

Upcoming Midterm Elections Highlight Regulatory Risks of Online Political Advertising

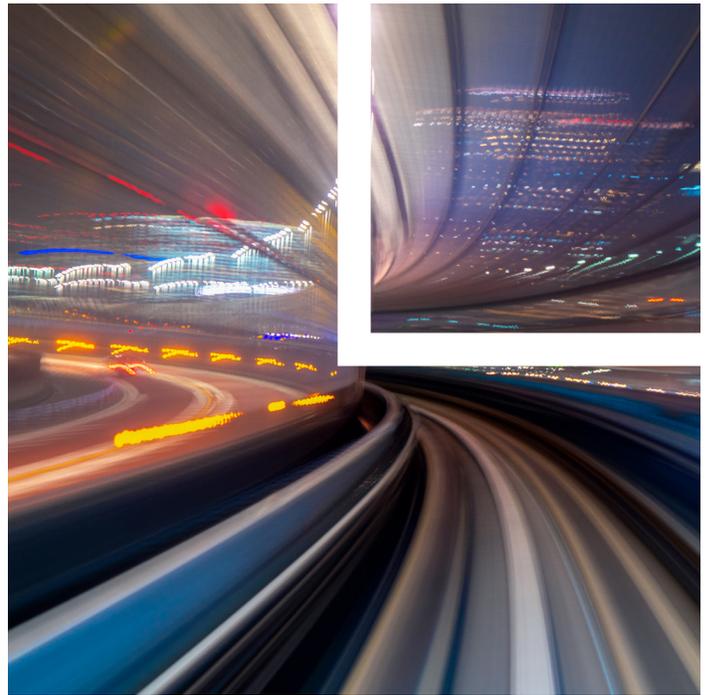
With the midterm elections fast approaching, political advertising spend is on the rise. The advertising stakes couldn't be higher, with millions of dollars on the line. Unfortunately for advertisers and online platforms, the regulations governing online political advertising aren't always clear.

At the federal level, online political advertising must identify who paid for the ad. But this requirement only applies to ads for federal office (for example, ads for presidential candidates or federal congressional races). The sponsorship identification rule is enforced by the Federal Election Commission (FEC). The FEC started a rulemaking in 2018 to determine whether additional disclaimers are required for online ads and whether any of the requirements placed on broadcast or cable operators should be applied to online ads. Unfortunately, that proceeding has yet to move forward with those rules, which means that there are few regulations at the federal level that apply to online political ads.

State Political Advertising Laws

In the absence of strong federal regulation, several states have passed their own laws governing online political advertising. Generally, these laws place obligations on both the platform on which the ads run and the advertiser (or the party paying for the ad).

Below are some examples of how states are filling the federal void regarding regulating online political ads. Remember that these state laws do not apply to federal political advertising, only to state or local political ads (such as races for governor or state senate and even ballot initiatives in some states).



Washington

Washington is quickly becoming known as the state with the country's strongest (and strictest) political advertising law. Not just because the law contains several additional requirements but also because Washington has been actively enforcing its online political advertising law against major platforms.

Under Washington's Commercial Advertiser Law, any "commercial advertiser" that has accepted or provided political advertising or electioneering communications during the election campaign must maintain current books of account and related materials that must be open for public inspection during normal business hours during the campaign and for a period of no less than five years after the date of the applicable election. The law defines a "commercial advertiser" as "any person that sells the service of communicating messages or producing material for broadcast or distribution to the general public or segments of the general public whether through brochures, fliers, newspapers, magazines, television, radio, billboards, direct mail advertising, printing, paid internet or digital communications, or any other means of mass communications used for the purpose of appealing,

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directly or indirectly, for votes or for financial or other support in any election campaign.” The law applies broadly to entities that accept advertising, but it was one of the first laws in the country to specifically address “paid internet or digital communications,” or online ads.

The documents and books of account that platforms are required to maintain must include:

- The names and addresses of persons from whom it accepted political advertising or electioneering communications.
- The exact nature and extent of the services rendered.
- The total cost and the manner of payment for the services.

At the request of the Public Disclosure Commission (PDC), each commercial advertiser must provide to the commission copies of the information that must be maintained and open for public inspection.

The law also prohibits political ads from being purchased by a foreign national, and it further prohibits a foreign national from being involved in making decisions about the political advertising.

California

California regulates “online platform disclosed advertisements,” which are defined as “paid electronic media advertisement on an online platform made via a form of electronic media that allows users to engage in discourse and post content, or any other type of social media, for which the committee pays the online platform” (unless the advertisements on the platform are video advertisements that can otherwise comply with the law). Note that individual posts, comments or other similar communications are not considered online platform disclosed advertisements if they are posted without payment to the online platform.

Under the law, an “online platform” (defined as any public-facing internet website, web application or digital application, including a social network, ad network or search engine, that sells advertisements directly to advertisers) must make the following information publicly available for ad buys over \$500 in a year:

- A digital copy of the advertisement.

- The approximate number of views generated by the advertisement and the date and time that the advertisement was first displayed and last displayed.
- Information regarding the range charged or the total amount spent on the advertisement.
- The name of the candidate to which the advertisement refers and the office to which the candidate is seeking election, as applicable, or the number or letter of the ballot measure and the jurisdiction to which the advertisement refers.
- The name and identification number (if a number is assigned) of the committee that paid for the advertisement.

This information must be made available “as soon as practicable” and should be kept by the platform for four years. The platform is also required to display a prominent button, icon, tab, or hyperlink with the text “View Ads” or similar text either: (i) near the top of a profile, landing page, or similar location of the committee that paid for an advertisement in a position that the average viewer will readily see it upon viewing that page; (ii) on a page that displays the committee’s profile information or biographical information; (iii) or on a page to which the average viewer would normally navigate to view additional information about a committee.

Online platforms that create a mechanism for online political advertisers to provide the required information to the platform can avail themselves of a safe harbor; the platform can rely in good faith on the information provided to satisfy the platform’s disclosure (recordkeeping) obligations.

Other State Disclaimer Requirements

Aside from recordkeeping requirements, states also impose sponsorship disclaimer requirements on online political ads. Alaska, Colorado, Maryland, Nevada, New Jersey, New York, Vermont, Virginia and Wyoming all require that online political ads identify the purchaser or sponsor of the ad.

Enforcement of State Online Political Ad Laws

With most online platforms offering advertisers the ability to buy ads in multiple states, compliance and enforcement are growing concerns. The requirements can

vary from state to state, and, as we've seen, they can even be markedly different, based on the type of media where the ad appears.

We're also starting to see states enforce their online political advertising laws. For example, Washington state has been very active in enforcing its state laws against online platforms. Washington regulators seem particularly focused on issues where online platforms are failing to display online all the information required to be available for public inspection. California is also actively enforcing its online political advertising laws, but California seems more focused on violations by candidates and committees. Over the past few years, California has sent warning letters to candidates and committees for (1) failing to include the proper "Ad paid for by" on social media pages and political ads and (2) failing to provide the online platforms with the required information for political ads and disclosing their ad buys as such.

Key Considerations for Online Platforms Accepting Political Advertisements

With such specific (and sometimes conflicting) state laws, it's more important than ever for online platforms to have the infrastructure and policies required to accept and legally disseminate online political ads.

Going into this election season, online platforms should:

- Understand the various state requirements and which obligations rest with the platform or the advertiser.
- Consider how to collect and capture the required recordkeeping information from political advertisers.
- Review contracts with advertisers to ensure that the political advertisements provided to the platform include the necessary disclaimers and that the advertiser provides the necessary disclosures.
- Implement policies and procedures for accepting and vetting online political ads.

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