



July 23, 2018

Submitted electronically to comments@elections.ny.gov

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State Board of Elections
40 North Pearl St., Ste. 5
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**Re: Comments on Proposed Rule Making for Implementation of the
Democracy Protection Act**

Mr. Cartagena,

In accordance with the State Administrative Procedures Act,¹ the Campaign Legal Center (“CLC”) respectfully submits these public comments to the New York State Board of Elections (“State Board”) in response to the Notice of Proposed Rule Making for Implementation of the Democracy Protection Act (I.D. No. SBE-21-18-0047-P).²

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening the democratic process across all levels of government. Since the organization’s founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court as well as numerous other federal and state court cases. Our work promotes every citizen’s right to participate in the democratic process and to know the true sources of money spent to influence elections.

I. Digital Campaign Advertising & The Democracy Protection Act

In the 2016 elections, digital campaign advertising surpassed one billion dollars for the first time.³ Approximately \$1.4 billion was spent on digital ads in

¹ N.Y. A.P.A. § 202.

² Vol. XL, Issue 21 N.Y. Reg. 24 (May 23, 2018).

³ Borrell Associates, *The Final Analysis: Political Advertising in 2016*, Jan. 3, 2017,

local, state, and national elections in 2016, a nearly *eightfold* increase over the \$159 million expended for digital advertisements during the 2012 election cycle.⁴ Digital campaign advertising also exceeded the total amount spent for political ads on cable television in 2016 (\$1.35 billion)—another first.⁵ According to one projection, digital advertising in the 2018 midterm elections will reach \$1.9 billion, a 2,539% increase over digital spending for the 2014 midterms.⁶

This rapid growth in internet-based advertising is largely fueled by digital media’s ubiquity and its unique capacity for targeting voters through demographic data available online,⁷ as well as the relatively low effort and cost of placing digital ads.⁸ But campaign finance law has largely failed to keep pace with the breakneck growth of digital advertising in contemporary elections; the lack of meaningful regulation around digital advertising directly facilitated Russia’s illicit campaign to interfere with the 2016 presidential election through social media and other electronic means.⁹ While Congress’s primary attempt to augment federal election law’s coverage of digital advertising—the Honest Ads Act—has stalled,¹⁰ various

<https://www.borrellassociates.com/shop/the-final-analysis-political-advertising-in-2016-detail>.

⁴ *Id.*

⁵ *Id.* Meanwhile, total spending for political advertisements on broadcast television and radio decreased by 20% and 23%, respectively, during the 2016 election cycle. Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, AD AGE (Jan. 3, 2017), <http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>.

⁶ Megan Janetsky, *Low transparency, low regulation online political ads skyrocket*, OPENSECRETS.ORG (March 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>.

⁷ “[C]ampaigns pay data firms, including those that track people’s voting records and party registration, credit scores, shopping data, home ownership and other factors to narrow down which voters they want to target. Once they have a list, campaigns can upload it to Facebook or other social media to match voters with their profiles, which help the data firms determine how best to reach them.” Christine Mai-Duc, *Political campaigns will run more digital ads this year than ever. Here’s how they’ll find you*, L.A. TIMES (March 26, 2018), <http://www.latimes.com/politics/la-pol-ca-digital-ads-targeting-20180326-story.html>.

⁸ As one campaign vendor remarked, “The only thing you need right now to buy political ads on the internet is a credit card and a web browser.” *Facebook’s grip on political ads seen defying stain of data leak*, ADAGE (March 23, 2018), <http://adage.com/article/digital/facebook-s-grip-political-ads-defying-stain-data-leak/312857/>.

⁹ See Amanda Becker, *What we know about U.S. probes of Russian meddling in 2016 election*, REUTERS (May 11, 2017), <https://www.reuters.com/article/us-usa-trump-russia/what-we-know-about-u-s-probes-of-russian-meddling-in-2016-election-idUSKBN1872Y6> (“The Central Intelligence Agency, the Federal Bureau of Investigation and the National Security Agency concluded in a report . . . that Russian President Vladimir Putin ordered a campaign not just to undermine confidence in the U.S. electoral system but to affect the outcome. . . . Putin’s associates hacked information, paid social media ‘trolls’ and backed efforts by Russian government agencies and state-funded media to sway public opinion, the agencies said.”); see also Scott Shane, *These Are the Ads Russia Bought on Facebook in 2016*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html>.

¹⁰ See Heather Timmons & Hanna Kozłowska, *Facebook’s quiet battle to kill the first transparency law for online political ads*, QUARTZ (March 22, 2018), <https://qz.com/1235363/mark-zuckerberg-and-facebooks-battle-to-kill-the-honest-ads-act/> (“But [the Honest Ads Act] hasn’t

states have recently approved legislation that bolsters transparency requirements for digital campaign ads and safeguards against foreign meddling in future elections.¹¹

In March, Governor Cuomo signed the New York State Democracy Protection Act (“Act”), Chapter 59 of the Laws of 2018, Part JJJ. The Act amended New York’s Election Law by improving disclosure of “paid internet or digital advertisements” funded by independent expenditure committees¹² and by prohibiting foreign entities from making independent expenditures in New York elections.¹³ Additionally, the Act requires the State Board to maintain an online database of public records of “paid internet or digital advertisements” related to state and local elections.¹⁴ Pursuant to the Act, the State Board must promulgate administrative rules for establishing online records of digital advertisements, and defining “online platform” within 120 days of the Act’s effective date.¹⁵

On May 23, 2018, the Secretary of State published a Notice of Proposed Rule Making for Implementation of the Democracy Protection Act in the New York State Register on behalf of the State Board.¹⁶ In accordance with authority granted under N.Y. Elec. Law §§ 14-107(5-a), 14-107-b and 3-102(17), the State Board’s Proposed Rule would amend existing regulations concerning independent expenditure reporting and create a new rule for the disclosure of “campaign materials,” including paid digital advertising. Pursuant to the State APA, the 60-day period for submission of public comments on the State Board’s Proposed Rule ends on July 23, 2018.¹⁷

II. CLC Recommendations for the Proposed Rule

The Campaign Legal Center supports the State Board’s efforts to implement the Democracy Protection Act and improve disclosure of digital campaign advertising. We make the following recommendations in an effort to enhance the effectiveness of the Proposed Rule. The recommendations are organized by the specific rule section to which they pertain, and, for certain sections, we have also included suggested textual revisions to illustrate our recommendations. Our textual

moved from the committee on ‘Rules and Administration’ since [it] was first introduced, thanks in part to Facebook’s lobbying efforts.”).

¹¹ See Online Electioneering & Transparency Act, H.D. 981, 2018 Leg., 438th Sess. (Md. 2018), (requiring disclosure of “qualifying paid digital communications” and public record-keeping by “online platforms”); H. 828, 2018 Vt. Act 129 (amending definitions of “electioneering communication” and “mass media activity” to include “electronic or digital communications” and “Internet advertisements,” respectively); H. 2938, 65th. Leg., Reg. Sess. (Wash. 2018) (amending definitions of “electioneering communication” and “political advertising” to include any “digital communication”).

¹² N.Y. Elec. Law §§ 14-107(1)(a); 14-107(2); 14-107(4)(a); 14-107(5); 14-106.

¹³ N.Y. Elec. Law § 14-107(3).

¹⁴ N.Y. Elec. Law § 14-107(5-a).

¹⁵ *Id.*; N.Y. Elec. Law § 14-107-b(2).

¹⁶ Vol. XL, Issue 21 N.Y. Reg. 24 (May 23, 2018).

¹⁷ N.Y. APA § 202(1).

suggestions are superimposed on the original text of the Proposed Rule in red strikethrough or underline.

A. Section 6200.10(b)(1): Definition of “Independent Expenditure”

The Proposed Rule amends the regulatory definition of “independent expenditure” to cover “any paid internet or digital advertisement targeted to 50 or more members of a General Public Audience” that meets the term’s content and timing criteria, and is not excluded under one of the definition’s exceptions. The Proposed Rule’s definition hews closely to the “independent expenditure” definition in Elec. Law § 14-107, as amended by the Act, though there are some technical edits that would serve to clarify this important term.

The definition’s qualification that a “paid internet or digital advertisement” must be “targeted to 50 or more members of the General Public Audience” would fit more cohesively within the definition of “paid internet or digital communication” in Proposed Rule section 6200.10(b)(11). This modification would both streamline the “independent expenditure” definition and consolidate the conditions establishing a “paid internet or digital advertisement” into a single definition.

Suggested textual revisions:

“(b)(1) Independent Expenditure means an expenditure made by an independent expenditure committee conveyed to 500 or more members of a General Public Audience or any paid internet or digital advertisement ~~targeted to 50 or more members of the General Public Audience~~, provided such expenditure is in a form described in subparagraph (i), ~~and~~ meets one of the three content and timing criteria described in subparagraph (ii), and is not a communication exempted from the definition of independent expenditure by paragraph (2) of this subdivision or other provision of law.”

B. Section 6200.10(b)(11): Definition of “Paid internet or digital advertisement”

A “paid internet or digital advertisement” is defined in the Proposed Rule as “any digitally displayed advertising paid for by an independent expenditure committee that exists on or is transmitted via the Internet,” including “banner advertisements;” “image, video, or interactive media advertisements;” “paid digital posts or advertisements on social networking sites;” “paid audio content found on the Internet;” and “any other paid text image, video, or audio.” As previously discussed, we advocate moving the 50-person “targeting” prong for digital campaign advertising from the “independent expenditure” definition into the definition of “paid internet or digital advertising.”

Additionally, we are recommending certain changes to the Proposed Rule’s examples of “paid internet or digital advertisements” to provide the rule with greater flexibility to accommodate the rapidly evolving digital landscape. For example, in lieu of “banner advertisements,” we recommend using the broader term

“display advertising,” which encompasses banner advertisements as well as other types of promotional advertising.¹⁸ We also advise listing other common modes of digital advertising in the examples, including “search engine marketing,” “native advertising,” and “sponsorships.”¹⁹

The Proposed Rule currently provides an exception in the definition of “paid internet or digital advertisement” for “advertisements that are purchased from a satellite, cable or terrestrial radio or television broadcaster and are included in an audio or video stream on the Internet in the same format as the radio or television broadcast version of the ad shall not be considered a paid internet or digital advertisement.” Generally, an exemption for advertisements delivered as part of online streams of cable, satellite, or broadcast programming is beneficial, since these advertisements are already subject to disclosure requirements as television and radio communications.²⁰ But this exception must be carefully crafted to prevent creating a regulatory loophole for video and audio advertisements separately disseminated both online and on television or radio. For example, the Proposed Rule should regulate a 30-second political advertisement promoted on YouTube as a “paid internet or digital advertisement,” even if the same advertisement is also aired on a cable network. To this end, we recommend certain edits to the exception’s text in order to accentuate its limited application to online streaming of cable, satellite, or broadcast content.

Suggested textual revisions:

“(11)(i) Paid internet or digital advertisement means any digitally displayed advertising paid for by an independent expenditure committee that:

(a) exists on or is transmitted via the Internet; and

(b) is targeted to 50 or more members of a general public audience.

(ii) ~~Such advertising~~ A paid internet or digital advertisement shall include, but not be limited to:

~~(i) (a) banner advertisements~~ display advertising;

~~(ii) (b)~~ image, video, audio, or interactive media advertisements;

~~(iii) (c)~~ paid digital posts or advertisements or promoted content on social

¹⁸ For examples of the range of “display advertising” formats, see Mike O’Brien, *A beginner’s guide to display advertising*, CLICKZ (Dec. 1, 2015), <https://www.clickz.com/a-beginners-guide-to-display-advertising/89821/>. See also *What is Rich Media?*, DoubleClick Creative Solutions, <https://support.google.com/richmedia/answer/2417545?hl=en> (last visited June 22, 2018).

¹⁹ Our suggested additions are used in the definition of “qualified political advertisement” in the federal Honest Ads Act. S. 1989, 115th Cong., § 8(a)(4) (2017) (“[T]he term ‘qualified political advertisement’ means any advertisement (including search engine marketing, display advertisements, video advertisements, native advertisements, and sponsorships) . . .”).

²⁰ N.Y. Elec. Law § 14-107(a)(i) (defining “independent expenditure” to include disbursements for “an audio or video communication via broadcast, cable or satellite”).

networking sites;

(iv) paid audio content found on the Internet; and (v) any other paid text, image, video, or audio;

(d) search engine marketing;

(e) native advertising; and

(f) sponsorships.

(iii) For purposes of this part, advertisements that are purchased from a satellite, cable or terrestrial radio or television broadcaster and are included in an audio or video stream on the Internet ~~in the same format as the radio or television of the satellite, cable, radio, or television broadcast version of the ad~~ shall not be considered ~~a~~ paid internet or digital advertisements; provided that, the advertisements otherwise comply with the requirements of EL 14-107 for satellite, cable, radio, or television broadcast advertisements.”

C. Section 6200.10(b)(12): Definition of “Online platform”

In the Proposed Rule, an “online platform” is defined as “a public-facing Internet Web site, web application, or digital application, including a social network, ad network or search engine, which sells political advertisements and has 50,000,000 or more unique monthly United States visitors or users for a majority of months during the preceding 12 months.” This regulatory definition integrates certain criteria from the Act, which the Board must consider in promulgating a regulatory definition of “online platform.”²¹

The State Board should consider decreasing the 50,000,000 monthly U.S. visitor threshold in this definition. The Election Law, as amended by the Act, obligates “online platforms” only to verify independent expenditure purchases on the platform, a fairly modest administrative undertaking. The State Board should contemplate whether to regulate more entities as “online platforms,” by reducing the monthly visitor threshold, since the attendant legal requirements of “online platform” status are not onerous. For example, recognizing differences between digital advertising in federal races versus state and local elections, Maryland’s legislators set a threshold of 100,000 unique monthly U.S. visitors, on average over the previous 12 months, in the definition of “online platform” within the recently-

²¹ See N.Y. Elec. Law § 14-107-b(2) (“The state board of elections shall promulgate regulations defining the scope of the term “online platform” as used in this section. In promulgating such regulations, the state board shall take into account the number of unique United States visitors to the platform and the extent to which the platform publishes paid internet or digital communications. Any public-facing website, web application, or digital application, including, but not limited to, a social network, ad network, or search engine, may be designated an “online platform” pursuant to the state board’s regulations. Such regulations shall be promulgated no later than one hundred twenty days after the effective date of this section.”).

enacted Online Electioneering Transparency and Accountability Act.²² The State Board should determine whether a comparable threshold for “online platforms” is appropriate for New York’s state and local elections.

D. Section 6200.10(b)(13): Definition of “Ad network”

The Proposed Rule defines “ad network,” subsumed under the term “online platform,” to encompass “any network, advertising agency, advertiser or third party advertisement serving company that buys and sells advertisement space on behalf of third party websites or social media sites.” While the digital advertising business is highly consolidated from end-to-end within closed platforms like Facebook and Google, the process is often much less integrated for online ads placed through other digital avenues. Between the initial purchaser (e.g., a committee paying for a digital advertisement) and ultimate publisher (e.g., the website displaying the advertisement), there are typically multiple intermediaries—each with a particularized role—involved in the advertising chain.

For instance, demand-side platforms (“DSPs”) use automated software to purchase advertising space on behalf of prospective advertisers,²³ while supply-side platforms (“SSPs”) use software to sell advertising space on behalf of websites and other digital content publishers.²⁴ Many transactions between DSPs and SSPs occur through ad exchanges, which operate as marketplaces for online publishers’ inventory of advertising space. Crafting a regulatory definition that distinguishes appropriately between each unit involved in the digital advertising business is difficult due to the diverse and specialized nature of these intermediate entities. Moreover, any attempt to define “ad networks” risks becoming obsolete in the near future because of constant evolution in digital processes.

Thus, we advise the State Board to remove the definition of “ad network” from the Proposed Rule. Instead, the State Board should assess, through the advisory opinion process, whether particular categories of entities selling or purchasing digital advertising qualify as “ad networks” for purposes of the definition of “online platform.” This approach will engender flexibility in the Proposed Rule’s application to various advertising business models and will allow for more tailored enforcement over time.

E. Section 6200.10(c)(2): Prohibition on Registration by Foreign Entities

Section 6200.10(c)(2) bars any “foreign national, government, instrumentality or agent” from registering as an independent expenditure committee. While the Election Law delineates the meaning of “foreign national” by reference to federal law,²⁵ the other foreign entities described in this paragraph are not defined by state

²² H.D. 981, 2018 Leg., 438th Sess. § 1(DD-1) (Md. 2018), http://mgaleg.maryland.gov/2018RS/Chapters_noln/CH_834_hb0981e.pdf.

²³ *Here is a quick explanation of how a demand-side platform, or DSP, works*, ADAGE (July 22, 2015), <http://adage.com/lookbook/article/dsp/demand-side-platforms-work/299456/>.

²⁴ *Id.*

²⁵ See N.Y. Elec. Law § 14-100(17) (“[F]oreign national’ means foreign national as such term is defined by subsection (b) of section 30121 of title 52 of the United States code.”)

law or the Proposed Rule. To provide clarity on the scope of these terms—and to ensure a comprehensive and effective prohibition on foreign entities’ spending in state elections—it would be beneficial to add definitions for “foreign government” and “foreign instrumentality or agent” to the Proposed Rule.²⁶

A sound definition of “foreign government” should encompass governmental units and officials of a foreign country, foreign political parties, and corporate entities controlled by foreign governments or officials. The federal Foreign Agent Registration Act includes definitions for each of these entities, which can be incorporated by cross-reference.²⁷ Likewise, the term “foreign instrumentality or agent” should embrace corporations and other entities owned or controlled by foreign nationals to protect against attempts to influence New York elections through non-governmental organizations. To this end, we suggest adding the definitions below as new subparagraphs (c)(2)(i) and (ii).

Suggested textual revisions:

“(i) Foreign government means:

(a) a government of a foreign country or an official of the government of a foreign country, as defined by subsection (e) of section 611 of Title 22 of the United States Code;

(b) a foreign political party, as defined by subsection (f) of section 611 of Title 22 of the United States Code; or

(c) a corporation principally owned or controlled by the government of a foreign country or an official of the government of a foreign country.

(ii) Foreign instrumentality or agent includes, but is not limited to, any entity in which:

(a) a foreign national or foreign owner holds, owns, controls, or otherwise has directly or indirectly acquired beneficial ownership of equity or voting shares equal to or greater than 5 percent of the total equity or voting shares;

(b) two or more foreign nationals or foreign owners hold, own, control, or otherwise have directly or indirectly acquired beneficial ownership of equity or voting shares in an aggregate amount that is equal to or greater than 20 percent of the total equity or outstanding voting shares, but not including any ownership or equity interest owned through United States mutual or pension funds; or

(c) any foreign national or foreign owner participates, directly or indirectly, in the process of corporate decision-making regarding independent expenditures.

(d) For purposes of this section, foreign owner means any entity in which a foreign national, holds, owns, controls, or otherwise has directly or indirectly acquired beneficial ownership or equity of voting shares in an amount equal

²⁶ Alternatively, these definitions could be added within Proposed Rule section 6200.10(i), which prohibits any “foreign national, government, instrumentality or agent” from making independent expenditures in New York’s state and local elections more generally.

²⁷ See 22 U.S.C. § 611.

to or greater than 50 percent of total equity or outstanding voting shares, but not including any ownership or equity interest owned through United States mutual or pension funds.”

F. Section 6200.10(d)(3): Weekly Disclosure Statements of Paid Internet or Digital Advertisements

Subparagraph (3) of section 6200.10(d) in the Proposed Rule requires an independent expenditure committee to report, on its weekly disclosure statements, any “expenditures made by such ~~person~~ committee over \$5,000 and *any independent expenditure in the form of a paid internet or digital advertisement over \$500*” made in the reporting period (emphasis added). Because a “paid internet or digital advertisement,” by definition, is always an “independent expenditure,”²⁸ we suggest eliminating this redundant language to prevent confusion about the meaning of “paid internet or digital advertisement.” In lieu of the existing text, the language should instead state any “expenditure made by such ~~person~~ committee over \$5,000 and *any paid internet or digital advertisement over \$500.*”

G. Section 6200.10(f)(2)(ii): Navigation to Full Attribution

Under the Proposed Rule, a “paid internet or digital advertisement” without video or audio components that cannot fit a complete attribution statement “due to external character or space constraints” must include an “adapted attribution.” The adapted attribution would have to contain an indicator allowing the ad’s recipient to access the full attribution statement “by navigating no more than one step away from the adapted attribution.”

The inclusion of a narrow “adapted attribution” option in the Proposed Rule for digital campaign advertisements produces the flexibility necessary to accommodate new formats of online advertising for which technological limitations render provision of a full attribution impossible. It is important, however, that ad recipients not be subject to a barrage of superfluous and distracting information when they seek to access the full attribution statement through an adapted attribution. To ensure the adapted attribution directly delivers the critical information required by law, the Proposed Rule should specify that the indicator must navigate recipients to the full statement without having to sift through additional content.²⁹ Hence, we suggest adding the following text to the final sentence in section 6200.10(f)(2)(ii):

²⁸ N.Y. Elec. Law § 14-107(1)(a)(“Independent expenditure” means an expenditure made by an independent expenditure committee . . . in the form of any paid internet or digital advertisement targeted to fifty or more members of a general public audience”).

²⁹ The federal Honest Ads Act has a similar requirement for disclaimer statements on digital advertising “disseminated through a medium in which the provision of all of the information specified in this section is not possible.” In relevant part, that bill would require such advertising to “provide a means for the recipient of the communication to obtain the remainder of the information required under this section with minimal effort *and without receiving or viewing any additional material other than such required information.*” Honest Ads Act, S. 1989, 115th Cong. § 7(e)(1)(B).

“The technological mechanism for an adapted attribution must be associated with the indicator and must allow a recipient of the communication to locate the full attribution by navigating no more than one step away from the adapted attribution and without receiving or viewing any additional material other than the full attribution required by this section.”

H. Section 6200.10(g): Public Records of Paid Internet or Digital Advertisements

The Proposed Rule requires “[t]he state [to] maintain and make available online for public inspection, in addition to all other information required by this Part, a complete record of paid internet or digital advertisements filed by independent expenditure committees, in a machine readable format.” Each public record of a digital advertisement would have to provide “the registration information required by Election Law § 14-107(3) (a) and (b), a copy of the independent expenditure committee’s registration documents and a digital copy of such paid internet or digital advertisement.”³⁰ The creation of a centralized, publicly-accessible database of digital campaign advertising is an important step toward addressing some of the regulatory issues posed by the digital realm. Specifically, a repository of digital ad records can provide voters with access to greater information about ads targeted to them, including details about the ads’ sources, and also facilitate meaningful enforcement of the law, especially the prohibition on foreign spending in U.S. elections.

This provision of the Proposed Rule essentially tracks the minimum requirements of the Act. But the Act also expressly directs the State Board to promulgate rules “necessary to comply” with its new record-keeping requirements.³¹ And, more generally, the Election Law grants broad authority to the State Board to issue regulations for “election campaign practices and campaign financing practices consistent with the provisions of law.”³²

We recommend that the State Board use this authority to ensure that the public file for each digital ad contains certain information to help voters make informed assessments. Unlike television and radio advertising, many digital ads are specifically targeted to, and only viewable by, the individuals to whom they are

³⁰ See N.Y. Elec. Law § 14-107(3)(a)-(b) (requiring each “person” who registers as an independent expenditure committee to provide, upon registration, information regarding “(a) Where the person making the statement is an individual, the name, address, occupation and employer of the person” or “(b) Where the person making the statement is an entity, the name and employer of any individual who exerts operational or managerial influence or control over the entity, as well as any salaried employee of the entity. The disclosures required by this paragraph shall include the name of at least one natural person.”).

³¹ N.Y. Elec. Law. § 14-107(5-a).

³² N.Y. Elec. Law § 3-102(1); see also *id.* § 3-102(17) (authorizing the State Board to “perform such other acts as may be necessary to carry out the purposes of this chapter.”); *Brennan Ctr. for Justice v. N.Y. State Bd. of Elections*, 159 A.D. 3d 1301, 1303 (N.Y. App. Div. 2018) (recognizing “the Legislature has conferred the authority to make directions pertaining to campaign financing practices upon [the State Board]”).

disseminated. The unique characteristics of digital advertising make it more difficult for the great majority of the public that is *not* targeted by a particular ad to view the ad—much less to discern who is responsible for it—and for law enforcement agencies to ensure advertisers’ compliance with disclosure requirements, bans on foreign electioneering, and other laws.

Accordingly, in addition to the sponsoring committee’s registration information and a copy of the actual advertisement, each record should include, at a minimum,³³ the total amount paid for the advertisement and the date of such payment, and identification of each candidate or ballot proposal to which the advertising relates. Administratively, this supplementary information would not be difficult to include for each ad record since independent expenditure committees must already report these details on regular disclosure filings with the State Board.³⁴

Our suggested revisions would enhance the informational utility of ad records by cataloguing cost and timing information for each digital advertisement and by disclosing which candidates and ballot initiatives are the focus of digital ad campaigns. The compilation of this information within a centralized database will help the public to evaluate a particular advertisement within a larger context, especially when an independent group has funded numerous advertisements over a prolonged period, and ultimately will aid voters in their assessment of the ad’s message.

Suggested textual revisions:

“(g) The ~~state~~ State Board shall maintain and make available online for public inspection, in addition to all other information required by this Part, a complete record of ~~each~~ paid internet or digital advertisements filed by independent expenditure committees, in a machine readable format, ~~for a period of no less than five years from the date of such advertisement’s filing.~~”

(1) ~~Such~~ Each record of a paid internet or digital advertisement shall include:

(i) the registration information required by Election Law § 14-107(3) (a) and (b) ~~for the independent expenditure committee;~~

(ii) a copy of the independent expenditure committee’s registration documents ~~and;~~

(iii) a digital copy of such paid internet or digital advertisement;

³³ Comparable legislation requires the inclusion of more information in records of digital campaign advertising. For example, the federal Honest Ads Act would require each record of a “qualified political advertisement” to include: a digital copy of the advertisement; a description of the ad’s target audience; the number of views generated by the ad; the date and time that the ad is first displayed and last displayed; the average rate charged for the ad; and the name of and office sought by each candidate referenced in the ad. S. 1989, 115th Cong., § 8(j)(2).

³⁴ N.Y. Elec. Law §§ 14-107(4)(b)(ii)(1)-(2).

(iv) the total amount paid by the independent expenditure committee for the advertisement and the date such payment was made; and

(v) the election to which the advertisement pertains, the name of each clearly identified candidate or ballot proposal referenced, and, if applicable, whether the candidate or ballot proposal is supported or opposed.

(2) For purposes of paragraph (1) of this subdivision, multiple versions of a paid internet or digital advertisement that contain no material differences, such as versions that differ only in size, color, font or layout, shall be considered a single paid internet or digital advertisement.”

I. Section 6200.11: Disclosure of Political Communications & Campaign Materials

The Proposed Rule would add new section 6200.11, concerning disclosure of “campaign materials.” This section reflects the Act’s amendments to “political communication” filings under Elec. Law §§ 14-106 and 14-107. As drafted, the Proposed Rule would require *all* political committees to file, along with post-election reports, copies of political communications paid for by the committees in connection with an election, including “reproductions of statements or information published to 500 or more members of a general public audience or paid internet or digital, by computer or other electronic device including but not limited to electronic mail or text message.”

An independent expenditure committee also would have to submit copies of political communications, including “paid internet or digital advertisements targeted to a general public audience of 50 or more persons,” to the State Board with its weekly or 24-hour disclosure statements. Independent expenditure committees would have to file copies of digital advertising via email in a form specified by the State Board, and include “a reasonable description of any visual elements” for digital advertisements with video components; screenshots of digital advertisements without audio or visual components; and each image in the advertisement for “dynamic” digital advertising without a video component, such as “advertisements with animation, or interactive advertisements that change when a viewer views or interacts with the advertisement.”

The coverage of this section, as structured in the Proposed Rule, is not sufficiently clear. In particular, the extent to which any “paid internet or digital” material is regulated as a “political communication”³⁵ under paragraph (a) is

³⁵ The corresponding section of the Election Law is also ambiguous. *See* N.Y. Elec. Law § 14-106 (requiring political committees’ post-election reports to “be accompanied by a copy of all broadcast, cable or satellite schedules and scripts, *paid internet or digital*, print and other types of advertisements, pamphlets, circulars, flyers, brochures, letterheads and other printed matter purchased or produced, and reproductions of statements or information published to five hundred or more members of a general public audience by computer or other electronic device including but not limited to electronic mail or text message, purchased . . .”) (emphasis added).

ambiguous. Likewise, it is unclear which types of communications must be “published to 500 or more members of a general public audience” in order to qualify as a “political communication.”³⁶

To bring greater clarity to the filing requirements for political communications, we suggest separately numbering each type of “political communication” that must be filed under paragraph (a). By individually listing each type of “political communication,” the Proposed Rule’s substantive requirements would become more clear, and the application of particular conditions to certain communications, such as the requirement for an electronic communication’s publication to 500 or more general public audience members, would be more apparent.

We also recommend some alterations to paragraphs (b) and (c), which concerns filing obligations for independent expenditure committees. First, we recommend removing the reference to disclosure statements being “preserved by the officer with whom or the board with which” the committee’s disclosure statements are filed; since independent expenditure committees only file disclosure statements with the State Board,³⁷ this sentence could simply state “preserved by the State Board.” Next, we suggest requiring the State Board to preserve copies of “paid internet or digital advertisements” for at least five years. This addition would harmonize this section with the State Board’s obligation to maintain public records of paid internet or digital advertisements for a period of five years, pursuant to Elec. Law § 14-107(5-a).

In paragraph (c), we suggest amending the text regarding email submissions of digital advertisement copies to “an electronic format specified by the State Board.” The Proposed Rule’s current language, referring to an email format “that is accessible and can be read by a screen reader,” is likely unnecessary and restricts the State Board’s capacity to specify other means of electronic submission in the future.

Suggested textual revisions:

“Section 6200.11. Disclosure of Campaign Materials Disclosure of Political Communications / ‘Campaign Materials’.

(a) All political committees required to file primary, general ~~and~~ or special election reports, must at the same time the applicable post-election campaign financial disclosure report is due and made, submit copies of all the filer's political

³⁶ The State Board’s Campaign Finance Handbook explains that Elec. Law § 14-106 requires political committees to file copies of the following materials: “all broadcast, cable or satellite schedules and scripts;” “internet, print and other types of advertisements, pamphlets, circulars, flyers, brochures, letterheads and other printed matter;” and “reproductions of statements or information published to 500 or more members of a general public audience by computer or other electronic device including but not limited to electronic mail or text message.” N.Y. State Bd. of Elections, Campaign Finance Handbook 18 (2017).

³⁷ N.Y. Elec. Law § 14-107(6).

communications, also known as campaign materials, ~~associated with that election, purchased in connection with such election by or under the authority of the person filing the statement or the committee or the person on whose behalf it is filed, as the case may be.~~ Copies shall include: (1) a copy of all broadcast, cable or satellite schedules and scripts; (2) internet, print and other types of advertisements, pamphlets, circulars, flyers, brochures, letterheads and other printed matter purchased or produced; ~~and~~ (3) reproductions of statements or information published to 500 or more members of a general public audience ~~or paid internet or digital,~~ by computer or other electronic device including, but not limited to, electronic mail or text message; ~~and~~ (4) ~~any paid internet or digital advertisement, purchased in connection with such election by or under the authority of the person filing the statement or the committee or the person on whose behalf it is filed, as the case may be.~~ Such copies, schedules and scripts shall be preserved by the officer with whom or the board with which it is required to be filed for a period of one year from the date of filing thereof. (EL 14-106)

(b) Independent expenditure committees must file at the same time as any required financial statement disclosures, including any weekly or 24 hour disclosures, a copy of all political communications paid for by the independent expenditure ~~committee,~~ including but not limited to: (1) broadcast, cable or satellite schedules and scripts, advertisements, pamphlets, circulars, flyers, brochures, letterheads and other printed matter; (2) any paid internet or digital advertisement targeted to a general public audience of 50 or more persons; and (3) any statements or information conveyed to 1,000 or more members of a general public audience by computer or other electronic devices. Such copies, schedules and scripts shall be preserved by ~~the officer with whom or the board with which it is required to be filed the State Board~~ for a period of one year from the date of filing thereof, ~~or, in the case of a paid internet or digital advertisement, for a period of at least five years from the date of filing thereof.~~ Any political communication filed by an independent expenditure committee with a Weekly or 24 hour disclosure statement shall not be required to be again filed with the post election report, and such previously filed political communication shall be deemed filed therewith.

(c) Copies of any paid internet or digital advertisement, as required by paragraph b of this section, shall be submitted to the State Board of Elections ~~via e-mail in a an electronic~~ format specified by ~~the board of elections the State Board that is accessible and can be read by a screen reader.~~ For the purposes of this section, copies of any paid internet or digital advertisement shall include: (1) scripts for any paid internet or digital advertisement with an audio ~~and/or~~ video component which shall include a reasonable description of any visual elements; (2) screenshots of any paid or digital advertisement without an audio ~~and/or~~ video component; (3) for paid internet or digital advertisements without a video component that are dynamic, such as advertisements with animation, or interactive advertisements that change when a viewer views or interacts with the advertisement, each image in the advertisement.”

Conclusion

In conclusion, we respectfully urge the State Board to consider adoption of our recommendations for the Proposed Rule as outlined in these comments. We appreciate the opportunity to submit public comments regarding this important rule making, and we would be happy to answer any questions or provide additional information to assist the State Board.

Respectfully submitted,

/s/

Adav Noti
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/s/

Austin Graham
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