (2) include a statement by the candidate that identifies the candidate and states that the candidate has approved the broadcast.

For example, the broadcast should say: "Paid for by [Name of candidate, committee, or other organization]. I'm [Name of candidate] and I approved this ad."

- **Ads Paid for by a Third Party but Authorized by a Federal Candidate:** If the advertisement is paid for by other persons but authorized by a candidate or a candidate's political committee or agents, the advertisement must (1) clearly state that the broadcast has been paid for by such other persons and is authorized by such authorized political committee, and (2) include a statement by the candidate that identifies the candidate and states that the candidate has approved the broadcast.

For example, the broadcast should say: "Paid for by [Name of organization that paid for the advertisement] and authorized by [Name of federal candidate or candidate's committee]. I'm [Name of candidate] and I approved this ad."

- **Special Additional Requirements for Television Ads:** In the case of a television advertisement, the candidate's statement that he or she approves the ad must be conveyed by an unobscured, full-screen view of a representative of the candidate making the

statement, or the candidate in voice-over accompanied by a clearly identifiable photographic or similar image of the candidate. Also, the statement must be in writing, at the end of the ad, in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

- **Third-Party Ads Not Authorized by a Candidate**

- **General Requirements:** Where the broadcast is not authorized by any candidate or any candidate's authorized committee, the ad must (1) clearly state the name and permanent street address, telephone number, or World Wide Web address of the sponsor; (2) state that the ad is not authorized by any candidate or candidate's committee; and (3) include an audio statement indicating that the sponsor is responsible for the content of the advertisement.

For example, the broadcast should say: "Paid for by [Name and permanent street address, telephone number, or World Wide Web address of sponsor/payor] and not authorized by any candidate or candidate's committee. [Name of sponsor] is responsible for the content of this advertising."

- **Special Additional Requirements for Television Ads:** In the case of a television advertisement, the audio statement above must be conveyed by an unobscured, full-screen view of a representative of the organization making the statement, or a representative of the organization in a voice-over. A similar written statement must also be included at the end of the ad, in a clearly readable manner that is at least four percent of the vertical picture height, has a reasonable degree of color contrast between the background and the statement, and is visible for at least 4 seconds.

#### **D. Special Ohio Sponsorship Identification Requirements**

Ohio state laws regarding sponsorship disclosures in political advertisements changed in 2014 to more closely resemble the federal requirements, but there some remaining broadcaster obligations that go beyond those of the federal sponsorship identification rules. The precise scope and application of Ohio's sponsorship identification requirements have not been discussed in any reported judicial or administrative proceedings, so stations should consult with legal counsel if they have questions or concerns about the applicability of Ohio's requirements to any particular advertisement.

## **1. General Disclosure Requirement**

Ohio's general sponsorship identification law (Ohio Rev. Code § 3517.20) provides that no entity shall utter, or cause to be uttered, over the broadcasting facilities of any radio or television station within Ohio, any communication in support of or in opposition to a candidate or a ballot issue or question, or any communication that is designed to influence the voters in an election, unless the name of the entity is contained or included within the communication. Consistent with the federal sponsorship identification requirement applicable to broadcast political advertisements, this disclaimer or identification, when paid for by a candidate, legislative campaign fund or campaign committee, must be identified by the words "paid for by" followed by the name of the entity. Simply stating that an advertisement is a "paid political advertisement" is not sufficient to comply with the disclosure requirement.

The Ohio disclosure statute imposes an obligation for compliance both on the entity purchasing advertising time and on the radio and television broadcasters airing the advertisements. A station found in violation of the requirement to ensure that a broadcast advertisement contains the proper sponsorship identification statement may be subject to a fine of up to \$500 per violation.

## **2. Additional Disclosures for Independent Expenditures**

### **a. Independent Expenditures Supporting or Opposing a Candidate**

Furthermore, under Ohio law (Ohio Rev. Code § 3517.105), when a candidate, campaign committee, political action committee or political contributing entity with ten or more members, or a legislative campaign fund purchases (or finances the purchase of) a radio or television advertisement advocating for the election or defeat of a candidate that is not authorized by a candidate, the advertisement must clearly identify the entity purchasing the advertisement in accordance with the general Ohio disclosure requirement, and it must indicate that the advertisement is not authorized by the candidate or the candidate's campaign committee. Where the purchasing entity is a political action committee or political contributing entity with fewer than ten members, this requirement applies only to expenditures in excess of \$100 for advertisements concerning a local candidate, in excess of \$250 for advertisements concerning a candidate for the General Assembly, or in excess of \$500 for advertisements concerning a statewide candidate. The above disclosure requirements also apply to independent expenditure advertisements purchased by entities using contributions received from corporations or labor organizations (Ohio Rev. Code § 3517.1011).



## **b. Independent Expenditures Supporting or Opposing a Ballot Issue or Question**

Similarly, when a corporation, labor organization, campaign committee, political action committee with ten or more members, or a legislative campaign fund purchases (or finances the purchase of) a radio or television advertisement advocating support of or opposition to an identified ballot issue or question, the advertisement must clearly identify the entity purchasing the advertisement in accordance with the general Ohio disclosure requirement, and it must indicate that it is not authorized by the identified ballot issue committee. Where the purchasing entity is a political action committee with fewer than ten members, this requirement applies only to expenditures in excess of \$100 for advertisements concerning a local ballot issue, or in excess of \$500 for advertisements concerning a statewide ballot issue.

Entities that violate these independent expenditure disclosure requirements are subject to a \$1,000 fine per violation. Unlike the general disclosure requirement above, Ohio law does not explicitly hold broadcast stations liable for violations of the independent expenditure disclosure requirement—so it is unclear whether stations may be held liable for violations of this requirement.

## **3. Ohio's Imposition of Disclosure Obligations on Broadcasters**

It is important to emphasize that, in contrast to FEC disclosure rules that impose obligations only on candidates and sponsors of political speech, the general Ohio disclosure statute imposes obligations on both the sponsors of the speech *and* *broadcasters* for failing to ensure compliance with the disclosure requirements. Accordingly, while we are not aware of any instances where the Ohio Secretary of State has taken enforcement action against a broadcaster for noncompliance with the disclosure requirements, the Secretary conceivably could attempt to impose fines on broadcasters that fail to ensure compliance with the requirements.

There is an argument that Ohio's law prohibiting broadcasters from airing certain political advertisements is preempted by the FCC's sponsorship identification rules to the extent it could be said that Ohio's law conflicts with the FCC's rules. But that argument has not been tried in the courts, so Ohio radio and television stations need to be mindful that they could face liability for airing noncompliant political advertisements unless or until the Secretary of State's office provides further official guidance on this matter. Stations should consult with counsel to address any specific state sponsorship identification issues.

## VI. POLITICAL DISCLOSURE STATEMENTS

FCC regulations require broadcast stations to disclose to prospective political advertisers detailed information regarding the advertising policies, rates, and various sales packages and plans offered by stations to their commercial advertisers, including the “lowest unit charges” for advertising time and all value-enhancing discount privileges. The disclosure should be in the form of a written statement and should cover policies, rates, plans, and packages that are in effect both (1) during the “lowest unit charge” periods (i.e., 45 days before a primary or primary run-off election and 60 days before a general or special election), and (2) where relevant, during the period outside the “lowest unit charge” periods. It is acceptable for a station to supply this information in a single statement or two statements (one for during the “lowest unit charge” periods and one for the period outside the “lowest unit charge” window). The relevant information must be complete, thorough, and presented in a clear, orderly manner.

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 a station has provided full disclosure to a regular purchaser (such as an agency), the station needs only to disclose any updated (i.e., changed) information to that purchaser for subsequent orders. The political disclosure statement is not required to be uploaded into the station’s public political file, and stations may wish to consult with legal counsel regarding whether to place it or upload it there.

A station may request, but federal candidates cannot, under any circumstances, be required to acknowledge receipt of the station’s political broadcast disclosure statement. It is advisable to attempt to obtain such written acknowledgment, but it cannot be a mandatory prerequisite. A station may require state and local candidates to provide such acknowledgments as a precondition to selling them time unless such a candidate is making an “equal opportunities” demand.

Each station should develop an internal recordkeeping system to document when it furnishes a disclosure statement to each prospective political advertiser. These records could prove invaluable if a candidate or time purchaser should later claim that the disclosure statement was not provided. Records made by station sales representatives indicating to whom they have given disclosure statements and the dates they were given would generally be sufficient.

The Commission has declined to adopt a standard disclosure form or to provide a comprehensive list of information that must be disclosed. Nonetheless, the rules require that each station disclose the following minimum information to political candidates and to their time purchasers:

- A description of each class of time offered to commercial advertisers (including an explanation of preemption priorities) that is sufficient to allow candidates to understand the specific differences between various classes of time (even if the station has a special candidate-only non-preemptible rate that is lower than all other rates);
- A description of the “lowest unit charge” and related privileges (such as priorities against preemption and the availability of any make-goods prior to specific deadlines) for each class of time offered to commercial advertisers;
- A description of the station’s method of selling preemptible time based on advertiser demand—i.e., demand-driven “current selling level,” (auctions, fluctuating levels, grid, etc.) with an express notation that candidates are able to purchase time at these demand-generated rates in the same manner as the station’s most favored commercial advertisers;
- A current approximation of the likelihood of preemption for each class of preemptible time (a “percentage” estimate of chances for preemption is sufficient);
- An explanation of the station’s make-good policy;
- An explanation of the station’s sales practices that affect rates, including arrangements based on audience delivery, with a notation that candidates will be able to purchase this class of time;
- An explanation of station rotations, together with a statement that other rotations and negotiated packages are available (if applicable); and
- An explanation of the station’s discount and value-added packages.

*(Note: If a station has any long-term package contracts currently on the books, the station should immediately review those contracts to determine the value of the spots within the packages and their impact on the station’s “lowest unit charge” 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, the station should contact legal counsel to discuss the allocation of the package purchase price.)*

Note that these are minimum requirements. Disclosure is an explicit, mandatory requirement; failure to make proper disclosure could result in substantial penalties. Rate practices vary among stations, so disclosure requirements will vary. Stations should take care to include all relevant information in the disclosure statement based on

the station's specific sales policies, plans, and rates. Once the information is disclosed, stations must update the information to ensure that political time purchasers have the station's most current information.

The following is a checklist of recommended information to include in a station's disclosure statement (if appropriate), in addition to the minimum requirements listed above:

- **Heading:** The heading should be typed on station letterhead and entitled: "Political Broadcast Advertising Disclosure Statement." The statement should be dated and numbered.
- **Introduction:** The disclosure statement should contain a general introduction or summary explaining the various advertising rate classifications and sales plans available. This could take the form of a generalized overview of the station's sales policies and plans with an explanation that the specifics of each rate, policy, and plan are provided in detail below. The introduction should encourage those who have questions or seek additional information to contact designated persons at the station. One or more staff persons should be named and their title(s), mailing address(es) (including email), and telephone number(s) should be provided.
- **"Lowest Unit Charge"/Comparable Charge Statement of Policy:** The disclosure statement should contain an affirmative statement that it is the station's policy and practice to extend the "lowest unit charge" to a "use" of the station's facilities by any qualified candidate during the 45-day period prior to a primary or primary run-off election and 60-day period prior to a general or special election (i.e., the "lowest unit charge" period). The disclosure should include an affirmative statement that it is the policy and practice of the station to extend to any "use" of the station's facilities by a legally qualified candidate outside the "lowest unit charge" period rates that are comparable to the rates extended to the station's commercial advertisers. The disclosure should also contain a statement that makes clear that a BCRA "stand by your ad" certification will be required of all federal candidates for such candidates to be entitled to the "lowest unit charge."
- **Definition of "Use":** A statement should be included that defines "use" of the station as any broadcast of a candidate's voice or picture, whether or not authorized by the candidate. Spots by an independent political group promoting a candidate, or even appearances of a candidate in old movies or TV shows, are considered "uses." However, a hostile ad, even if it contains the candidate's voice or picture, is not considered a "use" by the candidate being attacked.

- **Good Faith Estimate of Charges:** A statement should be included to indicate that the “lowest unit charge” and comparable charges reflected in the disclosure statement constitute the station’s best good faith estimate of the “lowest unit charges” and comparable charges for the various classes of time offered. The statement should expressly state that often it is impossible to determine the “lowest unit charge” and comparable charge until after the ad has been broadcast and that, in such cases, the station will, upon request, provide all appropriate additional information.
- **Classes of Time and Rates:** In addition to the information required above, the disclosure statement should contain the rates charged for each class of time offered by the station. Further, the statement should disclose: the length of available units; each time period; rotating schedules; fixed positions; any unique class characteristics (such as preemptible with notice, preemptible without notice, packages, etc.) that are offered by the station to its most favored commercial advertisers; and the lowest unit charge for each unit and class. If the station has multiple rotation schedules or rate plans, all of them must be disclosed. The Commission has stated that if the schedules or packages are voluminous, a summary may be provided in the disclosure statement with an explanation that a complete list of all rotations and package plans will be provided upon request.
- **Comparable Charge:** The disclosure statement should also contain a complete description of the comparable charges and related privileges (such as priorities against preemption, availability of any make-goods prior to specific deadlines, and volume discounts) available outside the “lowest unit charge” period for each class of time offered to the station’s commercial advertisers.
- **Audience Delivery Guarantee:** Further, the disclosure statement should explain that if a promised delivery of audience does not occur, the station will make available to the candidates make-goods, rebates, or credits to compensate for the difference. The statement should point out, if applicable, that in some instances, measurement of the audience delivered (i.e., ratings) may not be available until after the election, and, in that case, rebates or other compensatory alternatives will not be made available to the candidate.
- **Separation Policy:** Any station policy concerning separation of competitive announcements should be disclosed.
- **Sponsorship Identification:** The disclosure statement should indicate that all political advertisements must include a sponsorship identification as required by law and that if an ad does not include the

requisite sponsorship identification, the station will insert it in the spot even if the inserted identification blocks or obscures the picture or message.

- **Ordering Deadlines:** The disclosure statement should include information on ordering deadlines. The FCC has said that a station may generally apply the same ordering deadlines to candidates that it applies to commercial advertisers. However, the FCC has further explained that an ordering deadline cannot be invoked to deny “equal opportunities” to candidates during the days immediately prior to an election or to deny “reasonable access” to federal candidates. So, when an ordering deadline is stated, it should contain the following exception:

“The station’s regular ordering deadline may be waived, where appropriate, to provide equal opportunity to political advertisers or to ensure federal candidates reasonable access.”

- **Contact Information:** The disclosure statement should identify designated person(s) to be contacted about political advertising and provide an office mailing address and telephone number.
- **Tape and Copy Delivery:** The disclosure statement should provide express instructions indicating to whom and to what station address (physical or, if applicable, email) the tapes and copy are to be delivered.
- **Candidate Authorization:** Some states have enacted laws that prohibit the media from accepting advertisements for candidates unless the time purchaser provides a written statement signed by the candidate authorizing that agency or individual to make the purchase on the candidate’s behalf. If this is applicable in the jurisdictions from which a station accepts political advertising, the station may wish to include such a requirement in its disclosure statement.
- **Payment and Credit Policy:** The FCC permits stations to require advance payment only if similar advance payment would be required of a comparable commercial advertiser. In addition, for federal candidates, stations can only require advance payment up to seven days before the broadcast of the political advertisement (i.e., stations can’t require payment more than seven days in advance). The disclosure statement should reflect the station’s credit policy and indicate to whom payment should be made and the address to which it should be sent. A station may factor the candidate’s credit history into making its determination.

- **Tape (or Other) Specifications:** The disclosure statement should indicate any technical specifications for tape, or for video or audio formats, standards, or requirements.
- **Reserved Right of Station to Recapture Time:** On occasion, stations may find it necessary to cancel or modify a political sale after it is made to accommodate the “equal opportunities” demands of opposing candidates or to accommodate the “reasonable access” requirements for federal candidates. Therefore, a station should include in its political disclosure statement and in its political (and other commercial) advertising contracts the following statement:

“We reserve the right to cancel or modify any sale of time made or contract entered into for the sale of time on the station, pursuant to the Communications Act of 1934, to satisfy the ‘equal opportunity’ requirements for all legally qualified political candidates and the ‘reasonable access’ requirements for all legally qualified federal candidates. Where such cancellations or modifications are necessary, advertisers will be advised and rebates, schedule changes, or other adjustments will be made as may be appropriate.”

(*Note:* Again, a station should make sure such a statement is contained not only in its political disclosure statement, but in all of its advertising contracts—i.e., contracts with all commercial advertisers and all political advertisers. Stations should review their advertising contract forms to ensure that language to this effect is included. Or, if your station is no longer using paper confirmation contracts, steps need to be taken to communicate these terms and conditions to the advertiser.)

- **Not an Offer to Sell:** The disclosure statement should contain the following disclaimer:

“This document does not constitute an offer to sell time, nor is it a contract; rather, it is a statement of the policies that this station, in good faith, attempts to follow in connection with the sale and placement of political advertising. The terms of any actual sale of time are contained in our sale contracts, and none of the matters contained in this disclosure statement are incorporated by reference in the sale contract.”

- **Further Information:** We suggest that stations include a statement such as the following:

“We will be pleased to provide, upon request, further information about our rates, advertising policies, advertising packages, and advertising plans. We encourage prospective political time purchasers to inquire. It is our desire to furnish all appropriate information to those interested in purchasing political advertising on our station to enable you to make the most cost efficient and effective advertising decisions.”

It is the responsibility of each licensee to make full disclosure to all candidates inquiring about time purchases. Therefore, stations must educate their rep firms about their political policies and rates and provide them with sufficient copies of their political broadcast advertising disclosure statement. Rep firms must be immediately notified of any changes in the statement when political sales are being made. Stations should maintain detailed records of attempts to keep the rep firm up to date, and obtain information from your rep firm about requests for political time and place that information in your public files. We suggest a weekly e-mail to your rep firm with attachments including the disclosure statement, current rate sheet, and current packages being offered.

In many cases where the FCC has imposed fines on radio and television stations as a result of field office inspections, the inspections started with a review of the station’s “disclosure statement.” This is indicative of the FCC’s emphasis on disclosure and underscores the importance of thoughtfully preparing the station’s disclosure statement.



## **VII. POLITICAL FILE: RECORDS TO BE MAINTAINED BY STATIONS**

Each station is required to maintain in the “political file” folder of its online public inspection file certain records concerning all requests for political broadcast time made (1) by or on behalf of candidates, or (2) by third parties seeking to purchase time to communicate a message relating to any matter(s) of national importance (discussed below). The Commission has acknowledged that it is not always readily apparent when a “request” for time sufficient to trigger the recordkeeping obligations has been made. Accordingly, the FCC has clarified that a “request” occurs when a political advertiser places a final order for a specific schedule of ads that the station could act upon if it were to accept the order; i.e., a final order to purchase particular schedules, amounts of time, and classes of time. Put differently, stations are not required to place in their online public inspection files general requests for advertising time that stations have available to purchase, or rates for a general array of time; such a broad inquiry does not constitute a request that triggers the political file recordkeeping obligations. We recommend contacting your legal counsel should a circumstance arise in which you are uncertain whether the recordkeeping obligations have been triggered.

The specific rules regarding recordkeeping differ slightly depending on the nature of the purchaser of the advertisement and the subject of the advertisement. FCC staff has reminded broadcasters of the importance of uploading all required information to the online public inspection file in a timely manner, most recently (in 2020 and 2021) through a slew of consent decrees addressing timeliness and completeness issues in the practices of large and small stations alike. As each record in a station’s online public inspection file contains a “date/time stamp,” the Commission can easily discern when the record was uploaded—and whether such upload was “timely.” Likewise, the Commission or “watchdog” organizations may be able to determine whether a station is lacking required information for political advertisers simply by reviewing the station’s online public inspection file.

The information that a station is required to place in its political file falls into three general categories: (1) advertisements on behalf of candidates or their authorized committees; (2) issue advertisements that relate to a political matter (or matters, as the case may be) of national importance; and (3) issue advertisements that do not relate to political matter of national importance, but instead relate to controversial or political issues of state or local importance. Certain political records for each of the foregoing categories must be uploaded to the political file section of a station’s online public inspection file and must remain there for two years.

A copy of the station’s political disclosure statement is not required to be placed in the station’s online public inspection file. However, some stations nonetheless choose to upload their political disclosure statement in an effort to ensure that their online public inspection file contains all necessary information regarding each political advertising order (for example, a political disclosure statement may list the “codes” a station uses on a political advertising order sheet to indicate which class of time the political advertiser has purchased). Accordingly, stations may wish to consult with legal

counsel regarding whether to put the political disclosure statement in the online public file; the information in the disclosure statement may need to be updated from time to time, and stations may wish to avoid a situation in which an outdated political disclosure statement with then-inaccurate information remains in the online public inspection file.

#### **A. Advertisements by or on Behalf of a Candidate**

The Communications Act of 1934, as amended by BCRA, requires broadcasters to maintain and make available for public inspection a complete record of any request to purchase broadcast time that is made by or on behalf of a legally qualified candidate for public office. This includes both federal and non-federal candidates.

The records required by BCRA for candidate advertisements must contain information regarding:

- (1) whether the request to purchase broadcast time is accepted or rejected by the station;
- (2) the rate charged for the broadcast time;
- (3) the date and time on which the advertisement is aired;
- (4) the class of time that is purchased;
- (5) the name of the candidate to which the advertisement refers and the office to which the candidate is seeking election; and
- (6) the name of the candidate, the authorized committee of the candidate, and the treasurer of such committee.

#### **B. Third-Party Advertisements Relating to a Federal Candidate, Federal Election, or National Legislative Issue of Public Importance**

BCRA extends similar requirements to those listed in [Section VII.A](#) to any advertisement that communicates a message relating to any political matter(s) of national importance, including (i) qualified federal candidate(s), (ii) federal election(s), and/or (iii) national legislative issue(s) of public importance. This includes any advertising by third parties—including corporations, trade associations, or unions—that supports or opposes a federal candidate, addresses issues or other candidates in a federal election, addresses national legislation, or, as the FCC has clarified, references an issue that is controversial or generating discussion at a national level (for example, the topic of “gun control” could qualify as a “political matter of national importance” even if there is no currently pending federal legislation addressing the issue).

The records required by BCRA for third-party advertisements relating to a federal candidate, federal election, and/or national legislative issue of public importance must contain information regarding:

- (1) whether the request to purchase broadcast time is accepted or rejected by the station;
- (2) the rate charged for the broadcast time;
- (3) the date and time on which the advertisement is aired;
- (4) the class of time that is purchased;
- (5) the federal candidate to which the advertisement refers, the federal election to which the advertisement refers, and/or the national legislative issue of public importance to which the advertisement refers (as applicable); to clarify, for *each* request to purchase broadcast time that triggers BCRA's recordkeeping requirements, stations must include in their political files the names of *all* candidates (and the offices to which they are seeking election), *all* elections, and *all* national legislative issues of public importance to which the ad refers; and
- (6) the name of the person or entity purchasing the time (and, as clarified by the FCC, the name of any entity should not be an ambiguous acronym—using an entity's full name is therefore advisable); the name, address, and phone number of a contact person for such purchaser; and a list of the chief executive officers or members of the executive committee or of the board of directors of such purchaser.

*Note:* The law is clear that a complete list of officers or members or directors is required—one name does not meet this requirement if there are multiple officers, members, or directors. The FCC has clarified that where a purchaser of political advertising time has provided incomplete information (e.g., the name of only one officer or director), stations may discharge their legal obligation by (1) making a single inquiry to the entity sponsoring the ad or the third-party buyer of advertising time acting on the entity's behalf regarding whether there are other officers or directors of the sponsoring entity that must be identified under the law, or (2) informing the entity or third-party buyer as to which officers or directors must be identified under the law and asking the entity to provide that information. It would be advisable for stations to document any such follow-up inquiry in writing and to retain that documentation.

The FCC has clarified that it will use a standard of “reasonableness and good faith decision-making” when reviewing broadcasters’ efforts to:

- (1) determine whether, in context, a particular issue ad triggers disclosure obligations;
- (2) identify and disclose in their online political files all political matters of national importance that are referenced in each issue ad; and
- (3) determine when it is appropriate to use acronyms or other abbreviations in their online political files when disclosing information about issue ads.

Although, technically, there may be some “federal” issue ads that do not address a federal candidate, election, and/or piece of legislation, such advertisements are likely to be few and far between, and it would be prudent for stations to follow BCRA’s recordkeeping obligations for all federal issue advertisements. Additionally, stations should be aware that they may be required to “break out” ads and separately identify them even if they are part of the same schedule. For instance, if a station were to receive an order placed by an issue advertiser that spans a two-week period, and the issue advertiser ultimately ended up airing two separate, 30-second spots pursuant to that single order—e.g., the copy of one advertisement references healthcare and the general presidential election and the copy of the other advertisement references immigration and the general presidential election—the station would need to separately identify those two advertisements and upload that supplementary information identifying the relevant issues in each of the two spots to the online public inspection file immediately (i.e., within 24 hours, absent unusual circumstances) upon learning that the advertisements address different national legislative issues of public importance.

### **C. Third-Party Advertisements Relating to State or Local Candidates, Elections, or Issues**

The only political advertising not covered by BCRA’s recordkeeping obligations consists of advertisements by third parties that refer to state or local candidates, elections, or a controversial issue of public importance other than national legislation.

For this category of advertising, the FCC’s rules nevertheless require a station to place in its public inspection file a list of the chief executive officers, or members of the executive committee, or members of the board of directors, of the entity that is paying for or furnishing the broadcast matter. While the FCC may, generally, defer to licensees’ good-faith decision-making in determining whether or not an advertisement targets truly state or local issues or, instead, national legislative issues of public importance, stations may wish to contact legal counsel when making such determinations.

#### **D. Notation of “Equal Opportunities” Appearance in Public Inspection File**

As mentioned above, for purposes of the “equal opportunities” requirement, a station is not required to proactively notify a candidate when time has been sold or given to other candidates. Instead, FCC rules require stations to ensure that records of free time and notations of all requests for time are immediately uploaded to the station’s online public political file, so that a candidate may have a chance to learn of a “use” by his or her opponent and make a timely request for an “equal opportunity.” A station’s failure to promptly place notification of a use in the political folder of its online public inspection file may extend the seven-day period afforded a candidate claiming equal opportunity due to lack of proper notice. As such, stations would be well served by uploading the notation of a use in its online public inspection file on the day the use occurs.

#### **E. Telephone Requests for Information from Public File**

Please note that the FCC no longer requires that stations accommodate telephone requests for information from the political file. A station may provide political file information by telephone if it wishes, but it is not required to do so unless the request is for information that should be in the file but is not yet there. Nonetheless, some stations elect to provide basic information about the amount of time purchased over the phone to promote sales. A station taking this approach must treat all advertisers in the same fashion.

#### **F. Manner of Upload to Online Public Inspection File**

Stations must upload political file documentation to their online public inspection file in an organized and reasonable manner in order to comply with the FCC’s political file rules. Accordingly, stations should adopt a practice of carefully placing materials in the correct location of their online political files. Generally, stations’ public files should already contain FCC-generated folders for each election year and, under each year, further subfolders split into the following categories: (1) for candidate advertisements, there are folders labeled “Federal”; “Local”; and “State,” depending on the office to which the candidate is seeking election, and (2) for third-party issue advertisements addressing one or more issue(s) of national legislative importance, there is a folder labeled “Non-Candidate Issue Ads.” (Third party advertisements addressing controversial local or state issues that are not of national legislative importance should be placed in the “Political Matters and Controversial Issues Disclosures” folder, which is a separate folder than the “Political Files” folder.) Stations should select the correct FCC-generated folder for each advertisement, and then stations should create relevant subfolders as necessary to further group political advertising information in an organized and logical fashion. For instance, all political files relating to President Biden’s 2020 general election campaign could have been placed into a folder labeled “Biden” by using the following folders: 2020→ Federal→President→Biden.

**Browse → Political Files → 2020 → Federal → President → Biden**

Similarly, all political files relating to any advertisements placed during 2021 by a third-party issue advertiser named, for example, “America Next” could be placed in a folder labeled “America Next” by using the following folders: 2021→Non-Candidate Issue Ads→America Next.

**Browse → Political Files → 2021 → Non-Candidate Issue Ads → America Next**

## VIII. DIGITAL POLITICAL AND ISSUE ADVERTISING

Political advertisements displayed on a station's website or any other online digital platforms—be it in text, video, or audio format—are not subject to the FCC's political broadcasting rules. However, Internet spots sold as a package along with broadcast spots *will* be subject to the equal opportunities rule, and, in addition, the station must assign a value to the Internet spots for purposes of establishing the “lowest unit charge.”

The lack of FCC regulations over standalone digital online advertising, however, does not equate to a lack of legal risk. To the contrary—the content of a digital online political advertisement could expose a station to claims for, among other things, defamation, copyright or trademark infringement, or violations of federal or state election laws.

Fortunately, digital media law has developed some unique statutory protections for websites that display online content provided by third parties—including protections under Section 230 of the Communications Decency Act and the Digital Millennium Copyright Act (DMCA). Congress provided these statutory protections to foster a free and robust marketplace for Internet communications that allows websites to avoid costly pre-screening procedures for online advertising and other content submissions.

But these statutory protections are not absolute. Indeed, they are fraught with minefields for website operators that exercise too much control over third-party content. The statutory protections are built on the premise that website operators do not, and should not be required to, monitor or control the content of third-party online submissions. Accordingly, if a station decides to take an active role in monitoring and controlling such third-party submissions, the station may well lose the benefit of at least some aspects of the statutory protections. Additionally, the statutory protections do not cover all claims—i.e., trademark infringement, false endorsement, and right of publicity claims remain unaffected. Thus, stations should be prepared to remove potentially infringing content from their websites after discussion with counsel.

### A. Equal Opportunities and Non-Discrimination

Although the FCC's “equal opportunities” and “reasonable access” rules do not apply directly to standalone digital advertising on a station's websites and other online digital platforms, competing candidates for political offices should be afforded the same opportunity to purchase digital advertising and, if they are purchasing the same class and amount of digital advertising, should be charged the same rates.

Although there is no “lowest unit charge” requirement for candidate advertisements on the Internet, stations' websites should charge political candidates and regulated committees the “usual and normal” commercial rate for a similar type and amount of advertising.

Failure to adhere to either of these principles may lead a disappointed candidate to file a complaint with the FEC, FCC, Ohio Secretary of State, or relevant Ohio Board of Elections claiming that the website operator is making an unlawful in-kind corporate campaign contribution to the candidate's opponent(s) to the extent of the difference in the ad rates charged.

## **B. Digital Sponsorship Identification**

Sponsorship identification for political and issue advertising on a station's digital platforms is governed by the FEC rather than the FCC. The FEC generally enforces its sponsorship identification rules against the candidate or other advertiser—not the broadcaster.

The FEC sponsorship disclaimer rules govern certain paid content appearing on a station's website in any format—including a display advertisement or a video advertisement. As explained in Section V.C above, the disclaimer rules apply to:

- Communications paid for or furnished by a “political committee.” The Supreme Court has limited the FEC's definition of a political committee to encompass only those organizations controlled by a candidate or a committee (e.g., a candidate's campaign committee) or whose “major purpose” is the nomination or election of a candidate (e.g., a political action committee or PAC). Political committees are registered with the FEC. A SuperPAC is a political committee registered with the FEC even though it is not subject to contribution or expenditure limits.
- Communications paid for by any corporation, union, association, organization, or individual that (i) expressly advocate the election or defeat of a clearly identified federal candidate, (ii) solicit any political contributions, or (iii) refer to a clearly identified candidate for federal office and is made within 60 days before a general, special, or run-off election or 30 days before a primary election.

The rules require the inclusion of a “paid for” disclaimer and other information, depending on the advertiser, as outlined in Section V.C above.

For online banner or display advertisements, the FEC's disclaimer rules for “print” communications are the most relevant. Those rules require disclaimers to be (i) “clearly readable,” (ii) contained in a printed box, and (iii) of a reasonable degree of color contrast between the background and the printed statement. For online video advertisements, the FEC's disclaimer rules for advertisements are most applicable. Those requirements, which differ slightly depending on the advertiser, are outlined in detail in Section V.C.



Although the FEC's rules are traditionally enforced against candidates and other political committees regulated by the FEC, it is sound practice for stations to require advertisers to follow the FEC's rules and to notify the advertiser or agency if the station is aware that an advertisement lacks a proper FEC disclaimer.

### **C. Liability for Political Advertising Content**

Another area where the law governing station website operations contrasts with the rules governing broadcasting is that of liability for the content of advertising.

Stations are not liable for the content of broadcast advertisements by a legally qualified candidate. Stations are liable, however, for the content of broadcast advertisements by third parties, including political parties, SuperPACs, and other organizations funded by corporations or unions. The result is that a station's immunity depends upon the sponsor of the political advertisements.

For digital advertisements, the rule is different and more complex. While there is no absolute immunity for any political advertisement (not even for *candidate* advertisements), federal laws provide statutory immunity from defamation, privacy, and copyright claims arising out of political advertising so long as the station meets specific statutory criteria. However, there is no statutory protection from trademark infringement, false endorsement, or right of publicity claims in a political advertisement.

Please note that different federal statutes govern protections for defamation (Section 230 of the Communications Decency Act) and copyright (DMCA). The differences in these two statutory protections are discussed below. Stations should discuss the scope and application of these protections with their legal counsel.

#### **1. Defamation Immunity – Section 230**

Section 230 affords station websites broad immunity from liability arising out of online content that is "created and developed" by third parties (i.e., any party other than the station). There is no Section 230 immunity, however, for websites that are responsible for "creating" or "developing" any part of unlawful advertising content. This threshold presents important changes to the way stations engage with Internet advertising as opposed to television advertising. To avoid losing Section 230 immunity, stations should not produce Internet political advertisements for any candidate or political organization because doing so may cost the station its Section 230 immunity for that particular advertisement.

If a station makes edits to any part of a digital advertisement that becomes the subject of a lawsuit, or otherwise takes action to materially contribute to the content at issue, the station's role in contributing to those edits may threaten the loss of Section 230 immunity. For example, if a station recommends particular edits to the advertiser as a condition of running the advertisement, the station may be considered to have "created" or "developed" that part of the ad.

In addition, it is important that all political advertisements be provided for online use in order to fall within Section 230. Section 230 may not apply to advertisements obtained from television broadcasts where the sponsor of the advertisement did not intend for the advertisement to be published online. A political advertisement intended exclusively for television should not be placed on a station's website without the prior approval or consent of the advertiser. Even if a station's goal is to add value to an advertiser by including the spot on the Internet as part of a larger package buy, the station should make sure that such intention is reflected in the sales contract.

Section 230 also contains a "good Samaritan" provision that shields websites from liability for any action taken in good faith to restrict access to objectionable content. Once an advertisement is uploaded onto a station's website, the station has broad discretion to remove any or all of the advertising content that it deems to be objectionable. Although stations may also edit the advertisement to remove specific objectionable content without liability, they may not edit content in a way that creates or develops any part of the unlawful material. Stations also have the right *not to delete* political advertisements produced or created by a party other than the station—even highly controversial ones.

In sum, for digital advertising on digital platforms, stations should consult with legal counsel to establish web advertising procedures that are consistent with the operator's tolerance for legal risk.

As discussed below, Section 230 does not apply to intellectual property claims (nor to federal privacy or criminal law).

## **2. Copyright Immunity – Digital Millennium Copyright Act (DMCA)**

If a candidate or any other political advertiser uses copyrighted music or other content in a digital advertisement without the rights holder's authorization, the website could incur copyright liability if the content is deemed to be infringing.

Political advertisements are hotbeds for possible copyright violations because they are creative, cutting-edge, and designed to grab attention—especially Internet advertisements that can be created and distributed on almost a moment's notice. Candidates have landed in hot water with music publishers, record companies, and recording artists for alleged copyright infringement.

Section 230 does not provide immunity from copyright claims. The DMCA, however, offers a limited safe harbor from liability for copyright infringement if a website or other online platform meets the following statutory conditions:

- A station must appoint a designated agent to receive notifications of claimed infringement on its website in order to receive protection under the DMCA. The agent's contact information must appear on the website and be filed with the U.S. Copyright Office.

- The station must have a policy of terminating repeat online infringers.
- The website must not have actual knowledge that the material is infringing.
- The website cannot be aware of facts or circumstances from which infringing activity is apparent—also known as the “red flag” rule.
- The website must not have the right and ability to control the material on its service. Note that courts have held that this test requires “something more” than the ability to locate and remove infringing content. Rather, the website must have “substantial influence on the infringing activities” of users or advertisers who post the allegedly infringing material.

The DMCA requires a website to remove or disable any infringing content as quickly as possible as soon as it has *knowledge* or *notice* of the infringing content. Copyright owners may notify a website of third-party infringement and demand that such content be removed by sending the station a written “take down” notice under the DMCA that includes, among other things, the identity of the material at issue, contact information of the claimed owner, and a good faith statement that the use of the material is unauthorized.

*Note:* The requirement that a website remove any infringing content in order to secure DMCA protection is a key difference between Section 230 protection and DMCA protection. Section 230 does not require a website to take down defamatory content after receiving notice, but the DMCA *does require* that a website take down content that infringes copyrights. For this reason, stations should consult with legal counsel to properly address takedown notices.

A station that receives a valid takedown notice must respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” If the notification does not substantially comply with all the required components, the station must promptly attempt to follow up with the complaining party to obtain information omitted from the notice and to remove the infringing material.

To avoid liability for removing content pursuant to a valid takedown notice, a station also must promptly notify the advertiser. If the advertiser provides an effective “counter notice” to a station, then the station must provide a copy of the counter notice to the copyright owner who issued the takedown notice and notify the copyright owner that the advertisement at issue will be reposted on the station’s website in 10 business days. The station must then repost the advertisement not less than 10 business days later and not more than 14 business days later—unless the station’s designated agent

first receives notice that the copyright owner has filed an action in court seeking to block the alleged infringing work.

A valid “counter notice” from an advertiser must contain (1) a physical or electronic signature of the advertiser or other user, (2) identification of the material that has been removed or disabled and the location at which the material had previously appeared, (3) a statement under penalty of perjury that the advertiser or user has a good faith belief that the material was removed as a result of a mistake or misidentification of the material, and (4) contact information from the user and a statement that the user consents to jurisdiction of the federal court where the user is located and will accept service of process from the copyright holder.

If a station receives any “take down” notice from a copyright holder and/or a “counter notice” under the DMCA, it should consult with legal counsel immediately to determine the appropriate response.

### **3. No Immunity from Trademark Infringement, False Endorsement, or Right of Publicity Claims**

Neither Section 230 nor the DMCA protects station websites against trademark infringement, false endorsement, or right of publicity claims arising out of content contained in online political advertisements. Trademark and false endorsement issues are not unheard of in political advertising—for example, Mastercard sued Ralph Nader’s 2000 presidential campaign for using its “Priceless” advertising slogan. A different legal controversy arose when Republican candidates ran ads narrated by an unauthorized sound-alike of actor Morgan Freeman. While station websites are not charged with an obligation to investigate whether an advertisement is infringing where the infringement is not clear on its face, the liability of a website for contributory or vicarious trademark infringement in such circumstances can be minimized by requiring representations from the advertiser that the advertisement does not contain any unauthorized use of trademarks or a person’s name, image, or likeness and, then, by taking down any known infringing advertisement.

Obviously, stations carrying political or issue advertisements on their websites or other digital platforms will want to ensure against the risk of exposure for potentially unlawful or infringing content. This calls for conversations with the station’s insurance agents. In addition, stations should communicate with their legal counsel to set up appropriate protocols to minimize risk of exposure for the carriage of possibly unlawful digital political or issue advertisements.

We hope you find this handbook helpful. Please feel free to call on the Association whenever it may be of assistance.

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This handbook should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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