



MORE is better than less.

Dear Friends:

As the 2022 midterm elections approach, political advertising is on the upswing. Even without a presidential race on the ballot, spending estimates are expected to exceed \$8 billion, with encouraging numbers across all media. Political advertisements are subject to a great deal of regulatory requirements, which vary greatly across the different media platforms. By following all these rules to the letter, there is a lot of revenue to be captured! This issue of *Collective Wisdom* offers some guidance to help media make the most of this opportunity.

We are looking forward to returning (in person!) to the MFM/BCCA 62nd annual conference, "Media Finance Focus 2022," May 22-25, at the JW Marriott Tampa Water Street in Tampa, Florida. Szabo Associates is pleased to sponsor the opening night party at the Armature Works at the Heights.

Best wishes for a healthy and happy spring,

A handwritten signature in blue ink that reads "Robin".

Robin Szabo, President
Szabo Associates, Inc.

Political Advertising . . . Lucrative, but with Strings Attached

Political advertising is profitable, as all of us in the media industry would agree. An estimated \$7.8 billion is projected to be spent on advertisements for the 2022 midterm elections, according to projections from the data analytics and brand consulting company Kantar, with increased spending projected across every media sector. However, all that revenue most definitely comes with strings attached in the form of regulatory requirements. No matter what kind of advertising you sell and publish, understanding and complying with the complicated web of government requirements may be more difficult and time-consuming than making the sale.

As to specific media, Kantar sees the following: **Broadcast TV:** \$3.8 billion (vs. \$3.05 billion in the 2018 midterms); **Cable TV/Satellite:** \$1.4 billion (vs. \$1.2 billion in 2018); **Digital:** \$1.2 billion (vs. \$900 million in 2018); **Radio:** \$215 million; **OTT/CTV:** \$1.2 billion. Local broadcast television will see the highest growth rates, followed closely by digital channels, which have grown exponentially in the last decade, according to the Kantar article, "Political Ad Spending for 2022 Midterms to reach \$7.8 Billion," by Steve Passwaite. Network television is not expected to be as big a player in a year dominated by state and local races.

Another sector not included in Kantar's projections but poised for growth is Out of Home (OOH) advertising, according to The *MediaPost* article, "The Power Of Data-Driven Out-Of-Home to Win Voters in the Midterms" by Jim Wilson,

January 6, 2022. This sector goes far beyond billboards. Think of digital moving messages on trains, buses, scoreboards at sporting events and even shopping carts. This medium's growth has been triggered by the digitization of OOH inventory and new technology capabilities that make it possible to target audiences and measure results much more accurately. eMarketer predicts that digital OOH advertising spending will reach \$3.6 billion in 2022.

And do not forget about print. Even though print is facing challenging times, newspapers are well-positioned to recapture their share of the revenue, according to the *Editor and Publisher*, December 1, 2021, article "Newspapers Have Unique Advantages to Attract More Political Ad Dollars" by Bob Sillick. John Kimball, a source for the article, while not predicting newspapers' share of the political spend for 2022, said in 2020 the spend was almost \$1 billion.

Sillick covered a lively discussion on this topic as part of a session at the October 2021 America's Newspapers Senior Leadership Conference, in which the hosts and audience members shared their experiences and ideas to attract more political ad dollars to newspapers. Takeaway points included identifying all the players – going beyond candidates and campaign staff to reach political action committees, advocacy groups and state party leaders – and offering comprehensive package deals in print, in digital

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editions, on social media platforms, and even on printed targeted campaign flyers and direct mail pieces printed and delivered by the newspaper. Newspapers can often deliver direct mail pieces at a lower cost than the USPS.

Regulatory Basics.

As more political advertising and campaign spending moves to online platforms (social media, search engines, websites and more), the laws that govern money in politics have stayed largely the same. Regulations for television, radio, and print ads are not easily applied to internet ads, which are both more complex and abundant. The agencies in charge are the Federal Elections Commission (FEC) and the Federal Communications Commission (FCC).

The FEC's jurisdiction is primarily over campaign finance regulations; its purview does not extend to advertising content or issue-based ads that do not promote a specific candidate. The FEC does require that any public communication made by a political committee — including communications that do not expressly advocate the election or defeat of a clearly identified federal candidate or solicit a contribution — must display a disclaimer. Furthermore, disclaimers must also appear on political committees' public websites and in certain email communications.

Public communication goes well beyond print advertising, as defined by the FEC. The following media sources are included: broadcast, cable or satellite; newspapers and magazines; outdoor advertising facility (billboards); mass mailing (more than 500 substantially similar mailings within 30 days); and communications placed for a fee on another person's website.

The FEC says these disclaimers must be “clear and conspicuous,” regardless of the media type. They must state that the communication was paid for by the candidate or the authorized

campaign committee. When the advertisement is authorized by the campaign committee but paid for by a Political Action Committee or other group, the disclaimer should say, “Paid for by the XZY PAC and authorized by the Candidate John Doe for Congress Committee.”

Rules for Broadcast Media.

The FCC's jurisdiction over broadcast media includes rules on access to advertising time, rates charged, and disclosure, as well as extensive and tedious record-keeping requirements, which include making records available to the public on a central agency database (added in 2012). Jurisdiction includes radio and television broadcast stations, cable television systems, satellite TV providers, and satellite radio.

Specifically, the FCC ensures reasonable access by legally qualified candidates for federal office; ensures “Equal Opportunities” (frequently referred to as “equal time”) for legally qualified federal, state, and local candidates; prohibits censorship of candidate-sponsored ads; enforces “Lowest Unit Charges” and “Comparable Rates” that broadcast stations and cable systems may charge legally qualified candidates for their advertisements; requires on-air sponsorship identification for political advertisements; and requires online political files to be maintained for public inspection.

The FCC does not review or pre-approve the content of political ads before they are broadcast; ensure the accuracy of statements that are made by candidates and issue advertisers; require broadcast stations and other regulatees to provide all sides of controversial issues; or oversee the nature and extent of the coverage that individual candidates receive in news programs.

Liability. An important caveat to broadcast station immunity is that the “no censorship” rule ceases to apply if the station decides to stream its signal online. The station potentially would have liability for the content of the streamed candidate ad, even though it would be protected for broadcasting the same ad.

Additionally, third-party ads, such as attack ads bought by interest groups or political parties, are not subject to the “no censorship” rule. A station can choose to run or refuse to run a third-party ad based

on its content; therefore, it is not shielded from liability.

Sponsorship identification. All political advertisements must have a sponsorship identification referencing who paid for the spot. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), any ad by a federal candidate must not only contain the “paid for” or “sponsored by” language, but also must contain a statement of approval by the candidate. If the advertisement does not include that required language, the station may edit the spot to include the tag before airing it.

Advertising rates. Advertising rates are governed by complicated rules that apply differently within 45 or 60 days of primaries and general elections. The goal is for all political advertisers to pay the same rates for advertising and to have the same access for use of a station's facilities. During the political window, sales of broadcast time to candidates must be made at the lowest rate given to any other advertiser for a purchase of the same class of time. Any discounts offered to one campaign must be “available upon equal terms” to all candidates.

Recordkeeping requirements. Broadcast stations, cable system operators, DBS (Direct Broadcast Satellite) providers, and SDARS (Satellite Digital Audio Radio Service) licensees are required to maintain public inspection files, of which political files are a part. These files should contain requests for the purchase of broadcast time by or on behalf of legally qualified candidates, requests for the purchase of broadcast time by issue advertisers whose ads communicate a message relating to any political matter of national importance, and information about free time given to legally qualified candidates for public office.

The above records should be placed in the political file “as soon as possible” and shall be retained for a period of two years, according to FCC regulations. These political files are available for public inspection in an online database hosted by the FCC.

Changes for 2022.

In January, the FCC enacted two relatively minor changes in election

rules as they relate to political programming and record-keeping. The first change revises the way that a write-in candidate is deemed “legally qualified.” It adds use of social media and creation of a campaign website to the list of factors to consider. Legally qualified candidates are entitled to the protections of FCC political rules.

The second change updates recordkeeping requirements to require that stations upload to their political files any request for advertising time that “communicates a message relating to any political matter of national importance” (i.e., federal issue ads). This requirement was imposed by the Bipartisan Campaign Reform Act 20 years ago and has been enforced by the FCC, but the rule had not been officially adopted until 2021.

The Power of Print.

Because newspaper publishers are private companies and do not broadcast over public airwaves, publishers are free to turn down advertisements. However, most of the other rules do apply.

Pricing and payment.

Publications cannot charge more than their customary rate for comparable advertising and cannot favor one candidate over another

with rates. Volume or other discounts must be equally available to all political advertisers.

Recordkeeping. Publications are required to keep a signed agreement for each expenditure for each advertisement and those records are deemed public record by statute. A best practice would be to create a streamlined document to comply with the statutory requirements while keeping more detailed communications with the advertiser in a separate file.

Disclosures. The ad must state “Paid for by” and then name the candidate, candidate campaign committee, political party organization, political action committee, referendum committee, individual, or other sponsor. These disclosures must be in a readable type size and contained in a printed box set apart from other content.

Libel risks. While broadcasters have immunity from libel claims because they cannot reject political advertising from qualified candidates, print media does not have this protection. Newspapers and candidates have been sued and found guilty for libelous statements published in print advertisements and bear some fact-checking responsibility. If you doubt the accuracy of a claim in a political advertisement, we recommend

that you ask for substantiation or reject the copy.

Few Rules for Social Media.

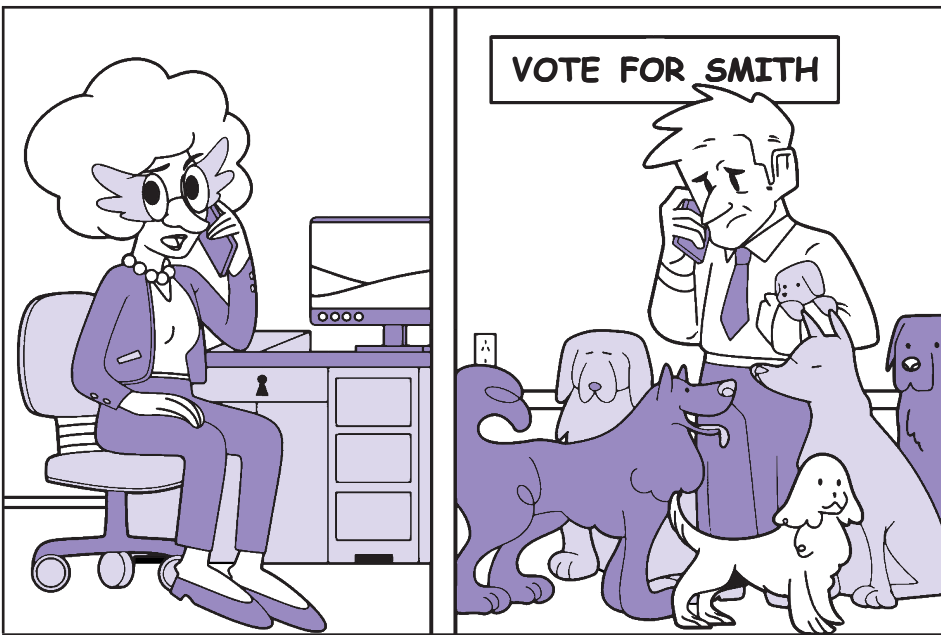
Laws written to regulate television, radio, and print ads are not easily applied to online ads. Like newspapers and cable TV stations, social media platforms are under no obligation to run every political ad they receive or offer advertising slots to all candidates. Of course there are unlimited platforms, but Facebook (which owns Instagram), and Google (which owns YouTube), are the major players. Each platform is free to set its own policies. Both Twitter and LinkedIn have banned all political advertising.

Because it is not nearly so regulated, social media has become sort of the Wild West of political advertising. In fact, social media platforms are not considered publishers at all. They are considered internet service providers, and because of Section 230 of the Communications Decency Act, they are not liable for what other people post on them. They cannot be sued for allowing false content on their sites or for running false political ads.

Microtargeting. An important – and somewhat controversial – difference between social media platforms and traditional media is that they allow a practice called microtargeting, broadly defined as a practice of using people’s data (searches, shopping, purchasing, contacts and interests) to segment them into small groups for content targeting. Instead of putting the messages out there for the media and the entire voting population to fact check and evaluate, carefully crafted appeals are targeted to a specific demographic. As a result, falsehoods in microtargeted political ads may go unchecked and unseen by society at large — and these falsehoods can have a significant impact on elections.

Creditworthiness and Collection.

Creditworthiness is certainly a concern with regard to political advertisers, particularly with new candidates without an established history or large trove. It is important to make sure the agency/campaign buying the ads is in a position to pay. Before allowing



So your candidate client wants to place an ad saying, “John Smith saves puppies. Susie Jones wants to make it illegal to own pets.” And he’s willing to say, “I’m John Smith and I approve this message.” Well, there aren’t any rules yet about making outrageous claims on broadcast TV.

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Collective Wisdom® is a publication of Media Collection Professionals, 3355 Lenox Rd. NE, Suite 945, Atlanta, Georgia 30326
Tel: 404/266-2464, Fax: 404/266-2165
Website: www.szabo.com
e-mail: info@szabo.com

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their purchase of political advertisements, verify that you are working with a “legally qualified” candidate. Requirements can vary by jurisdiction but generally require filing necessary paperwork and paying fees. In presidential races, once a candidate is legally qualified in ten states and the District of Columbia, the FCC considers the candidate to be qualified in all 50 states for purposes of the political broadcasting rules.

The FCC has said that a station can apply its normal credit policies to political candidates. If a station does not extend credit to organizations that have a temporary existence and that will effectively cease operations after a specific event (such as an election), stations do not need to extend credit to candidates and

can require cash-in-advance. Additionally, credit extension to an advertising agency on a candidate’s behalf is required only if the agency accepts legal responsibility for payment and qualifies for credit under the station’s policies.

Be aware that credit card payment is not equivalent to cash-in-advance. That said, if a station accepts credit card payment from one candidate, it must do so for all candidates in the race. State and local candidates can be required to pay for their spots before the spots will be scheduled. Federal candidates, however, cannot be made to pay more than seven days in advance of the running of their schedule.

Stay Diligent.

Compliance with all rules and regulations is a vital part of capturing political advertising dollars. Adhere to current FCC and FEC rules regarding liability, sponsorship identification, advertising rates, and

recordkeeping. Note that in addition to these regulations for federal elections, states and even local cities have their own varying requirements. Stay tuned for tweaks and changes among social media platforms, which are free to make their own rules about what they will and will not allow.

Continue to require advance payment, with the above-mentioned caveat in mind, and with the understanding that payment from federal candidates cannot be demanded more than seven days prior to airdate. Consult industry experts and legal counsel when questions arise.

By preparing early, making sure your staff knows the rules, staying abreast of legal challenges and decisions, and consulting expert counsel when needed, you can make the most of the opportunities that the coming election season offers while minimizing payment-related and rule-related risks. ♦