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THE HONEST ADS ACT

Longstanding U.S. law prohibits any foreign national from financially influencing U.S. elections.¹ But the 2016 campaign exposed glaring holes in our ability to police foreign intervention in U.S. elections, particularly when it comes to online electioneering.

The conclusion of Special Counsel Robert Mueller’s report was unequivocal: “The Russian government interfered in the 2016 presidential election in sweeping and systematic fashion,”² and a key method of that interference was “a social media campaign designed to provoke and amplify political discord in the United States.”³ This social media campaign included spending six figures on Facebook ads, many of which “explicitly supported or opposed a presidential candidate.”⁴ But because Congress has not updated campaign finance disclosure laws for the digital age, those ads circulated undetected and undeterred.

The Honest Ads Act, introduced in the Senate and House with bipartisan sponsorship, offers Congress an opportunity to close those gaps in our laws that Russia exploited in 2016.⁵

Under existing federal law, a TV ad that identifies a candidate and is run near an election is subject to FEC and FCC reporting requirements and must include on-ad disclaimers stating who paid for it. But an identical ad run online can escape those same disclosure and disclaimer requirements. Thanks to outdated statutes and FEC regulations, a political ad subject to legal transparency requirements when aired on TV can remain shrouded in secrecy when that same ad is run online.

The Honest Ads Act would close this digital loophole by requiring reporting and disclaimers for digital ads that mention a candidate shortly before an election. The bill creates a public file of digital political ads and strengthens protections against the specific threat of foreign interference.

The key provisions of the Honest Ads Act are summarized below.

The Honest Ads Act ensures that digital political ads are subject to disclosure requirements.

The Act would expand the definition of “electioneering communications”—meaning ads run near an election that name a candidate, but that don’t expressly tell recipients to vote for or against a candidate—to include paid online ads.⁶

Throughout the 1980s and 1990s, advertisers evaded disclosure requirements by spending millions on so-called “issue ads” that attacked or supported a candidate but stopped short of expressly telling viewers to vote for or against candidates. To close this issue ad loophole, the 2002 McCain-Feingold law created a new category of expenditures called “electioneering communications,” defined as ads (1) naming a candidate and (2) broadcast in the candidate’s geographic area (3) within 30 days of the candidate’s primary or 60 days of the general election.⁷

Under current law, an electioneering communication must carry an on-ad disclaimer identifying its sponsor and, once more than \$10,000 is spent, the sponsor must file a report with the FEC describing the amount spent on the ad, the candidate supported or opposed, and the names of contributors who gave for the purpose of furthering the communication.⁸

However, the current definition of “electioneering communication” omits digital ads. Many of Russia’s ads that Mueller’s report highlighted “overtly opposed” a candidate, but may not have expressly advocated for the defeat of that candidate.⁹ If such candidate-focused ads had run on TV, they would have been subject to legal disclosure requirements because they would have qualified as electioneering communications. But because they ran online, they were not.

The Honest Ads Act would close this loophole by extending the definition of “electioneering communications” to digital advertising (and dropping the geographic requirement).¹⁰ As a result, paid digital advertising that mentions a candidate 30 days before a primary election, or 60 days before a general election, would be subject to disclaimer and reporting requirements.

The Honest Ads Act clarifies disclaimer requirements for digital ads and prohibits the FEC from carving out exceptions.

Disclaimers stating a political message is “paid for by...” a candidate, party committee, or PAC are ubiquitous on TV, radio, and print ads during election season. Digital ads, however, have often omitted the disclaimers that accompany political advertisements run on any other medium. This is largely because the FEC has failed to provide guidance as to how the disclaimer rules—which were written many years ago with only broadcast and print media in mind—apply to modern digital communications.

The Honest Ads Act makes clear that digital political ads are subject to the same disclaimer requirements as offline communications.¹¹ The Act also clarifies that the FEC may not exempt digital ads from these requirements merely because some of them are smaller than traditional TV or print ads.¹²

The Honest Ads Act creates a public “political ad file” for digital ads.

Under current law, television and radio ads are subject to an additional layer of transparency through the political ad file, a Federal Communications Commission (FCC) requirement that broadcasters make public certain information about who paid for an ad and how much they spent. No such requirement currently exists for digital ads. Moreover, television and radio ads are widely distributed and the content usually available to the press and public; many digital ads, in contrast, are only viewable by the targeted audience.

This lack of transparency makes it very difficult to detect illegal spending by foreign actors or to detect other violations of federal campaign finance law.

The Honest Ads Act would require that large platforms with more than 50 million monthly visitors maintain a digital copy of ads that pertain to a “national legislative issue of public importance”—the same standard the FCC uses for TV and radio ads, and the same standard Facebook has been applying for its own political ad archive—from advertisers whose spending exceeds \$500 on the platform during a single year.¹³

The political ad file is maintained by the platform itself, and would contain a digital copy of the ad; a description of the targeted audience for the ad; the dates and times the ad began and finished running; the number of views of the ad; the federal candidate, office, election, or “national legislative issue of public importance” the ad refers to; and basic information about the ad purchaser.¹⁴

To ensure the files are easily usable and searchable, the Act also requires the FEC to write regulations standardizing the files’ data formats and search interfaces.¹⁵

The Honest Ads Act requires that TV and radio stations and online platforms “shall make reasonable efforts” to ensure that foreign entities are not purchasing political ads, directly or indirectly.

Current law prohibits a U.S. person from providing “substantial assistance” to a foreign national who seeks to spend in a U.S. election, but that provision is triggered only when the U.S. person already has reason to suspect that s/he is dealing with a foreign actor.¹⁶ The Honest Ads Act would strengthen this provision by requiring major sellers of online advertising to take commercially reasonable, affirmative measures to avoid selling political ads to foreign nationals.¹⁷

Had the Honest Ads Act been law in 2016, journalists, watchdog groups, and law enforcement would have had access to the tools to uncover the Russian influence effort sooner—or it may have been deterred in the first place.

1 52 U.S.C. § 30121.
2 SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE
2016 PRESIDENTIAL ELECTION: VOLUME 1, at 1 (March 2019) (“Special Counsel’s Report: Volume 1”).
3 *Id.* at 4.
4 *Id.* at 25.
5 Honest Ads Act, S. 1356, 116th Cong. (2019).
6 *Id.* § 6.
7 52 U.S.C. § 30104(f)(3)(A)(i).
8 52 U.S.C. § 30104(f)(1)-(2).
9 Special Counsel’s Report: Volume 1 at 25.
10 Honest Ads Act, S. 1356, 116th Cong. § 6 (2019).
11 *Id.* § 7.
12 *Id.* § 7(b)(2).
13 *Id.* § 8.
14 *Id.*
15 *Id.* § 8(b).
16 11 C.F.R. § 110.20 (h).
17 Honest Ads Act, S. 1356, 116th Cong. § 9 (2019).