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IN FOCUS

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Online Political Advertising: Disclaimers and Policy Issues

Introduction and Background

How campaign finance law and regulation affect online political ads illustrates the challenge of incorporating emerging technologies into preexisting regulatory frameworks. Should Congress adapt campaign finance law and regulation to emerging technology and tactics, and if so, how? How can or should it do so amid disagreement over what constitutes "political" messages? In addition to grappling with these complex and politically sensitive topics, the debate covers an area of law that receives substantial First Amendment protection. This CRS product provides a brief policy overview.

Campaign finance policy provides a regulatory framework for identifying and reporting information about ads clearly intended to affect federal elections. Many ads, however, that might shape the environment in which a campaign is waged—but without necessarily affecting an election—likely fall outside campaign finance law. Paid online ads must include language identifying the sponsor, but some requirements for ads transmitted via other media do not apply to online ads.

Latest Policy Developments

Congress has not enacted legislation focused specifically on online campaign activity, although elements of existing statute and Federal Election Commission (FEC) rules address internet communications. In March 2019, the House passed H.R. 1, which contains provisions of the Honest Ads Act. First introduced in the 115th Congress as H.R. 4077 and S. 1989, the bill would amend the Federal Election Campaign Act (FECA; 52 U.S.C. §§30101-30145) to further regulate some online ads.

Before these recent developments, as the internet became more politically prominent in the early 2000s, questions emerged about which activities were considered *public communications* (discussed below), and thus subject to FECA and FEC regulations. The FEC issued rules in 2006, implementing parts of the Bipartisan Campaign Reform Act (BCRA), that exempted most internet activities in which individuals would engage (e.g., blogging) from the *public communication* regulatory definition—but required disclaimers on paid online ads (11 C.F.R. §100.26).

The Supreme Court's 2010 *Citizens United* decision, and reports of foreign interference in the 2016 elections using social media, renewed interest in online advertising in Congress and at the FEC. In 2011 the FEC announced an Advanced Notice of Proposed Rulemaking (ANPRM) to receive comments on whether it should update its rules concerning internet disclaimers, but the agency did not advance new rules. In 2016, the FEC announced that it was reopening the comment period on the 2011 ANPRM. It again reopened the comment period in October 2017. Several Members of Congress filed comments. On November 16, 2017, the FEC voted to draft revised internet-disclaimer rules (a notice of proposed rulemaking) for paid advertising, and held a hearing in June 2018. Report language (H.Rept. 116-9) accompanying the FY2019 consolidated appropriations law (P.L. 116-6) directs the FEC to update congressional appropriators on the rulemaking.

Which Advertising Is "Political"?

The term *political advertising* does not necessarily mean the same thing in popular culture or media accounts as it does in federal policy and law. In the former, the term generally implies any advertising that concerns American politics or policy issues. Campaign finance law generally does not use the term *political advertising*, but distinguishes between advertising that explicitly refers to federal candidates or elections, versus that which refers to public policy issues without mentioning candidates.

These differences are not merely semantic. The content, timing, and medium of advertising all can affect whether or how it is regulated in federal campaign finance law and agency rules, as well as policy options available to Congress. Perhaps most importantly, advertisements that refer only to policy issues but do not address elections or candidates likely fall outside the bounds of campaign finance law and regulation.

Communications containing *express advocacy* call for election or defeat of candidates. *Issue advocacy* calls for support for or opposition to policy issues but does not necessarily refer to particular candidates. Campaign finance policy and law regulates express advocacy, but typically not issue advocacy, unless those messages are classified as *electioneering communications* (ECs). Under FECA, ECs refer to candidates during pre-election periods and in certain media but do not call for election or defeat.

Disclaimers and Disclosures

As used in campaign finance policy and law, *disclaimer* means a statement identifying who is responsible for a political advertisement. Disclaimers are often confused with the related but separate concept of *disclosures*. The latter refers to publicly reporting (e.g., to the FEC) information about contributions and expenditures. This CRS "In Focus" does not discuss disclosure. In general, however, the activities discussed herein would be reported to the FEC in regularly filed financial reports, in special notices filed within 24 or 48 hours of an expenditure, or both. Issue advocacy (unless meeting the *electioneering communication* criteria) is not disclosed to the FEC.

Online Ads and Campaign Finance Policy

FECA and FEC regulations address various kinds of political activities and messages. Different requirements apply to different circumstances. FECA defines *public communications* as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising" (52 U.S.C. §30101(22)). FEC regulations (11 C.F.R. §110.11) also specify that *public communications* disclaimer requirements (see below) apply to fundraising solicitations and electioneering communications.

Disclaimer Requirements for Online Ads

FECA, FEC rules, or both typically classify advertising from political committees (candidate campaigns, parties, and political action committees [PACs]) as *public communications*. As such, political committees' online campaign ads, fundraising solicitations, publicly available websites, and more than 500 "substantially similar" emails generally must contain disclaimers (52 U.S.C. §30120(a)(1); 11 C.F.R. §110.11). The same is true for other "persons" (e.g., corporations or unions post-*Citizens United*) whose messages meet the *public communications* definition by expressly advocating election or defeat of federal candidates (11 C.F.R. §110.11(a)(2)).

- *Candidate ads* must state that the candidate's authorized committee (campaign) paid for the ad (52 U.S.C. §30120(a)(1); 11 C.F.R. §110.11(b)(1)).
- *Ads not authorized by candidates* (e.g., party independent expenditures) must state that no candidate is responsible for the ad and must provide a name, contact information, or website address for the "person" (entity) that paid for the ad (52 U.S.C. §30120(a)(3); 11 C.F.R. §110.11(b)(3)).
- Other requirements affect coordinated party expenditures and address technical issues, such as prominence of the disclaimer.
- FECA specifies that candidate voice-over and image requirements, known as the "stand-by-your-ad" provisions, apply to certain broadcast ads (52 U.S.C. §30120(d)(1)), but does not extend the requirement to online ads.

Disclaimer Exemptions

FEC rules adopted in 2006 exempt unpaid, independent online activity from disclaimer requirements (11 C.F.R. §§100.26; 100.94; 100.155). FEC rules also waive disclaimer requirements when the medium's format or size would make disclaimers impractical (e.g., skywriting or campaign buttons) (11 C.F.R. §110.11(f)). When asked for advisory opinions (AOs) about how these exceptions affect some online advertising, the FEC has reached different conclusions, although their applicability varied with each request. In December 2017, the agency advised (AO 2017-12) that certain planned Facebook video and image ads require the authorization/payment disclaimers (52 U.S.C. §30120(a)) explained above. However, commissioners could not agree on the rationale for their conclusion. Although AOs provide additional guidance, they apply only to specific circumstances and do not provide the certainty of law or regulation.

Policy Discussion and Options in Brief

The most relevant FEC rules governing online ads date to 2006, and most of the statute dates to at least 2002. Both were formulated before the internet played its current role in American politics, and in an environment in which protecting individual volunteer activity was a primary concern. Do those rules need to be updated, by whom, and how? Perhaps more fundamentally, how can—or should—federal regulation of political advertising address previously unanticipated intersections of law, regulation, and campaign tactics? In sum, is the current regulatory framework suited to the current policy challenge?

Currently, that framework generally depends on advertising promoting some combination of (1) express advocacy; (2) fundraising; or (3) electioneering communications. Absent at least one of those elements, the disclosure and disclaimers normally associated with campaign advertising would not apply. In addition, if volunteers perform online activity, or if an activity does not involve a financial exchange, that, too, might avoid campaign finance regulation.

If Congress pursues additional regulation of online advertising, it could either expand the scope of campaign finance law; create some other area of law regulating general policy messages; or some combination of the two. Options include, for example, extending to online advertising Federal Communications Commission (FCC) requirements for broadcast, cable, and satellite operators to publicly disclose advertising purchases; reclassifying the distinction between express advocacy and issue advocacy, such as Congress did in BCRA's electioneering communication provision; or, perhaps looking to other policy areas, such as lobbying or telecommunications.

The Honest Ads Act, as previously introduced and contained in H.R. 1, would expand the *public communication* and *electioneering communications* definitions to include paid online ads, thus applying FECA's disclaimer and disclosure requirements. The legislation also would require the FEC to administer a new database containing information about these ads, as well as those concerning some policy issues. FECA regulation of ads other than those that clearly attempt to influence elections would mark a change in campaign finance law.

For additional discussion, see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett; CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by L. Paige Whitaker; CRS In Focus IF10697, *Foreign Money and U.S. Campaign Finance Policy*, by R. Sam Garrett; and CRS Legal Sidebar WSLG1857, *Foreign Money and U.S. Elections*, by L. Paige Whitaker.

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