

Who Paid for that Ad? US Considers Internet Disclosure Rules

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Anyone who watches television or listens to radio during an election cycle is bombarded with political advertisements from candidates, political parties and issue groups. While some commentators have lamented the rise of issue advocacy groups in US politics, they take for granted that all political ads running on TV or radio inform viewers or listeners about who is paying for the ad – under federal law, all broadcast political advertisements must include a disclosure saying who "paid for" or "sponsored" the ad. In addition, specific information about political advertising that runs on TV, radio or cable is also available in a "public file" that can be accessed from the website of the Federal Communications Commission (FCC). Now, as reports of foreign involvement in the 2016 election cycle continue to emerge, many have raised concerns that the real problem about influence in US elections is not from the issue groups that advertise on TV and radio, but rather from unknown parties who purchase advertisements on social media and other internet platforms without disclosing who paid for the ad or any of the other information that broadcasters are required to provide.

While political advertising on TV, radio and cable is heavily regulated, political advertising that runs on the internet is not. In the past, social media platforms asserted that technical limitations made internet disclosures infeasible, and regulators agreed. Now regulators are looking at the issue again. At the federal level, the Federal Election Commission (FEC) has issued a Notice asking for public comment on whether online ads and internet postings should include disclosures similar to those currently imposed on broadcasters. The FEC asks commenters to address questions such as

- How do parties disseminate and receive electoral information via the internet and other technologies?
- Would mandatory disclosures help voters identify the source of advertising so voters are better "able to evaluate the arguments to which they are being subjected"?
- Are there informational benefits from disclosures on internet communications, including web sites and social media pages, that would help avoid voter confusion and reduce the incidence of solicitations that appear to be from candidates but are actually from non-candidate committees and other sources?
- To what extent should the FEC's consideration of disclosure requirements take into account current or anticipated models of internet advertising?

The FEC voted unanimously to open a public comment cycle, which is the first step in potentially adopting new disclosure rules to cover internet ads. The FEC may also hold a public hearing on the issue. **Comments from interested parties on the Notice are due to the FEC by November 9.**

Since FEC rules cover only federal candidates and federal elections, states are also looking at the issue of mandatory disclosures for internet ads. Last week California passed and Gov. Jerry Brown signed legislation that expands disclosure requirements for print, broadcast and digital ads. Under the "California Disclose Act," starting January 1, 2018, political ads in California must disclose the top three contributors to the committee paying for the ad with the required information meeting specific size, color and font requirements. New York is also considering legislation that would require disclosures on internet political ads. In New York, legislation has been introduced that would significantly expand the statutory definition of a "political communication" that would require a written disclosure of who paid for an ad.

Congress is also considering legislation to increase transparency of political ads posted on social media platforms. Sens. Amy Klobuchar (D-Minn.) and Mark Warner (D-Va.) have been working on a bill that would require internet platforms to establish a "public file" for political ads, similar to the public file requirements currently in effect for radio, TV and cable. Press reports indicate that the proposal would also require companies selling online political ads to make "reasonable efforts" to determine whether foreign entities are paying for the message.

Given the difficult political climate in Washington, DC, some commentators believe that new federal rules or

legislation on internet political advertising requirements may not be adopted or passed in time for the 2018 election cycle. Others believe that federal regulators will be hard pressed not to adopt disclosure requirements for internet ads similar to those in place for broadcasters. If you would like more information about these proposals, or if you would like to participate in the public comment cycle at the FEC, please contact your Cooley relationship partner or one of the attorneys on this alert.

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