



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey &
Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434)
977-3716

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Legal Memorandum

ONLINE POLITICAL FILES—TOP FOUR POTENTIAL PITFALLS IN LIGHT OF RECENT FCC COMPLAINTS

Public interest groups have been closely monitoring the political recordkeeping practices of local broadcast stations in their online political files, particularly as they relate to “non-candidate/issue” ads purchased by third parties.

In late September 2016, a group of public interest organizations (The Campaign Legal Center, Common Cause, and the Sunlight Foundation) filed a Complaint with the FCC that alleged violations of the FCC’s political file rules with respect to 17 different non-candidate/issue ad purchases. The Complaint revealed just how thoroughly complaining parties will review and analyze the details of a station’s online political file (including the NAB’s PB-18 Form for non-candidate/issue advertisements) in search of potential violations.

The Complaint focused largely, but not exclusively, on the following items: (i) whether a particular spot involved a political matter of national importance, (ii) whether the PB-18 Form included sufficient information regarding the identification of candidates, offices, elections, and issues referenced in a particular spot, (iii) whether the PB-18 Form contained a sufficient list of the advertiser’s chief executive officers, executive committee members or board members, and (iv) whether the station included the *actual* dates and times that the ad ran.

It is not known what action, if any, the Commission may take with respect to the Complaint. But the Complaint nevertheless serves as a roadmap of the non-candidate/issue advertising recordkeeping items that appear to attract the most attention from potential complaining parties.

Below is a brief description of some of the recordkeeping requirements for non-candidate/issue ads and some of the pitfalls that may attract attention of “watchdog” organizations. This information is provided as general guidance, not specific legal advice, and the examples provided are for illustrative purposes only. As always, you should consult with your

communications counsel and corporate leadership regarding any specific questions regarding any particular ad and the applicable recordkeeping requirements.

I.

Basic Recordkeeping Requirements for Non-Candidate/Issue Ads

Ads that involve “a political question of national importance” trigger the enhanced reporting obligations set forth below. Even if a non-candidate/issue ad does not involve a question of national importance – e.g., it involves only state or local candidates and does not reference any national issues – the ad still must comply with traditional political file recordkeeping requirements shown below.

“Political matter of national importance”?

If yes, the station must include the following information in its political file:

- ✓ The name of the **candidate** referenced
- ✓ The name of the **office** being sought
- ✓ The date and type (general, primary, special) of the **election**
- ✓ The **issue(s)** discussed in the spot
- ✓ The date and time the ad actually aired
- ✓ The rate charged for the ad
- ✓ The class of time purchased
- ✓ A list of the **chief executive officers**, members of the **executive committee**, or members of the **board of directors**
- ✓ The name, address, and phone number of the entity that purchased the ad.

If no, the station still has public file recordkeeping obligations and must include the following in its online political file:

- ✓ A list of the **chief executive officers**, members of the **executive committee**, or members of the **board of directors**
- ✓ The name, address, and phone number of the entity that purchased the ad.

II. Potential Pitfalls in Recordkeeping for Non-Candidate/Issue Ads

A key takeaway from the Complaint is that stations should not rely solely on information provided by an agency or advertiser in an NAB PB-18 Form (or any other, similar political recordkeeping form) for non-candidate/issue ads. Rather, stations must ensure (i) that all of the required information is included on the form, and (ii) that the information is sufficient to comply with the FCC's political file rules. After all, the recordkeeping obligations are regulatory requirements applicable to broadcast licensees, and agencies and advertisers have no FCC liability whatsoever for failure to provide the required information.

Below are *some* of the potential pitfalls that can arise in the course of generating, maintaining, and uploading records to a station's online political file for non-candidate/issue advertisements.

- **POTENTIAL PITFALL NO. 1:** *Do not rely on the advertiser or agency to determine whether a spot involves a "political matter of national importance."*

Pursuant to the Bipartisan Campaign Reform Act of 2002 (BCRA), a political matter of *national* importance includes any spot relating to (i) a federal candidate, (ii) a federal election, or (iii) a national legislative issue of public importance. While the scope of these categories may seem clear at first blush, it is important to understand that a political issue of national importance can include spots relating to *state/local* candidates, *state/local* elections, and *state/local* ballot initiatives if the spots refer to issues that are also *national* legislative issues—for example, health care costs, gun control, voting rights laws, etc.

Unfortunately, there is no bright line rule to determine what constitutes a matter of "national importance" or a "national legislative issue." Thus, it is incumbent upon each station (and, more specifically, each station's sales staff) itself to make that determination—particularly where the agency or advertiser asserts on the NAB's PB-18 Form that the spot does not involve a political matter of national importance. Each station needs to have its own processes and personnel involved in that determination, and each station should consult with its communications counsel when spots are "close to the line." (Although not required, some stations choose, out of abundance of caution, to treat *all* non-candidate/issue advertisements as involving political matters of national importance in order to avoid being second-guessed by watchdog groups or the FCC on any particular ad.)

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- **POTENTIAL PITFALL NO. 2:** *If the spot involves a political matter of national importance, the PB-18 must include a description of (i) the candidate referenced, (ii) the office the candidate is seeking, (iii) the date and type of the election, (iv) and the issue(s) being discussed.*

Because all ads that refer to federal candidates or federal elections are political matters of national importance, all such ads must include the name of the candidate referenced, the office

they seek, the election date, the type of election (e.g., primary, general, special), and, if applicable, the issues discussed in the ad. These requirements apply even if the ad does not specifically advocate for the election or defeat of a candidate referenced in the ad. If an agency or advertiser refuses or fails to identify the name of the candidate referenced, the station has an independent duty to include that information in the political file records, together with all of the other applicable information.

For example, a non-candidate/issue spot that praises incumbent Congresswoman Jane Smith (who is currently running for re-election) for fighting for better health care for veterans, would need to include the following information:

Does the programming (in whole or in part) communicate “a message relating to any political matter of national importance?”
 Yes No

For programming that “communicates a message relating to any political matter of national importance,” list the name of the legally qualified candidate(s) the programming refers to, the offices being sought, the date(s) of the election(s) and/or the issue to which the communication refers (if applicable):

Congresswoman Jane Smith (D-CA); Candidate for U.S. House of Representatives; General Election, November 8, 2016; Veterans’ health care

Similarly, even if a spot does not mention a specific candidate or an election, the station still must list any national legislative issue referenced in the ad. For example, if a spot only advocates for stricter gun control laws and does not refer to any candidate or election, the station would still need to include the issue referenced:

Does the programming (in whole or in part) communicate “a message relating to any political matter of national importance?”
 Yes No

For programming that “communicates a message relating to any political matter of national importance,” list the name of the legally qualified candidate(s) the programming refers to, the offices being sought, the date(s) of the election(s) and/or the issue to which the communication refers (if applicable):

Ad urges passage of stricter gun control laws

If the same spot referenced gun control as an issue for voters in an election, even indirectly, the ad should also include the date of the applicable election.

It is often the case that an agency will provide an NAB PB-18 Form that purports to describe the issue merely by reciting the name of the non-candidate/issue advertiser. In most cases,

the name of the advertiser—without more—does not adequately describe the issue(s) under discussion in the spot.

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- **POTENTIAL PITFALL NO. 3:** *Be sure that every non-candidate/issue advertisement includes a list of the chief executive officers, the members of the executive committee, or the members of the Board of Directors of the advertiser.*

Some agencies or advertisers may simply submit the name(s) of an employee, the treasurer of a SuperPAC, or a political consultant on the PB-18. But unless that individual is the only chief executive officer of the organization or the lone individual serving on the executive committee or the board of directors, that information will not be sufficient. If stations have reason to believe that the person(s) listed do constitute all the relevant people that fit into one of those categories, the station should seek additional information from the agency or advertiser (or search publicly available sources if necessary and available).

* * *

- **POTENTIAL PITFALL NO. 4:** *The initial agreed-upon schedule for an ad buy does not always prove to be the final, as-aired schedule. Thus, stations must be sure to later include the actual dates and times that the spots aired.*

When a station includes a proposed schedule with the NAB PB-18 Form (or another, similar political recordkeeping form), it satisfies the recordkeeping requirements up to that point in time. However, political advertising flights rarely run precisely as scheduled, and stations are required to include revisions reflecting the actual dates and times that the spots ran in the political file. Because that information is not available at the time that the order is placed and initial records are placed in the political file, stations must upload the as-run dates and times when that information becomes available. Sometimes, when the order changes prior to or during the flight, it results in the generation of a new traffic order or contract; in such cases the revised contract or order should be placed in the political file “immediately.” Other times, no revised order or contract is issued, and only the station’s invoice details the as-run information; in such cases, stations that monthly invoice advertising clients in their regular course of business may wait to upload invoices until the end of the month. (Remember, too, as noted above, that stations also must include the rate charged for the time purchased.)

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Political file issues will continue to attract attention—and complaints—given the ease with which complaining parties can access information. Being accurate, prompt, and transparent in your filings will always help your station stay compliant.

If you have questions regarding this legal memorandum, please contact us at (919) 839-0300. Because every station has different sales practices, forms, and recordkeeping

administration, you should always consult your communications counsel to address specific political file questions relating to your station.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

Stephen Hartzell, Editor

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
Julia C. Ambrose
Elizabeth E. Spainhour
Timothy G. Nelson

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