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Combating Political Disinformation with Online Political Ad Regulation

Summary

Online advertisers take advantage of several misleading advertising practices to bypass the Federal Election Commission's (FEC's) existing rules around political ad disclaimers. This makes it significantly easier for political propagandists to spread disinformation through these ads without accountability. For example, between May 2018 and June 2019, [more than half](#) of Facebook pages that displayed political ads violated the company's policies by concealing the identities of their backers, making attribution impossible.

Further, online political ads already have a massive reach, and that reach is growing exponentially. In the summer of 2018, online political ads generated [tens of billions of views](#), and total online political ad spending for 2020 is expected to be [over three times](#) what it was in 2016.

Fortunately, the FEC already has the regulatory authority to end these practices without the need for further legislation. In this brief, we identify three misleading online advertising practices that bypass political ad disclaimer requirements and, for each, propose regulations to discourage them. If these draft regulations are adopted, these misleading political advertisements will be forced to: (1) disclose that they are paid content and (2) disclose who paid for the content. With this information, voters will both be more informed about what they see online and empowered to hold purveyors of political disinformation accountable.



Background

In the summer of 2018, Facebook, Google, and Twitter ran over 1.3 million political ads in the United States. Experts estimate these ads were viewed between 8.7 and 33.8 billion times. This impressive reach was purchased for only about \$300 million, meaning each micro-targeted view cost (on average) between 0.9 and 3.4 cents. Given how cost-effective online political ads are, total online political ad spending is expected to explode in 2020 to \$1.34 billion.

Many online political ads use deceptive practices that allow them to mislead voters without accountability. As an example, Michael Bloomberg's campaign paid over 500 "deputy digital organizers" \$2,500 per month to generate political content for the Bloomberg campaign, and much of that content bypassed disclaimer and disclosure rules. Further, in 2016, a senior official in the Trump campaign told *Bloomberg Businessweek* that they were using online platforms to micro-target and directly message people: "We have three major voter suppression operations underway They're aimed at three groups Clinton needs to win overwhelmingly: idealistic white liberals, young women, and African-Americans." The last of these "operations" targeted black voters in swing states just before Election Day with the text "Hillary Thinks African-Americans Are Super Predators."

Deceptive online political advertising practices like these have proliferated because they exploit loopholes in current FEC regulations. At its core, FEC regulation requires that political "public communications" and "electioneering communications" include disclaimers.¹ However, there are two loopholes for political communications that happen online. First, only "communications placed for a fee on another person's Web site" count as "public communications," according to the current regulation,² and this regulation does not clarify what counts as a "Web site" in the modern era nor what "placed for a fee" means. Second, the FEC has explicitly excluded any form of "communication over the Internet" from its definition of electioneering communication,³ even though the law itself does not mention the internet in its definition.⁴



The FEC has already publicly acknowledged these loopholes and demonstrated a will to regulate online political advertisements. In December 2019, FEC Commissioner and then-chairperson Ellen L. Weintraub released a [public statement](#) arguing (emphasis in original):

*“The Federal Election Commission last wrote internet communication disclaimer regulations several eons ago, in 2006, when political internet advertising was in its infancy... The Commission has since been unable to revamp its regulations to better tailor the disclaimer rules to today’s far more significant and varied political internet advertising market... **Virtually all paid political advertising on the internet must contain a full, clear, and conspicuous disclaimer on its face.**”*

The FEC also [proposed draft regulations](#) in its 2018 notice of proposed rulemaking to clarify the mechanisms for including disclaimers in online advertisements.

However, **both existing and proposed regulations leave significant room for willful misinterpretation and do not cover several misleading online political advertising practices. In this policy brief, we present three such practices, along with draft regulations.**



Recommendations

We met with journalists, social media policy leads, fact-checking organizations, disinformation experts, social scientists, and legal experts to better understand how disinformation, particularly in elections, is spread online. As a result of that research, we make three key recommendations that the FEC can implement solely through regulatory change, without an act of Congress:

- ▶ Include internet broadcasts as a form of electioneering communication;
- ▶ Clarify that paying “influencers” for endorsements is subject to ad disclaimers; and
- ▶ Clarify that paid direct messaging campaigns are subject to ad disclaimers.

Together, these three regulatory changes will make it significantly more difficult for bad actors to spread political disinformation online.

INCLUDE INTERNET BROADCASTS AS A FORM OF ELECTIONEERING COMMUNICATION

Online Broadcasts as Electioneering Communications

First, because the reach of paid online broadcasts has begun to rival that of television and radio broadcasts, the FEC should recognize online broadcasts as a form of electioneering communications. The term “electioneering communications” is defined in 52 U.S.C. § 30104(f) as the following:

- (i) The term “electioneering communication” means any broadcast, cable, or satellite communication which—
 - (I) refers to a clearly identified candidate for Federal office;
 - (II) is made within—
 - (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or



(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

FEC regulations explicitly exclude any form of “communications over the Internet” as a potential electioneering communication.⁵ This exemption was added in October 2002, justified with an explanation that the legislative intent was that the internet not be included as a form of broadcast.⁶ However, the register also notes:

[The] potential evolution of the Internet calls for a more precise approach and **makes the exemption as proposed too broad a treatment of this issue.** The Commission has decided to include the exemption in the final rules, rather than attempt to craft a regulation that responds to unknown, future developments.

We agree with the FEC’s assessment: the existing blanket exemption for any broadcast over the internet is too broad. Due to the dramatic increase in online internet broadcasts, the time has come for the FEC to revisit the “more precise approach” it recommended. Facebook alone [reported 1.66 billion daily active users](#) in the fourth quarter of 2019. Meanwhile, Sean Hannity’s Fox News broadcast, 2020’s highest-performing primetime TV show, has a much more modest average viewership of [3.3 million](#). The “future development” anticipated in 2002 has become today’s reality: exponentially larger online viewership, with spending on online political ads expected to [skyrocket to \\$1.34 billion](#) this year. Advertisers can broadcast over internet platforms just as they already do on television, but online they gain the additional power to micro-target specific demographics unlike ever before. On top of this, because advertisers do not need to report these broadcasts to the FEC, they undermine the original intent of Congress. Thus, we propose that the 2002 regulatory exemption for internet communications should be removed.

Proposed regulatory language follows in Appendix A.



Defining “Targeted to the Relevant Electorate” for Online Electioneering Communications

Once the exemption is removed, as with other forms of electioneering communications, the FEC will need to define how to measure the potential audience of online electioneering communications in order to determine whether the communication in question was “targeted to the relevant electorate.”

Targeting is defined in 52 U.S.C. § 30104(f) as the following:

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is “targeted to the relevant electorate” if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

FEC regulation builds on this definition by specifying how the 50,000 should be counted for each broadcast technology (FM radio, AM radio, cable TV, and satellite TV). As an example, for television, subsection (b)(7)(i) of 11 C.F.R. § 100.29 states:

(i) ***Can be received by 50,000 or more persons*** means —

...

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.



Concretely, this means that a cable or satellite television broadcast satisfies the targeting criterion if it is aired on a network with a viewership of at least 50,000 in any district, independent of how many individuals actually viewed or heard the broadcast.

Extending this requirement to online platforms is relatively straightforward. It would effectively require online political advertisers to keep track of the number of views of electioneering communications across districts. Due to the widespread use of technologies to count views of content and services that correlate IP addresses and web requests with approximate physical locations, such a requirement should not impose a significant regulatory burden.

Online advertisers and broadcast services already routinely keep track of views per post or communication. The biggest online advertisers, including Google, Twitter, Facebook, and YouTube, all base their advertising fees on number of views, impressions, or clicks. In 2018, [62% of online ad revenue was based on clicks and 35% on viewership](#). Further, in addition to Google AdWords, there are at least three freely available open source technologies ([one](#), [two](#) and [three](#)) that can be used by companies to track views, impressions, and clicks for their own products. Every time a piece of content gets viewed, a platform can simply log privacy-compliant metadata to one of these services, which can easily keep track of views per location.

Proposed regulatory language follows in Appendix A.

REQUIRE DISCLAIMERS ON INFLUENCER ENDORSEMENTS

Second, the FEC should ensure that paid political influencer posts are subject to disclaimer rules by updating its definition of “public communication.” Influencers are social media users with large online followings. They often make money by talking about or promoting products in online content for a fee, sometimes without disclosing this sponsorship explicitly to their followers. Regulations should be updated to make clear that any candidate who pays for an influencer



to create political content is paying for an advertisement.

The term “public communication” is defined in 52 U.S.C § 30101(22) as the following:

The term “public communication” means 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.

However, the FEC regulations, 11 C.F.R § 100.26, add an extra sentence to this definition:

Public communication means 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. **The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.**

It is currently unclear whether influencers’ posts are “communications placed for a fee on another person’s Web site,” because the advertiser pays the influencer directly, bypassing the web site owner. Regulation thus should make clear that any payment from an advertiser to any actor creating and placing an online advertisement on their behalf meets this definition. Notably, the FEC and FTC have already expressed their desire to regulate influencer endorsements as advertisements. The FTC has [issued public disclosure guidelines for influencer posts](#) that qualify as advertisements. Further, FEC Commissioner Weintraub has [publicly stated](#) that, “When social influencers get paid to post about candidates, let’s have some real transparency: Influencers should disclose who’s paying them.” We agree with both these sentiments.

To recall the example noted above, [the Bloomberg campaign used 500 paid “deputy digital organizers”](#) and other social pages to create memes and posts promoting his candidacy, many without proper disclaimers. These posts reached an audience of [over 60 million people](#).



Because the campaign paid influencers, not social media companies directly, it is not clear whether current regulation restricts this behavior. However, these paid pieces of content reached and misled millions of Americans, violating the intention of the law. Simple regulatory language, which follows in Appendix B, would clarify that influencer endorsements qualify as public communications.

REQUIRE DISCLAIMERS FOR DIRECT MESSAGING CAMPAIGNS

Third, the FEC should make clear that paid direct messaging campaigns are subject to disclaimer rules, just like other advertisements. Paid direct messaging campaigns are those in which advertisers purchase the ability to message users of messaging platforms directly, similar to unsolicited emailing. This includes both text messages sent to phones via online platforms and direct messages sent via online platforms like WhatsApp and Snapchat. FEC regulation already requires disclaimers for “electronic mail of more than 500 substantially similar communications when sent by a political committee.”⁷ The intent of this regulation should extend to other text and direct messaging mechanisms.

The reach of online direct messages and text messages is already on par with that of email, and such messages are dramatically more effective at garnering a response. As examples of the power of direct messaging campaigns, the Democratic National Committee was able to buy [94 million registered cell phone numbers](#) for voters from key demographics, and campaigns and organizations [sent 350 million direct messages](#) in 2018 (a six-fold increase from the previous year). Further, it is easy to send direct messages at little to no cost: Eleni Kounalakis’s campaign for California Lieutenant Governor was able to use the online mass messaging platform Hustle to target 10,000 text messages to specific voters across California, all in [under an hour with the help of a dozen volunteers](#). Finally, direct messages are even more effective than traditional email. A [Tech for Campaigns report](#) showed that potential voters are 3.9 times more likely to read a direct message than an email and 6.5 times more likely to respond, a dramatic improvement in engagement. Unfortunately, direct messaging has already been used as a tactic to discourage voting. As



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stated in the background section, the Trump campaign used services like Hustle to actively micro-target African American Clinton supporters and attempt to dissuade them from voting with messages like “Hillary Thinks African-Americans Are Super Predators.”

Because direct messaging via online services is an increasingly prevalent and powerful form of political advertising, the FEC must ensure that such messages meet the same requirements for disclaimers as other forms of regulated political advertising. A modernization of the regulation covering “electronic mail” should include these forms of messaging because the reach is at least as great, and possibly far greater.

Therefore, the FEC should broaden its definition beyond email to include any unsolicited direct message, as these are in effect the same communication mechanism. It should explicitly state in the regulation that paid direct messaging campaigns should require disclaimers, as other online ads and email campaigns already do.

Proposed regulatory language follows in Appendix C.

Appendix A: Internet Broadcasts as Electioneering Communication

The following amendments add “internet provider” as a form of broadcast communication. They also specify how to determine whether the communication was “targeted to the relevant electorate” in the case of electioneering communications concerning federal offices other than the President or Vice President.

Subsection (b)(7) in particular uses the industry best practice of measuring viewership of online content via the direct number of views (number of times a piece of content appeared on people’s screens) and via the number of unique devices that received the content. Because this data can be cross-referenced with privacy-preserving, approximate location data, it can be used to determine whether 50,000 individuals within a district received the communication.

Subsection (b)(1) of 11 C.F.R. § 100.29 should be amended to read:

“BROADCAST, CABLE, OR SATELLITE COMMUNICATION means a communication that is publicly distributed by a television station, radio station, cable television system, ~~or~~ satellite system, **or internet provider.**”

Subsection (b)(3)(i) of 11 C.F.R. § 100.29 should be amended to read:

“Public distributed means aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, ~~or~~ satellite system, **or internet provider.**”

The first sentence of subsection (b)(6)(i) of 11 C.F.R. § 100.29 should be amended to read:

Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, ~~or~~ satellite system, **or internet provider**, shall be available on the Federal Communications Commission’s Web site, <http://www.fcc.gov>.

Subsection (b)(7)(i)(G) and onwards of 11 C.F.R. § 100.29 should be amended to read:

G. In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station, ~~or broadcast~~ network, **or internet platform**, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; ~~or~~

H. In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more; **or**

I. In the case of a communication appearing on an internet platform, that the viewership of the communication lying within a Congressional district or State is 50,000 or more.

Subsection (b)(7) of 11 C.F.R. § 100.29 should have the following subsection added:

iv. Internet platform viewership is determined by the number of viewers of the communication who can be shown to be within a Congressional district or State, as determined by:

(A) the number of views of the communication known to originate from each Congressional district or State;

(B) the number of different devices that received the communication known to be within each Congressional district or State;

(C) if targeted solely to one specific Congressional district or State, the total number of views of the communication; or

(D) if targeted solely to one specific Congressional district or State, the total number of unique devices which received the communication.

Subsection (c)(1) of 11 C.F.R. § 100.29 should have the following text removed:

“Communications over the Internet, including electronic mail;”

Appendix B: Influencer Endorsements

The following should be appended to the end of 11 C.F.R. § 100.26:

“Communications placed for a fee on another person’s website” includes any communication sent via an internet platform that requires payment for that communication. This includes—

- (1) advertisements purchased on the platform, whether targeted at individuals or not;
- (2) promotion of communications such that they are seen by more people; and
- (3) communications created by a third party for pay.

Appendix C: Direct Messaging Campaigns

Subsection (a)(1) of 11 C.F.R. § 110.11 should be amended to read:

1. All public communications, as defined in 11 C.F.R. 100.26, made by a political committee; ~~elec-
tronic mail~~ **direct messaging, such as electronic mail or text messages**, of more than 500 sub-
stantially similar communications when sent by a political committee; and all Internet websites
of political committees available to the general public.

Endnotes

1. Contribution and Expenditure Limitations and Prohibitions, 11 C.F.R. 110 § 11 (2016), <https://www.govinfo.gov/content/pkg/CFR-2016-title11-vol1/xml/CFR-2016-title11-vol1-part110.xml>.
2. Voting and Elections, 52 U.S.C. 30101 § 22 (2014), <https://www.govinfo.gov/content/pkg/USCODE-2014-title52/html/USCODE-2014-title52-subtitleIII-chap301-subchapI-sec30101.htm>.
3. Electioneering Communication, 11 C.F.R. 100 § 29(c)(1) (2010), <https://www.govinfo.gov/content/pkg/CFR-2010-title11-vol1/xml/CFR-2010-title11-vol1-sec100-29.xml>.
4. Voting and Elections, 52 U.S.C. 30104 § f (2014), <https://www.govinfo.gov/content/pkg/USCODE-2014-title52/html/USCODE-2014-title52-subtitleIII-chap301-subchapI-sec30104.htm>.
5. See Electioneering Communication, *supra* note 3.
6. Federal Election Commission, “11 CFR Parts 100 and 114,” *Federal Register* 67, no. 205 (October 23, 2002): 65196–65197, <https://www.govinfo.gov/content/pkg/FR-2002-10-23/pdf/02-26482.pdf>.
7. See Contribution and Expenditure Limitations and Prohibitions, *supra* note 1.



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