

The Legal Loophole for Online Political Advertising (Barely) Starts to Close

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With COVID-19, the nationwide call for racial justice, and the battle for the Supreme Court dominating the news, it has been easy to lose track of the fact that the U.S. Presidential election is just over one month away. To get voters to focus on the November 3 vote, political candidates and their backers are steadily increasing their advertising spending, especially in the digital media space. Voters expecting online political advertising this Presidential election cycle to dodge the criticisms and controversies that plagued the last Presidential election cycle are likely to be disappointed, however.

After the 2016 election cycle concluded, U.S. intelligence officials confirmed that foreign entities had affected the election outcome. Among the most widely reported examples of foreign interference was Russian actors' purchase of Facebook ads to spread misinformation in order to help Donald Trump win the Presidency.

To regain voter confidence in the integrity of the U.S. elections, and to help protect those elections from foreign meddling, Congress reintroduced the Honest Ads Act (the Act) in 2019, which extends to online political advertising certain requirements for television, radio and print advertising.

Under the Act, an online ad that mentions a political candidate and runs shortly before an election must identify the advertiser. The Act also requires online platforms with at least 50 million monthly visitors to maintain, for each advertiser that has spent more than \$500 in political ads on the platform in a single year, a searchable public library of such ads and information about the advertiser, audience and media buy for each ad. Online platforms also must make "all reasonable efforts" to avoid selling political ads to foreign nationals. The Act had bipartisan sponsorship and support, but Senate Majority Leader Mitch McConnell blocked its passage in November 2019.

Congress's inaction on the Act was matched by the Federal Election Commission (FEC)'s failure to enact even more basic rules requiring online political ads to identify the advertiser, in the ad or one click away. Ideological deadlock, once again, doomed competing Democratic and Republican FEC commissioners' pending proposals in 2019.

Many states stepped into the void, however, passing laws requiring online platforms, ad networks and advertisers to create and maintain detailed records for their online political ads. The laws vary per state, but generally require the platform, network and/or advertiser to maintain (and, oftentimes, make publicly accessible), at a minimum, a copy of the ad, the price paid, the territory and the audience targeted. A federal appellate court struck down portions of Maryland's law in December 2019, however, ruling that the law violated the First Amendment by compelling publishers to identify political speakers and open their records to government inspection. The ruling leaves the legal status of other similar state laws now uncertain.

More lasting change has come from the social media platforms and other online publishers and networks that released rules for political advertisers in 2019. Most severely, Twitter and TikTok banned all political ads. Google prohibited advertisers from microtargeting political ads based on public voter records and/or political affiliations, and permitted targeting based on age, gender and/or zip code only. Google also barred "demonstrably false" political ads. Facebook announced that it would permit all (including demonstrably

false) political ads, but would subject advertisers to expanded vetting to screen out foreign parties. More recently, Facebook has prohibited new (but not existing) political ads in the week before the election and ads linking voting to catching COVID-19.

Finally, the Digital Advertising Alliance (DAA), a trade group, released its own guidelines in 2019, requiring online political ads to include a “political ad” icon that provides the advertiser name, contact information, expenditure records and other information, one click away. The DAA is campaigning for its icon to form the basis for a federal legal standard.

Key Takeaways

- Congress and the FEC have not imposed any new obligations on online political ads for the 2020 election cycle.
- New state laws requiring maintaining publicly accessible records of political advertising may stand on shaky Constitutional grounds.

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