

ALERT

# The Dramatic Domestic Effects of the Proposed Honest Ads Act (S. 1989 and H.R. 4077)

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A bipartisan group of U.S. Representatives and Senators recently introduced legislation, dubbed the “Honest Ads Act,” in an effort to prevent foreign influence of elections via certain large online platforms. If enacted, the legislation – often referred to by the name of its three Senate co-sponsors Amy Klobuchar (D-MN), Mark Warner (D-VA), and John McCain (R-AZ) – would supplement the existing foreign national contribution and expenditure prohibition in the Federal Election Campaign Act, as well as the Foreign Agents Registration Act. But in looking deeper at the legislative text, the bill contains a number of dramatic effects on the political activities of Americans, including:

- Registries for online speech concerning issues of public importance;
- Further regulation of grassroots advocacy;
- An expansion of the regulation of election-related online advertisements; and
- Restrictions on state parties wholly unrelated to online speech or foreign interference.

Each of these four areas are discussed in further detail below.

## New “Public File” Recordkeeping Requirements for Online Ads

The bill would create registries of online political and issue advertisements, Internet campaign strategies, and other information about those who communicate their views to citizens online. Under the proposal, large online platforms (e.g., Google, Drudge,

## Authors

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D. Mark Renaud  
Partner  
202.719.7405  
mrenaud@wiley.law  
Andrew G. Woodson  
Partner  
202.719.4638  
awoodson@wiley.law  
Brandis L. Zehr  
Partner  
202.719.7210  
bzehr@wiley.law

## Practice Areas

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Election Law & Government Ethics

USAToday.com, etc.) must collect and make public the following information when they receive requests to purchase certain political and issue advertisements:

- A digital copy of the advertisement;
- A description of the audience targeted by the ad and the number of views generated;
- Information regarding the average rate charged for the ad; and
- The name of the person purchasing the ad, the name/address/phone number of a contact person, and the identities of the CEO, executive committee, or board of directors of such person (if the ad is not requested by or on behalf of a candidate).

While some of these provisions are similar to the public file that broadcasters must maintain for television and radio ads, the new legislation is broader in some respects (such as the requirement to keep a copy of the ad). Moreover, advertisements covered by this requirement include those “relating to any matter of national importance,” which potentially sweeps in large amounts of advocacy, possibly including grassroots lobbying and ballot measure activity at the state/local level.

### **Domestic Effects on Grassroots Advertisers**

In 2002, Congress passed legislation regulating “electioneering communications,” which are television and radio communications that mention or feature a candidate during certain pre-election periods and are targeted to the candidate’s electorate, but do not contain words of express advocacy such as “vote for” or “defeat.” Importantly, Internet advertisements were not subject to regulation as electioneering communications.

Under the proposed legislation, however, if a corporation, trade association, or other entity: (1) is engaged in advertising (including grassroots advertising) via an Internet website or platform with at least 50 million unique monthly visitors, or 50 million monthly users of the platform, in a 12-month period; (2) communicates 30 days before a primary or 60 days before a general election; and (3) mentions any candidate for office in that election, then the advertising would be treated as an “electioneering communication.” Regulation would occur regardless of how innocuous the mention of a candidate is or (apparently) where the ad is targeted. Thus, for example, a Google ad targeted to South Florida that merely mentions U.S. Senator Mitch McConnell (R-KY) or Chuck Schumer’s (D-NY) name in relation to a legislative issue could be regulated as an electioneering communication if the ad ran within 30 days of a primary to be held in Kentucky or New York. The law also would ban coordinating Internet electioneering communications with the named candidates, a political party committee, or their agents, and the entity paying for such ads could be required to disclose some of its donors.

### **Express Advocacy**

While there are some ambiguities in the legislative text, the Honest Ads Act would expand the disclaimer and reporting requirements for Internet communications that expressly advocate the election or defeat of federal candidates. Under existing Federal Election Commission (FEC) rules, Internet communications generally are

not regulated unless they are “communications placed for a fee on another person’s Web site.” The bill would broaden the scope of regulated Internet communications to any “paid Internet, or paid digital communication.” This appears to be a more expansive standard than the FEC’s existing regulatory provision. Thus, groups and individuals that pay blast email service fees, for example, could be subject to reporting/disclaimer requirements if their emails contain regulated content.

In addition, under existing FEC rules, disclaimers are not required for “small items” and where they are “impracticable.” In recent years, the FEC has debated whether and how these disclaimer exemptions apply to Internet communications. The Honest Ads Act takes these exemptions off the table for “any communication which is placed or promoted for a fee” on certain large online platforms. This would overturn FEC Advisory Opinion No. 2010-19, issued to Google several years ago, concerning its online ads. At a minimum under the proposal, covered communications that contain express advocacy would have to include a disclaimer identifying the name of the sponsor on the face of the communication, and a means for recipients to obtain the rest of the FEC-required disclaimer information (i.e., a statement that the communication is not authorized by any candidate or candidate’s committee, as well as the sponsor’s address, Website address, or telephone number).

### **State and Local Political Parties**

An underreported aspect of the Klobuchar-Warner-McCain bill is that it would dramatically narrow the slate card/sample ballot and volunteer materials exemptions for state and local political parties in ways that would inhibit non-Internet political activity. (Currently, the slate card/sample ballot and volunteer materials exemptions allow state and local political parties to pay for slate cards/sample ballots and campaign materials distributed by volunteers (e.g., pins, bumper stickers, handbills, brochures, posters, yard signs, certain mass mailings) in coordination with candidates with minimal regulation.) These exemptions involve core grassroots volunteer activities on behalf of political parties – not Internet communications or digital advertising by unknown actors – and it is unclear why the Klobuchar-Warner-McCain bill is targeting them.