collective wisdom®

SZABO ASSOCIATES, INC. VOLUME 26, ISSUE 3, SEPTEMBER 30, 2011

Dear Friends:

Election years always present great profit opportunities for media, and the upcoming 2012 election season promises to be a record-breaker in political advertising dollars. Media organizations positioned to take fullest advantage of these opportunities will be those that develop an understanding of the rules and regulations imposed on political advertising, a clear policy regarding non-federal elections, and a well-defined plan to ensure payment. This issue's feature article addresses how media can best prepare to maximize profits while mitigating rule- and credit-related risks.

Our fall calendar of industry events includes the Alliance for Women in Media (AWM) Symposium and 60th anniversary luncheon, November 2-3 in New York, New York; and the Broadcast Cable Credit Association (BCCA) Media Credit Seminar, November 15 in New York, New York. Also, on November 12 here in Atlanta, Szabo Associates will hold a special celebration In honor of our 40th anniversary. We would like to thank our many clients and friends for the opportunity to mark this very special milestone!

Best wishes for a terrific fall,

Robin Szabo, President
Szabo Associates, Inc.

As the 2012 Campaign Season Heats Up ...

Prepare for the Wave of Political Advertising!

In one of the more quotable moments in movie history, Bette Davis pauses on the stairway and says, "Fasten your seatbelts. It's going to be a bumpy night." That memorable line could have relevance for media in the coming election year, with its soaring opportunities for profits as well as potential for unpleasant consequences should media fail to perform proper due diligence or to adhere to the rules regarding political advertising.

In a recent report, Moody's Investors Service predicted that political advertising expenditures tied to the 2012 presidential, Congressional, and gubernatorial elections were "all but certain" to be record-breaking. Attributable largely to a January 2010 Supreme Court ruling that effectively ended spending caps for political advertising, the surge in spending could represent a windfall for media, particularly broadcast, where the credit ratings agency forecasts a growth in revenue between 9 percent and 18 percent in 2012 over 2010 levels. As the tidal wave of political advertising fast approaches, media should prepare to move quickly on opportunities while effectively managing rule-related and credit-related risks.

Bone Up on the Law.

The Federal Election Commission (FEC) and the Federal Communications Commission (FCC) are charged with ensuring that media and candidates comply with their obligations under the law regarding election-related advertising. The most recent law affecting these obligations is the Bipartisan Campaign Reform Act (BCRA), commonly referred to as "McCain Feingold," which amended the Communications Act of 1934. This sweeping 2002 legislation drove the implementation of new agency regulations to address "soft money" abuses and improve campaign spending disclosure.

The FEC requires that public communications, regardless of the medium used, carry a "clear and conspicuous" disclaimer identifying who paid for it—either the authorized campaign committee or other persons or groups authorized by the candidate as well as the candidate who endorsed it. Public communication, as defined by the FEC, includes television, cable, and satellite transmission; newspaper; magazine; outdoor advertising (billboard); mass mailing; and telephone banks. Excluded in the definition is Internet advertising, except when placed for a fee on another person's website. The agency has issued specifications for these visual and audio disclaimers (see *Collective Wisdom*, June 2004).

The FCC imposes its own complex set of rules for broadcast media. These rules address access to advertising time (who is entitled to it, and under what circumstances), rates they can be charged, and disclosure and recordkeeping requirements. While most FCC rules regarding political advertising have remained unchanged for a couple of decades, the sponsorship identification and rate rules established in the wake of BCRA continue to be a source of confusion among broadcast media.

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Generally, the laws and regulations imposed by federal law and FCC regulations require broadcast media to disclose their stations' political advertising policies; offer time to candidates at the "lowest unit charge" during specified periods before primary and general elections; provide "reasonable access" to all legally qualified candidates for federal office; provide "equal opportunities" to all legally qualified candidates seeking the same office; refrain from censoring political advertisements; fully identify the advertisements' sponsors; and maintain a political file, available for inspection by the public and other candidates.

Understand the Definitions. Much of the confusion surrounding FCC regulations arises out of misconceptions over terminology; specifically, "use," "reasonable access," "lowest unit charge," "equal opportunities," and "sponsorship identification."

Use. Applications of FCC lowest unit rate rules and "no censorship" provisions are restricted to "use," defined as a non-exempt "positive" appearance by a legally qualified candidate where the candidate's voice or picture is readily identifiable. Sponsorship identification alone does not qualify an advertisement as a use! Exempt programs include bona fide news or news interview programs, news documentaries, and on-the-spot coverage of bona fide news events. In recent years, the FCC has broadened the definition of a news interview program to include programs that are primarily entertainment but which regularly include conversations with newsmakers. Third-party advertisements may qualify for a "use" if all of these requirements are met, but only if the candidate's voice or likeness is used to create a positive impression.

Reasonable Access. The FCC rules stipulate that legally qualified candidates for federal offices can demand "reasonable access" on commercial radio and television broadcast stations, and with DBS providers. Cable systems do not have to meet this requirement; however, they are subject to Lowest Unit Charge, Equal Opportunities, and Sponsorship Identification rules. Reasonable access rights do not extend to third-party advertisers, "issue" advertisers, or candidates for state and local offices.

Reasonable does not mean "free"; nor does it mean necessarily that candidates can get exactly the times they want. It means simply that access must be provided to all classes and dayparts on a station, without restricting the buy to only certain stations in a commonly-owned group or to certain time periods.

The FCC has not stated how much actual "time" constitutes reasonable access; rather, it relies on stations to make the determination. Factors such as the number of candidates running in the station's service area, the expressed needs of the candidate, the impact on commercial advertisers and programming priorities, and the timing of the request should be discussed with the candidates.

Lowest Unit Charge (LUC). The FCC's lowest unit charge rule dictates that, during the 45 days prior to a primary or 60 days prior to a general election, political candidates must be charged the lowest rate that any commercial advertiser was charged for an ad in the same class that runs in the same time period. The value of discounted and bonus ads awarded to commercial advertisers must be figured into the LUC. The rule means basically that political candidates must receive all the perks, or the value of those perks, that a station's best advertisers receive without having to buy in the same frequency or volume. Generally, if a broadcaster or cable operator makes available non-spot parts of a package, it is not required to assign value to them and deduct it from the paid spots in the package.

Equal Opportunities. Otherwise referred to as "equal time," the FCC equal opportunities ruling seeks to ensure that all candidates are treated the same with regard to air time access. Any extra benefits extended to a political candidate who purchases time must be extended to all candidates for the same office. For example, if "use" of a station website is sold within a package with broadcast time, the same should be extended to competitors in the race.

Sponsorship Identification. Political advertising must include a statement that the ad was "paid for" or "sponsored by" the person or group purchasing the time. The station should add this information if the sponsor fails to include it. A provision in the BCRA also requires candidates to personally declare their approval of advertisements on radio, TV, and satellite broadcasts.

Know the Rules for the Internet. With the Internet becoming an increasingly valuable component of political campaigns, controversy has raged about whether online paid political advertising should be subject to the same disclosure and financial regulations prescribed by BCRA as other media. In 2006, the Federal Election Commission decided to regulate only paid political ads placed on a website belonging to someone other than the candidate, revising its initial 2002 interpretation of the law as exempting all Internet activity.

The FEC decision was subsequent to a 2004 federal court ruling that the FEC must extend some of the new campaign financial and spending limits prescribed by the BCRA to political activity on the Internet. As it stands now, political activity by bloggers, Internet news services, and citizens acting on their own are entitled to the same exemption from the BCRA that newspapers and other traditional forms of media receive.

Facebook recently mounted an effort to exempt the 160-character ads that appear on its website next to user profiles from the FEC's disclosure rule. The social networking company argued that the required "paid for" language would almost totally consume

the space of the ad. In June, the commission upheld in the Facebook case an earlier ruling on a case brought by Google, which requires the ads to include a hyperlink to a web page that identifies the ad's sponsor.

Make Advance Decisions About State and Local Races.
Commercial broadcast media are not obligated to sell time to candidates in state and local elections. Once a station does so, however, the FCC rules regarding reasonable access, LUC, equal opportunities, and censorship apply to all candidates vying for the same office.

For example, if a station allows a state or local candidate to buy time or to appear in a non-exempt program, the station must then provide "equal opportunities" to all legally qualified candidates for the same office. It is not the responsibility of the station to notify opponents, and candidates must make the request for equal time within seven days of the opposing candidate's on-air appearance. Stations should immediately record a candidate's use in its public file to ensure that the time frame requirement is met.

Determine Responsibility for Content.
The FCC's "no censorship" rule forbids broadcasters and cable operators to censor a candidate's message once the candidate has bought a "use" on the station, unless the ad's content violates a felony statute or is deemed legally obscene. The good news about the ruling is that the station has no liability for the content of ads that they are not allowed to censor. The bad news is that third-party ads, which are not subject to the "no censorship" rule, may expose a station to liability for content. Many stations choose to reject third-party ads, which do not qualify as a "use," because of potential liability and damage to their reputations.

The "no censorship" rule has also created a sticky wicket for broadcasters with websites. Since the rule does not apply to Internet spots, stations have the right to reject or censor content on their websites. In theory, a station that packages advertising on its website with the sale of broadcasting time could face liability for content on the Internet spot while remaining immune to liability for the broadcast spot. Stations should carefully evaluate whether spots bought by candidates are in fact "uses," review third-party and Internet spots for potential liability, and consult with regulatory counsel to find out how packages might affect advertising policies.

"Boss, you know those regulations that are supposed to make sure ads for federal candidates are paid for by 'hard money'? Sales says you don't have to worry about it one single bit!"

Keep Accurate Records.
The FCC does not specifically require written disclosure statements; however, stations should provide them to candidates, their agents, or groups requesting political time, both to guarantee compliance with the law and to avoid disputes. The statement should include classes of time available to advertisers, the LUC for each class, preemption and make-good policies, and other information deemed pertinent.

Compliance with the FCC's public file rule is critical to protecting broadcast, cable, and DBS providers from potential challenges regarding use. The 2012 election promises to be flush with hotly contested races, increasing the chances for review. The file should contain all requests to purchase time, whether accepted or rejected, all specifics related to the buy and airing, and records of any unpaid uses by a candidate on non-exempt programs. The names of the candidate, purchaser, contact person for the purchaser, chief executive officers, board of director or members of the purchaser's executive committee, and the committee treasurer should also be listed. The same information should be compiled for "issue" advertising that relates to "a political matter of public importance," such as abortion or gun control.

Make Sure You Will Get Paid.
In 1992, the FCC declared that where a candidate or its agent has an "established credit history, requiring any advance payment is inappropriate if the station would not so treat commercial advertisers or their representatives under the station's customary payment/credit policies." (See *Collective Wisdom*, June 1996.) The statement appeared to represent a significant departure from long-standing FCC policy of allowing payment in advance for political advertisers. The many voices of dissent—including Szabo Associates'—prompted the FCC to issue a

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memorandum clarifying its position. It stated that a broadcaster was required to extend credit to a political advertiser "only if the station would extend credit to a similarly situated commercial advertiser under the station's customary payment/credit policies." Further, credit extension to an advertising agency on a candidate's behalf was required only if the agency accepted legal responsibility for payment and qualified for credit under the station's policies. The Commission addressed the issue of discrimination by stating that "so long as a station's policies are not designed as subterfuge to favor particular candidates and are applied even-handedly to all, impermissible discrimination does not occur."

Candidates or their agencies may insist that stations accept payment by credit card, asserting its equivalence to cash in advance. It is not! In view of the FCC's position on equal treatment, stations need to be aware that if they accept a credit card payment from one candidate, they must do so with all other candidates in the race. While stations do not have an affirmative obligation to inform other candidates that they have done so, they must extend the privilege upon request.

Szabo recommends that media continue to require advance payment, with the above-mentioned caveats in mind and with the understanding that payment from federal candidates cannot be demanded more than seven days prior to airdate.

Stay Abreast of Court Decisions. Legal challenges and subsequent court decisions continue to adjust the parameters for media with regard to political advertising. In 2007, the Supreme Court by a narrow margin ruled to allow issue ads that air on television in the days leading up to an election. In 2010, a divided Supreme Court issued a landmark decision in the Citizens United v. Federal Election case, easing campaign restrictions for corporations and interest groups. The decision overruled two precedents, including a 2003 ruling that had upheld a part of the BCRA. The BCRA rule had previously banned broadcast, cable, or satellite transmission of "electioneering communications" paid for by corporations or labor unions from their general funds in the 30 days before a presidential primary and in the 60 days before a general election.

The FEC has yet to issue regulations that lay out the full implications of the 2010 ruling. The Commission stated shortly after the ruling that it would no longer enforce regulations that had been struck down by the court; however, partisan disputes over disclosure and whether Congress has legislative authority in the matter have obstructed efforts to produce new regulations.

Consult Legal and Industry Resources. While overviews such as this one can provide considerations and general information about the changing landscape of political advertising, media should always consult industry experts and legal counsel when questions arise. We recommend as valuable primers the *Political Advertising Handbook for the Television Executive* and the *Political Advertising Handbook for the Radio Account Executive*, available free on the MFM website, as well as the 17th edition of the NAB *Political Broadcast Catechism*.

2012 promises to be a banner year for media advertising revenues. By preparing early, ensuring that sales and credit staff know the rules, staying abreast of legal challenges and decisions, and consulting expert counsel when needed, media properties can successfully "seize the day" while minimizing payment-related and rule-related risk. ♦

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