



MORE is better than less.

Dear Friends:

Election 2020 is in full swing, for any out there who have been hibernating for months and missed the news. Candidates are already going full bore with advertising, filling the airwaves, print space, and cybersphere with messaging. According to the analytics firm eMarketer, political advertising could surpass \$6 billion on television, search, social media, video and audio streaming services, and other platforms by November. This issue's feature focuses on the growing use of digital political advertising and the complex patchwork of regulations that govern it.

Best wishes for a healthy and happy spring,

Robin Szabo, President
Szabo Associates, Inc.

The Rules of the Game . . . Political Ads in the Digital Arena

Here we are, in early 2020, and political messaging is already spreading faster than the Grumpy Cat meme, particularly in the digital space. Political spending on online advertising is projected by consulting firm Borrell Associates to reach \$2.9 billion this year, more than double the amount spent on digital ads by political campaigns in 2016. Predictably, calls for greater transparency and accountability have increased along with this surge in spending.

The Federal Election Commission (FEC) and the Federal Communications Commission (FCC) are charged with ensuring that candidates and media comply with their obligations under the law regarding election-related advertising. The FEC is charged with protecting the integrity of the federal campaign finance process. The agency has jurisdiction over campaign financing for the U.S. House, Senate, Presidency, and Vice-Presidency. Its purview does not extend to issue-based ads, such as those from advocacy groups or trade organizations.

The FEC requires that public communications carry a "clear and conspicuous" disclaimer identifying who paid for it. Internet advertising is excluded in the definition of public communications, except when placed for a fee on a website other than the candidate's.

The FCC imposes additional rules for broadcast media, addressing access to advertising time, rates they can charge, and disclosure and record keeping requirements. The agency voted in January 2016 to

give the public easier access to data about advertising spending by political campaigns, requiring pay-TV providers and radio stations to post the information on an internet database. The vote expanded the requirement placed in 2012 on television broadcasters to make their public files available on a central agency database instead of making people physically view paper files at stations. The rules apply to most cable and satellite TV providers as well as broadcast and satellite radio.

None of this is new. What has changed, however, is the explosion of digital media, particularly social media such as Facebook, Instagram, Twitter, and YouTube. Platforms designed to provide tools for networking among family and friends have evolved in the last decade from their original purpose, developing into extremely useful platforms for exerting political influence.

Guided by data analytics, the presidential campaign of Barack Obama during the 2008 election recognized and effectively used social media to digitally target, network, and virtually build an online community in support of their candidate. Unfettered by pesky federal agency rules that apply to traditional media, social media certainly provides a cheaper and, arguably better, (farther reach, fewer legal review costs, less risk of fines, better targeting) method of reaching voters.

The Rise of Social.

Most Americans today are not

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reading the daily newspaper or even watching the evening news, according to contributor Peter Suci in an October 2019 article, “More Americans Are Getting Their News From Social Media,” in *Forbes*. Suci cites a newly published Pew Research Center report stating that 55% of U.S. adults now get their news from social media either “often” or “sometimes.”

For those American adults who rely on social media for their news, Pew’s study found that Facebook is now where about half (52%) get the news; YouTube is second at 28%; Twitter is third at 17%; and Instagram (owned by Facebook) is fourth at 14%. LinkedIn, Reddit, and Snapchat had smaller but notable audiences at 8%, 8%, and 6%, respectively.

Now, according to Suci, almost all news organizations rely on social media, if not to report a story, then to promote a story. Lon Safko, author of *The Social Media Bible* and a source for Suci’s article, noted a serious criticism of social media—that they, without consequences, may allow the promotion of a particular agenda, misinformation, or propaganda masquerading as “news.”

The accessibility of social media also makes it easy for groups of individuals with common agendas to form social networks to have online discussions and share messages. Between these groups and social media feeds, the opportunities to quickly, even spontaneously, develop cultural and political movements are rampant.

Twitter, founded in 2006, has proven to be particularly powerful in developing communities of like-minded people, including shared political identities. The site was originally designed to allow people to send short messages, or “tweets,” to friends. Its immediacy was akin to texting, although pictures and even short videos could be uploaded to the site. As its popularity grew, Twitter users refined its use by including the @ symbol before a username to identify other users and adding # (hashtag symbols) to facilitate following topics.

The beauty of the “Twitterverse”

was its ability to act as a virtual megaphone to spread information fast and widely. President Trump’s use of Twitter has been the subject of both admiration and derision, depending on one’s point of view, but no one can argue with the magnitude of its reach and consequences. Indeed, the Twitterverse has substantially changed how politicians, the press, and the people exchange information.

Legislative Efforts.

Why, we might ask, has there been such a dearth of response at the federal level to the lack of regulations with regard to digital advertising? Although there has been broad-based concern among agencies, organizations, and politicians across the political spectrum about the integrity of our elections, there has been little consensus about possible solutions. The subject has been discussed, debated, voted on, and tabled for years, with few results from federal agencies or Congress to address inadequacies.

The FEC has been paralyzed by vacancies and staff disagreements over updating rules, according to Emily Glazer and Patience Haggin in their November 15, 2019 *Wall Street Journal* article, “Political Ads Are Flourishing Online. Few Agree How to Regulate Them.” Right now, the agency does not have a quorum, which is necessary to hold meetings and hearings and to take enforcement action against rule-breakers. The FEC should have three Democratic and three Republican commissioners. After the most recent resignation in August 2019, the agency is down to three, one member short of a quorum. Members, who serve six-year terms, must be nominated by the President and confirmed by the Senate, and they can continue to serve past their terms if not replaced.

According to Glazer and Haggin, current and past commissioners have admitted that even prior to this latest impasse, Democratic and Republican members for years were unable to reach consensus over possible disclaimer and disclosure rules that would apply to all digital political ads. Presently, with only three commissioners, the FEC will continue to collect and post online campaign finance records, and its staff of about 300 will continue to

collect complaints, which a reconstituted commission could take action on in the future.

Last October, the Senate put forth the Honest Ads Act, which would require online platforms to maintain a public file of all political ads that appear on their sites if the purchaser has already bought \$500 of political ads on the platform. They would have to provide a copy of each ad, a description of the audience targeted, the number of views generated, the dates it ran, and more. Advertisers and platforms would be liable for collecting and providing this information.

The House then put forward its own bill, the Stopping Harmful Interference in Elections for a Lasting Democracy (SHIELD) Act, which would require campaigns to report any illicit offers of assistance by foreign governments or agents and would take steps to ensure that paid online political advertisements are subject to the same rules as TV and radio ads. The SHIELD Act incorporated the Honest Ads Act, but added additional legislation.

Critics of both have argued that such legislative efforts not only would fail to accomplish their stated goals, but also would place undue burden on American candidates, citizens, and organizations, while placing liability for foreign advertisements on media and advertisement platforms.

A generally accepted figure for paid online advertising by the Russians prior to the 2016 election was about \$100,000. Most of the disruptive activities, such as efforts by the Russian Internet Research Agency, were accomplished through free social media posts, which would not be regulated by these bills.

These and other bills, some partisan, some bipartisan, have ultimately failed to make it through both chambers of Congress. Legislators opposing passage have cited reasons such as 1) being overly broad, possibly causing problems for allied nations, 2) being partisan, and/or 3) representing unnecessary federalization of election law when other measures have already been taken.

Additionally, while it may seem reasonable to place the same

requirements on digital ads as on traditional media, the nature of digital media often makes such compliance impracticable. As an example, an eight-second YouTube ad would be required to have four seconds of video disclaimer and three seconds of audio disclaimer, leaving only one second to convey its message.

State Efforts.

Some states are seeking to fill what many regard as a policy vacuum with regard to online advertising. State rules extend only to local and state elections, however, so their impact on overall digital political advertising is limited.

In 2018, Maryland adopted its own political ad law whose intent was to impose transparency in advertising for state and local candidates. Federal judges in the Fourth Circuit ruled the law unconstitutional this past December, agreeing with plaintiffs *Washington Post* and other companies owning newspapers with an online presence in the state, that it violated the First Amendment. David Oxenford, in his December 11, 2019 Broadcast Law Blog, stated that the court's arguments were supported by numerous other media organizations, including the National Association of

Broadcasters (NAB) and the Internet and Television Association (formerly the National Cable & Telecommunications Association).

Maryland attempted to justify its rules by comparing them to rules imposed on radio and television stations (and on certain other FCC-regulated entities) which require disclosures about political advertising in each station's online public file, according to Oxenford. Relying on precedent, the court found that while regulation was justified for broadcast because of the scarcity of the spectrum, such regulation was not justified for online platforms because of the virtually unlimited capacity of the internet.

The Maryland rules, says Oxenford, required that online advertising platforms post on their websites information about political ads within 48 hours of the purchase of those ads. The information had to be maintained on the website for a year and kept for inspection by the Maryland Board of Elections for a year after the election was over. The appeals court concluded that the requirement to reveal this information was forcing these platforms to speak, which the court found to be just as much against the First Amendment as telling them to not

speak (e.g., preventing them from publishing). Because the court could find no compelling state interest in this obligation that could not be better met by less restrictive means, the law was declared unconstitutional.

At least 32 states have expanded their ad disclosure laws to include online ads, either by requiring disclaimers or requiring a link to the source, according to the Campaign Legal Center. (The advocacy group filed a complaint petitioning the FEC to extend enforcement of traditional media laws to digital ads.) Other states continue to grapple with the issue.

The First Amendment analysis by the Fourth Circuit might suggest that these state efforts may also be subject to challenge. In the meantime, small campaigns that lack the resources and time to slog through numerous new and often confusing ad requirements are at a clear disadvantage.

Industry Efforts.

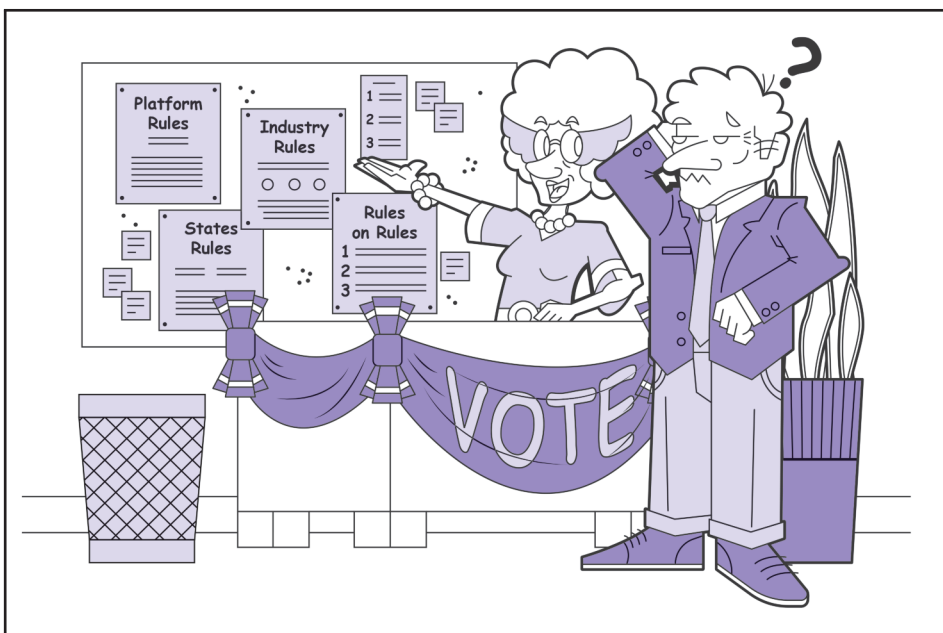
In 2018, the Digital Advertising Alliance (DAA) launched an industry-wide initiative to increase transparency and accountability for digital political ads through industry self-regulation. Building on its YourAdChoices program, the organization issued new guidance for political advertisers and a "Political Ad" icon that links to additional information about the ads. The initiative is the result of a collaborative effort by experts from media, advertising, and technology.

Compliance with the guidance is independently enforced, as of January 1, by the Advertising Self-Regulatory Council (ASRC) of the Council of Better Business Bureaus (CBBB) and Association of National Advertisers (ANA), which also are responsible for enforcement of the DAA's YourAdChoices program.

Platforms and Services Respond.

Last June, Facebook announced its intention to roll out its transparency tools globally for advertisers wanting to place ads about social issues, elections, or politics. Later last year, CEO Mark Zuckerberg stated that private companies should not censor politicians, reflecting Facebook's policy for not fact-checking political advertising.

In January, the social media giant



So in the interest of "transparency," you've got your state rules. Then you've got your platform rules, and they may refuse ads from states 'cause they don't like their rules. Then we have your industry rules, but they're voluntary so some have signed on but a lot haven't yet. Does that clear things up?

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announced a new plan, which would give users marginally more control by allowing them to limit the political ads that appear in their newsfeeds. Then in February, Facebook announced a reversal of policy on paid influencers. According to Barbara Ortutay and Amanda Seitz of *The Associated Press*, the change came days after Democratic candidate Michael Bloomberg exploited a loophole to run humorous messages promoting his campaign on the accounts of popular Instagram personalities. The policy change involves “branded content,” sponsored items posted by users who are paid by companies or organizations. Previously, Facebook tried to deter campaigns from using branded content by barring them from using a tool designed to help advertisers run such posts on Facebook and Instagram. The change now allows campaigns in the U.S. to use this tool provided they have been authorized by Facebook

to run political ads and disclose who paid for the sponsored posts.

Last year, according to Garrett Sloane in *Ad Age*, Twitter banned political advertising while still allowing some leeway for special-interest advocacy. Betsy Morris reported in the *Wall Street Journal* in February that Twitter also removed about 70 accounts backing Mr. Bloomberg for violating its rules against platform information and spam. Twitter’s rules prohibit “coordinating with or compensating others to engage in artificial engagement or amplification, even if the people involved use only one account.”

Google tweaked its rules, says Sloane, prohibiting campaigns in 2020 from using voter lists to hyper-target individuals in search ads, on YouTube, and through its ad network that reaches third-party websites.

Snapchat, Hulu, and Pandora allow political ads, while TikTok, Pinterest, and LinkedIn do not. Spotify has hit the pause button with regard to political advertising, and Reddit allows federal political ads only.

In her December 13, 2019 article for the global digital-only business news publication *Quartz*, “Each Platform’s Approach to Political Ads in One Table,” reporter Hanna Kozłowska includes a nifty chart that shows the policies of various social networks and online services. The table shows whether they allow political ads, fact-check, have a public ad database, disclose the buyer, allow micro-targeting, verify the buyer, and provide public information on ad targeting or audience. It provides a useful, at-a-glance overview of policies, at least for now.

If this patchwork of rules and regulations has your head imploding like the Griswolds’ roast turkey in National Lampoon’s Christmas Vacation, you are not alone. We in the media industry with a presence and a stake in the digital space, however, have a need to know what is happening at all levels—corporate, state, and federal. There is little doubt there will be even more changes prior to the midterm elections! ♦