

National Association of  
**NAB**  
BROADCASTERS

# COUNSEL MEMO

FROM THE LEGAL DEPARTMENT

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## POLITICAL ADVERTISING UPDATE February 2006

### - BIPARTISAN CAMPAIGN REFORM ACT - New Sponsorship Identification Rules, New Public File Requirements

On December 10, 2003, the Supreme Court upheld all the major provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). And in late 2005, the Federal Elections Commission (FEC) revised its regulations governing "electioneering communications." This memo summarizes BCRA's provisions that affect television and radio stations. Broadcasters immediately need to familiarize themselves with BCRA's requirements so as to comply with them in the current federal election cycle.

**NAB has updated the Political Broadcast Agreement Forms to reflect the BCRA regulations. The PB-16 forms can now be purchased from the NAB by calling (800) 368-5644 or visiting [www.nab.org/nabstore](http://www.nab.org/nabstore).**

There are new **certification and sponsorship identification requirements for federal candidates**. **Federal candidates** include those persons running for the office of President, Vice-President, U.S. Senate or U.S. House of Representatives. Additionally, there are **new public file requirements**. Below is a summary of these new regulations. Other FCC political broadcasting rules remain in effect.

#### Candidate Certification

To avail themselves of a station's lowest unit charge ("LUC"), federal candidates or their authorized committees must provide a broadcast station with a **written certification at the time programming is purchased**.

A federal candidate must certify whether or not the programming refers to another candidate for the same office. If the programming does refer to an opposing candidate, the certificate must state that the programming will contain the following:

##### For Radio

During the political programming, a candidate is required to include an audio statement voiced by the candidate identifying him or herself, the office being sought, and that the candidate has approved the broadcast.

##### For Television

At the end of a political spot, and for a minimum of four seconds there must be a clearly identifiable photographic or similar image of the sponsoring candidate while simultaneously a clearly readable printed statement is displayed. The printed statement must identify the candidate, state that the candidate approved the broadcast and that the candidate and/or the candidate's authorized committee paid for the broadcast.

Congress' intent in passing this provision was to limit the number of "attack ads" being placed by opposing candidates. The provision, however, broadly applies to any mention of an opposing candidate, whether or not the spot attacks the opposing candidate,

praises the opposing candidate or merely refers to the opposing candidate in a neutral manner.

Failure to adhere to these certification requirements means that the candidate forfeits all rights to the LUC for all programming aired during the remainder of the political window (45 days before a primary, 60 days before a general election).

### **Sponsorship Identification - Federal Candidate Ads**

In the case of political programming **which advocates the election or defeat of a federal candidate or that solicits any political contributions**, BCRA amends the Federal Election Campaign Act to require stricter sponsorship identification requirements. For political spots which are authorized by a federal candidate and/or the candidate's authorized committee, the following sponsorship identification rules will apply:

#### **For Radio**

The advertisement must include an audio statement by the candidate identifying himself/herself and stating that the candidate approved the broadcast and that the candidate and/or the candidate's authorized committee has paid for the broadcast. (As described above in the Candidate Certification section, if the broadcast refers to an opposing candidate in any manner, it must also identify the office being sought).

#### **For Television**

As with radio broadcasts, the political programming must identify the candidate on whose behalf time was purchased, state that the candidate approved the broadcast, and state that the broadcast has been paid for by the candidate and/or the candidate's authorized committee. This can be achieved by one of two ways:

- 1) The candidate making the statement in an unobscured, full-screen view (at least 80%); or
- 2) A candidate voice-over, accompanied by a clearly identifiable photograph or similar image of the candidate.

There must also be a written presentation of the same statement at the end of the political programming "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 four seconds."

These new sponsorship identification rules will be enforced by the Federal Election Commission. At this point, stations are not required to ensure candidate compliance with the new rules. However, the preexisting FCC sponsorship identification rules remain in place - Part 73.1212 of the FCC's rules require political advertisements to explicitly state the "paid for" or "sponsoring" entity purchasing the time, and in television spots the disclosure must be 20 scan lines high and aired for at least four seconds against a contrasting backdrop. Stations must ensure that these FCC requirements are met.

### **Sponsorship Identification - Third Party/Issue Ads**

Political programming **that advocates the election or defeat of federal candidates or solicits any political contributions**, but is not authorized by a federal candidate or his/her authorized committee must:

- 1) State that the programming is not authorized by any federal candidate;

and

2) Include the aural statement: " \_\_\_\_\_ is responsible for the content of this advertising."

The blank must be filled in with the name of the political party, committee or person paying for the broadcast, the name of any connected organization of the payor, and a permanent street address and telephone number. For television, this statement is required to be made in "an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such committee or other person in voice-over, and shall also appear 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." This new sponsorship identification rule will be enforced by the Federal Election Commission and is also applicable to any electioneering communication (see section below). At this point stations are not required to ensure third party/issue advertiser compliance with the new rules.

### **New Public File Requirements**

BCRA expands broadcasters' existing public file recordkeeping requirements. Although the scope of this definition has not been clarified, for any paid political programming that "***communicates a message relating to any political matter of national importance***," a broadcaster must keep in the station's public file:

- 1) A record of each request to purchase time;
- 2) Whether the station accepted or rejected the request (in whole or in part);
- 3) The rate charged for the programming;
- 4) The date and time on which the programming is aired;
- 5) The class of time purchased;
- 6) The issue to which the programming refers
- 7) The name of the candidate and the election/office to which the programming refers (if applicable)\*; and
- 8) The name of the purchaser, the name, address and phone number of a contact person for the purchaser, and a list of chief executive officers/board of directors of the purchaser. If the purchaser is the candidate and/or the candidate's authorized committee, the committee treasurer's name must also be listed.

\* Note: Although most of BCRA's provisions refer solely to federal candidates, the language in the public file provisions may be broadly construed to include all candidates for public office.

This is a significant change because it requires disclosure of rate and other information for certain issue ads which are not subject to the access, equal opportunities, and lowest unit charge rules applicable to candidate ads. Broadcasters must continue to comply with the FCC's preexisting recordkeeping requirements for the political programming of all legally qualified candidates (local, state and federal).

### **Additional BCRA Provisions - Electioneering Communications**

In addition to the candidate certification requirements and new public file and sponsorship identification requirements, BCRA prohibits certain entities (i.e., corporations and labor organizations) from making electioneering communications.

On January 20, 2006, new rules governing "electioneering communications" went into effect. Previously, the FEC had limited its regulation of "electioneering communications"

to those distributed for a fee. In response to a recent court decision, however, the FEC now includes in its definition of "electioneering communications" all programming that is not covered by a press exemption (i.e., news story, commentary, or editorial distributed through the facilities of any broadcasting station unless such facilities are owned or controlled by any political party, political committee or candidate). This includes Public Service Announcements (PSAs) and other communications made by non-profit/section 501(c)(3) organizations.

**In addition, incorporated broadcasters may be in violation of federal election law if they air a free PSA that qualifies as an "electioneering communication."**

"Electioneering communications" are radio or television broadcasts that (1) refer to a clearly identified candidate for Federal office, (2) occur within 60 days before a general election or 30 days before a primary election and (3) are targeted to the relevant electorate. Thus, stations should immediately put in place measures that prevent PSAs and other communications referring to (promoting, supporting, opposing, attacking) or featuring federal candidates from airing during the applicable periods.

Additionally, the FEC encourages section 501(c)(3) organizations to provide broadcasters with either an expiration date or some indication that the PSA should not run in the applicable 30 and 60 days periods if the PSA features a federal candidate.

*Reporting Requirements*

When the Federal Election Commission issued rules governing electioneering communications in 2002, it expressly stated that any reporting obligations lie with the person or entity making the electioneering communication and, thus, not with the broadcaster airing the communication. Stations may, however, be asked by potential advertisers whether their electioneering communications will reach an audience of 50,000 or more persons. To assist in this determination, the FCC has created an Electioneering Communications Database that is available on the FCC website at <http://gulfoss2.fcc.gov/e.cd> or, alternatively, <http://svartifoss2.fcc.gov/e.cd>. The Database enables a user to determine whether a communication sent via broadcast station, cable system and/or satellite system can or cannot reach 50,000 people or more in a particular Congressional District or State.

*NAB's Counsel Memos are intended to serve as a source of general information on legal issues of interest to the broadcast industry. Broadcasters seeking information on how the principles discussed in a Counsel Memo apply to their specific circumstances should seek the advice of their own attorneys.*

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