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A Banner Year for Online Political Ads in a Socially-Distanced Reality

The Bottom Line

- *Although the future of some state laws governing online political advertising is uncertain, at this time, many states still have laws governing online political advertising in effect, and state attorneys general are eager to enforce these regulations. In addition, the DAA has implemented a specific self-regulatory program for political ads.*
- *Because laws vary so greatly from state to state, political advertisers and online platforms should be careful to review the advertisements they place or accept on a case-by-case basis to ensure compliance with all applicable legal requirements.*

With less than a month until the 2020 election and the presidential debates in full swing, campaigns are entering the crucial "get out the vote" period of their campaigns and are doing everything they can to motivate their supporters and ensure voters get to the polls. Candidates up and down the ballot are receiving record-setting donations, bolstering their campaign coffers for the last stretch of the election.

At this stage of the campaign cycle, the presidential candidates would usually be canvassing the country, shaking hands with voters and attending rallies and campaign staff would be knocking on voters' doors. However, the campaign landscape has been significantly altered by COVID-19.

With many U.S. states still under COVID-19 social distancing mandates prohibiting large gatherings of people, candidates for state, local and federal office are being forced to get creative with voter outreach. Unable to hold traditional campaign events, more candidates are sinking their resources into a blanket of localized, targeted online advertising in an effort to reach voters on their computers, mobile phones and other internet-connected devices.

While the influx of online political advertising is good news for platforms that disseminate ads online, these platforms and political advertisers should be aware of the complex patchwork of laws that regulate online political advertising, self-regulatory programs developed by the advertising industry and platform-specific rules.

Federal Laws Governing Online Political Advertising

There are few federal laws currently regulating online political advertising. In the wake of the 2016 U.S. presidential election, with confirmation that foreign entities had used online advertising to spread misinformation in order to help Donald Trump win the presidency, Congress introduced the Honest Ads Act. The legislation would have extended the current federal laws imposed on television, radio and print political advertising to online ads. Although the Act had bipartisan support, Senate Majority Leader Mitch McConnell blocked its passage last year.

The Federal Election Commission (FEC) has also failed to establish rules governing online political advertising. FEC commissioners have submitted proposals to enact rules as simple as requiring online

political advertisements to identify the advertiser in the ad or within one click away, which have garnered public support. However, the FEC only has three of six commissioner seats filled. With four commissioners required for the FEC to update its rules or issue official advice, until at least one vacancy is filled, the FEC is not able to move forward with any proposals.

State Laws Governing Online Political Advertising

Without legislation at the federal level regulating online political advertising, states have stepped in to close the gap, including by passing laws that regulate online platforms that accept or disseminate online political advertising. These laws vary greatly from state to state. Some simply extend existing requirements for TV and radio advertising to online political advertising. Others go farther and impose new requirements on online political advertisers and online platforms. Most commonly, these laws require online platforms, ad networks and political advertisers to create and maintain robust records relating to the online political advertisements they place or disseminate, including retaining a copy of the advertisement, information relating to who paid for the advertisement, the audience targeted and cost of the advertisement. In certain states, these records, including proprietary audience and cost data, must be made available on designated web pages readily accessible by the public.

Enforcement of State Online Political Advertising Laws

States are eager to enforce these laws. In 2018, Washington State settled lawsuits with Facebook and Google for $455,000 over allegations the online platforms were not complying with Washington's laws governing online political advertising, including its requirement that online platforms make detailed records relating to their political advertisements publicly available. In response, Google and Facebook banned advertising relating to Washington elections on their platforms.

In April, Washington's Attorney General filed a *new* lawsuit against Facebook, alleging that Facebook is still allowing political advertising in Washington on its platform and is still not complying with Washington's requirements for online platforms accepting and disseminating online political advertising. As more public attention is focused on online advertising during the 2020 election season, more states may follow Washington's lead and seek to enforce these laws.

State Laws on Shaky Constitutional Ground?

Some of the state laws regulating online platforms may sit on shaky constitutional ground. In late 2019, the Fourth Circuit Court of Appeals struck down portions of Maryland's online political advertising law, holding that Maryland's law requiring public records of all online political advertisements violated the first amendment by compelling publishers of online political advertisement to identify political speakers and to open their records to government inspection. This decision leaves the legal status of other similar state laws uncertain. It is possible that in the coming months and years, we will see more constitutional challenges to state laws that have online recordkeeping requirements similar to Maryland's.

Industry Self-Regulation

The Digital Advertising Alliance (DAA), which is well-known to the interactive advertising industry for their Ad Choices program for online behavioral advertising, launched another self-regulatory program in 2019 to provide greater transparency into online political ads. The Application of the Self-Regulatory Principles of Transparency & Accountability to Political Advertising sets forth the terms for greater transparency and the use of a unique political ads transparency icon for enhanced notice, which links to a website where

consumers can learn more about candidates and/or advocacy groups behind the ads they have viewed. This program is subject to the same self-regulatory enforcement program as that for behavioral advertising.

In addition, various online platforms have come up with their own policies and guidelines regarding the placement of political advertising on their services.

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