



Illuminating Dark Digital Politics

Campaign Finance Disclosure for the 21st Century

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About MapLight

MapLight is a nonpartisan nonprofit that seeks to achieve a government that (actually) works for the people. We illuminate the influence of money in politics, facilitate informed voting and civic engagement, and advance reforms that make government more responsive to the people. Our innovative database, online tools, and original research expose the links between political money and legislative outcomes, helping to illuminate hidden influences on elected officials.

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Online Version

A version of this paper is available for comment on Madison, an interactive platform that allows users to provide annotations and feedback on issues related to public policy.

Introduction

In September 2017, Facebook revealed to Congress that false accounts affiliated with a Russian propaganda company had spent approximately \$100,000 on ads in the months surrounding the 2016 election.¹ These accounts purchased 3,000 ads meant to inflame political tensions – and the ads reached an estimated 10 million people in the U.S.² Similar discoveries have since been made by Google and Twitter.³ Although Facebook claims that the majority of the ads it found did not explicitly reference the presidential election or candidates, there is no telling what impact they had on voters, who had no way of knowing the true sources behind the advertisements they were shown.⁴ While this scandal raises questions about foreign interference in U.S. elections, it also points to an underlying problem with our political system: even as more of American political life moves online, we have not implemented policies to ensure transparency for all political spending on the internet.

The lack of a 21st-century disclosure system is all the more stark when considering the pace with which communication is moving online. Eighty-eight percent of American adults reported using the internet in 2016, up from 52% in 2000.⁵ Many people now rely heavily on online sources for media consumption; according to Pew Research Center, as of August 2017, 43% of Americans report “often getting their news online,” up from 38% in 2016.⁶ One consequence of this shift is that candidates, parties, and outside spending groups are increasingly spending money on online advertising to reach and influence voters. As a result, there has been a rapid proliferation of new digital advertising technologies, platforms, and intermediaries in the political space.

In fact, the Russian ad buys on Facebook were just a drop in the bucket relative to total online political spending. According to one estimate, over \$1.4 billion was spent on digital ads in the 2016 elections, a significant increase over previous cycles.⁷ However, even this oft-cited estimate is likely inaccurate, because existing campaign finance disclosure requirements simply do not provide adequate information about spending by political actors in the digital arena. This lack of transparency means that voters are left in the dark about who is attempting to influence them, and there is little accountability for bad actors – including foreign nationals, who are legally barred from spending on U.S. elections. In this context, trust in democratic processes erodes. In order to provide sufficient transparency and accountability to safeguard our political system, we must address these challenges at every level of government, from the federal to the local.

This paper examines how dark digital advertising has impacted the political landscape, identifies gaps in current disclosure policy, and presents recommendations to address those gaps. Our findings are based on interviews with eight digital campaign practitioners across the political spectrum (most of whom preferred to remain anonymous) and a review of commentary on this issue by academics and policy experts.

We begin by reviewing the history and present state of federal disclosure policy pertaining to digital advertising, identifying gaps that allow online spending to go virtually unreported. We follow with an outline of the digital advertising ecosystem and the unique challenges it presents that require regulation, based on our interviews. With these gaps and challenges in mind, we argue that it is necessary and urgent for government to enshrine disclosure for digital political spending. We conclude by presenting policy recommendations that would help government

keep pace with 21st-century politics by bringing greater transparency and accountability to the digital arena.

I. Campaign finance disclosure and the internet: a history

In practice, campaign finance disclosure policies have two key components: (1) filing requirements for contributions and expenditures and (2) on-ad disclaimer requirements for funding sources. Disclosure filings provide crucial information to reporters, government watchdogs, and enforcement agencies about who is spending money where, how much, and what that is buying. Disclaimers indicate that content is promotional material – that the viewer is seeing or hearing an ad. Beyond this, they display the funding sources of a campaign directly on ads, allowing viewers to evaluate the ad based on the interests paying for it. Both components present challenges for regulation where digital advertising is concerned, as the majority of campaign finance laws were established before the rise of the internet as a political medium.

Federal, state, and local campaign finance laws differ; however, principles established at the federal level (discussed in detail here) carry over to policy at lower levels of government. The Federal Election Campaign Act (FECA) was passed in 1971 to regulate campaign finance in federal elections and amended in 1974 to establish the Federal Election Commission (FEC) as a regulatory body. In addition to imposing limitations on campaign contributions and expenditures and regulating the public funding system for presidential elections, FECA requires candidates, parties, and political action committees to disclose political spending, including spending on television, radio, print, and online advertising, to the FEC.⁸

Over the years, the Supreme Court has found many campaign finance provisions in FECA to be unconstitutional, but has consistently supported disclosure. In *Buckley v. Valeo* (1976), the Court established the logic for upholding disclosure that it maintains to this day, arguing that while disclosure policies may infringe on First Amendment rights regarding privacy of association and belief, there are compelling government interests for this: information about money raised and spent in campaigns is useful to voters' decision-making processes, deters corruption by making records public, and makes it possible to detect violations of campaign finance rules.⁹

The next major update to campaign finance law was the 2002 Bipartisan Campaign Reform Act (BCRA), which required disclaimers on all ads classified as “public communications,” including communications placed on TV, radio, print, and more, placed by candidates, party committees, and independent expenditure groups.¹⁰ Online campaigning was initially left out of the public communications category; up to this point, the FEC had addressed complaints involving the internet on a case-by-case basis, attempting to adapt existing regulations to the new, rapidly evolving medium. In 2006, the FEC finally issued a rule adding paid online advertising to its definition of “public communications,” while exempting unpaid political activity, such as social media posts.¹¹ The basis for this distinction was that, “Unlike other forms of mass communication, the Internet has minimal barriers to entry, including its low cost and widespread accessibility” – i.e., unpaid online activity was seen as an equalizing force.¹² As a result, disclosure requirements now applied to all ads placed on websites for a fee, but not to other free communications.

BCRA also partially closed a loophole created by the *Buckley* decision regarding the types of content that could be regulated. In *Buckley*, the Supreme Court listed – in a footnote – a set of words that constitute “express advocacy” and would make an ad subject to disclosure rules,

including phrases such as “vote for,” “elect,” “vote against,” and “defeat.”¹³ Communications that lacked these words would fall under the category of “issue advocacy” and would not have disclosure requirements. In the following decades, political actors used a literal interpretation of this distinction to flood voters with sham issue ads that featured candidates but avoided the specific words listed in *Buckley*.¹⁴ In BCRA, Congress partially addressed this by creating a new advertising category, “electioneering communications,” that is subject to federal filing and disclaimer requirements. Electioneering communications are issue ads that target voters, refer to a candidate, and air on broadcast, cable, or satellite channels close to primary or general elections.¹⁵

It is important to note that online ads are specifically exempted from the federal definition of electioneering communications, meaning that there is no disclosure required for so-called “issue ads” placed online – even if they target voters, refer to a candidate, and air near an election.¹⁶ This means that most of the Russian Facebook ad campaigns, like many targeted digital political ads, would fall outside current disclosure requirements because they did not expressly advocate for or against a particular candidate using the “magic words” from the *Buckley* decision. (Any ads that did expressly promote or oppose candidates would have been illegal.) The Russian Facebook example suggests that disclosure rules for electioneering communications should be expanded to cover digital ads as well, as there is no telling what influence sham online issue ads have on elections.

Beyond the rules maintained by the FEC, the Federal Communications Commission (FCC) requires a further layer of transparency for TV and radio advertising: broadcast stations and cable and satellite providers are required to maintain records of all requests for ad time, which as of 2016 must be posted publicly online.¹⁷ As Alex Howard and John Wonderlich of the Sunlight Foundation note, this requirement to post TV and radio advertising records online “has added a digital twist to a decades-old requirement that political ad spending be publicly disclosed, in near real time, while technology companies, newly relevant as political ad vendors, continue to get a pass altogether from analogous public protections.”¹⁸ That disclosure requirements for electioneering communications and ad buys do not apply to online activity signals a growing gap in current law.

Since the *Buckley* decision, the Supreme Court has found many provisions of campaign finance law to be unconstitutional. The 2010 *Citizens United v. FEC* decision and subsequent rulings unleashed a flood of political spending by super PACs and opened the door to chains of contributions and expenditures funneled through social welfare nonprofits, trade associations, and LLCs – groups that are not required to disclose their donors. Although the Court has consistently upheld disclosure, this “dark money” in the political system has introduced a lack of transparency that is compounded by digital advertising from nontransparent sources: “dark digital.”

Meanwhile, deep divisions between FEC commissioners have stymied effective regulation of digital advertising by the agency. Democratic and Independent commissioners have long maintained that novel digital technologies for political spending require updated regulation to protect the public interest. However, Republican commissioners have repeatedly blocked regulatory efforts. Since its 2006 rule-making, the FEC has provided advisory opinions to technology platforms and repeatedly sought public comment, but has not issued substantive rules regarding digital advertising or effectively addressed complaints. For example, in 2014, a complaint was brought before the FEC regarding online political attack ads by the social welfare

nonprofit Checks and Balances for Economic Growth, which spent nearly \$900,000 without disclosing the expenditure (which would have been an electioneering communication if the ads had appeared on TV). Unable to come to a resolution about disclosure of digital activity, the FEC wound up closing the case.¹⁹

While the regulatory environment has stagnated, the digital political landscape is rapidly evolving. New technologies for reaching voters have spawned a complex advertising ecosystem that, due to its lack of transparency, threatens the integrity of our political system. These changes are discussed in further depth below.

II. The dark digital political landscape

It's virtually impossible to tell exactly how much money is spent on online political campaigning and where that money is going, though it is a safe bet that the amount is growing rapidly. According to an estimate from Borrell Associates, a company that tracks and forecasts ad spending, the 2016 elections saw digital political spending exceed \$1.4 billion, a 789% increase compared to the 2012 election cycle.²⁰ Digital ads have made up a growing share of all political advertising: as one source that reported on the Borrell Associates numbers shows, digital spending made up 14% of all campaign ad spending in 2016, up from under 2% in 2012.²¹ A new study comparing digital spending in the 2012 and 2016 presidential elections calculates that in 2012, Barack Obama and Mitt Romney's campaigns combined spent \$77 million on digital media, while in 2016, Hillary Clinton and Donald Trump spent a combined \$104 million online – with Trump outspending Clinton four to one.²²

However, as Jordan Lieberman, the politics lead for a digital advertising company, argues, estimates of advertising expenditures tend to come from incomplete data sources, whether from the FEC or public company data from advertising buyers and media platforms.²³ Reports to the FEC do not require spending to be reported in standardized ways, which makes it impossible to assemble comprehensive and accurate analyses. For instance, one article on spending by potential 2020 presidential candidates reported that Senator Kamala Harris' campaign spent nearly \$300,000 on digital advertising in the first quarter of 2017, while Senator Kirsten Gillibrand spent nearly \$500,000.²⁴ A look at FEC filings shows that the two committees reported this spending in different ways. Harris' team made payments to Revolution Messaging for "Advertising – Web" and "Campaign Consulting," while Gillibrand's team reported payments to Anne Lewis Strategies for the vague "Communications Consulting." Other filers might report more or less specific descriptions of their expenditures, making it difficult to determine how money is actually being spent.

Beyond this lack of standardization, all of the experts we spoke with agreed that online political spending is especially opaque because of the complexity of the digital advertising ecosystem. This complexity emerges from the growing number of platforms on which political ads can appear, the ever-evolving variety of ad types, the explosion of digital advertising intermediaries, the rise of microtargeting, and the challenges of online anonymity.

As media and public affairs scholar David Karpf wrote in 2013, "[...] the Internet also poses some uniquely steep methodological hurdles as a medium that is in continuous, rapid, disruptive change. The Internet of 2016 will feature important dissimilarities from the Internet of 2006. It will be barely recognizable when compared to the Internet of 1996."²⁵ Unlike TV, which is comprised of a limited number of channels and technologies (broadcast, cable, and satellite), the internet offers nearly limitless ways to access voters – Google (and YouTube),

Facebook, Twitter, Snapchat, TV and music streaming services, news sites, mobile apps and games, and more – and a wide variety of ad types, from videos to banner ads and popups to promoted social media posts and native advertising. Google and Facebook are the reigning titans, but the technologies involved in digital advertising are numerous, distinct, and constantly evolving.

Specific types of ads pose unique challenges to disclaimer requirements. Our interviewees all noted the vital importance of accounting for ad size; ignoring these constraints would place undue burdens on the ability of political actors to convey their messages to voters. And indeed, federal campaign finance law (and most state law) allows exceptions for communications that are so small that disclaimers become impractical or consume an unreasonable proportion of ad space. These small-items and impractical exceptions were originally devised with materials such as promotional pens in mind, but have since been applied to digital advertising. On a case-by-case basis, the FEC has issued advisory opinions to companies regarding ways to satisfy disclaimer requirements on small digital ads. In 2010, the Commission ruled that Google’s proposal to link from its AdWords ads to separate landing pages with full disclaimers would be sufficient to satisfy disclaimer regulations. However, when Facebook requested a small item or impractical exemption for certain types of character-limited ads, the FEC deadlocked; some commissioners argued that the ads should not be exempt because Facebook could feasibly increase its own ad size and character limits, while others thought the ad types should be taken as is.²⁶ Due to the lack of guidance, these ads were effectively exempted from disclaimers.

Another potential voter information challenge is presented by native advertising: paid, sponsored material on websites that is designed to resemble news, games, or other non-marketing content. In a forthcoming law review article, law student Irina Dykhne notes that native advertising is gaining popularity with political campaigns, with Barack Obama’s campaign placing ads as billboards inside sports-themed games in 2008, Bernie Sanders running sponsored stories in Politico and BuzzFeed in 2016, and Zynga actively developing mini-game ads to run on its gaming platforms.²⁷ As Dykhne and several of the digital ad experts we spoke with point out, these ads are by design misleading: viewers are not meant to distinguish between the advertised content and unsponsored material. Without adequate warning that they are seeing a political ad, voters do not have sufficient information to evaluate messages, depriving them of important informational heuristics.

In addition to rapidly proliferating technologies and ad types, there has been an explosion in the number of intermediaries between a political actor and the purchase of an ad seen by voters. In fact, one of our interviewees noted that candidates themselves may not know where and how their own campaign’s money is being spent. Campaigns and outside spending groups regularly contract out the bulk of their advertising and communications work to consultants, reporting only that top-level expenditure to the FEC (as in the above examples of filings by Harris and Gillibrand’s committees). However, political consultants are often only the first link in a chain of spending and frequently subcontract to other vendors for TV, mail, or digital advertising. Subvendors for online advertising could include polling and analytics shops, sellers of voter data, companies that match voter data to cookies, IP addresses, or social media profiles, companies that create ads, or ad buying platforms.

At the federal level, spending on subvendors goes entirely unreported, meaning that current disclosure filing requirements fail to identify much of digital political activity – unlike with TV or radio, where, between FEC and FCC disclosure requirements, it is possible to obtain a

reasonably accurate portrait of who is spending money and what that buys in terms of voter reach.

Beyond these issues, because the internet and social media platforms are freely accessible, it becomes extremely difficult to verify the identities of online actors, which makes it challenging to trace the true sources of advertising and other content or enforce rules. This online anonymity is what allowed Russian affiliates to purchase online ads while using fake Facebook pages to pose as Americans.²⁸ It has also enabled the proliferation of automated bots and networks of linked websites that spread information—often “fake news” or disinformation—by sheer repetition. Of course, the online anonymity that complicates enforcement of disclosure is precisely why it is crucial to provide the public with transparent information about the true sources of online political ads.

The opportunities that digital media offers for data-driven advertising have led to another potentially dangerous political practice: microtargeting. Campaigns have long sought to segment and target particular audiences with tailored messages, but had relatively blunt means of doing so with TV. Digital platforms like Google and Facebook, on the other hand, collect vast amounts of data about users and allow for more nuanced messaging to narrower audiences. These platforms allow ad buyers to directly target specific people based on matched voter data. People now see vastly different ads depending on their demographics, causing “political redlining,” which sociologist Philip Howard defines as “the process of restricting our future supply of political information with assumptions about our demographics and present or past opinions” —contributing to, for example, partisan echo chambers.²⁹

Microtargeting prevents reporters and government watchdogs from holding ad sponsors accountable. Communications scholar Kathleen Hall Jamieson writes, “When reporters are able to locate ads, they can both hold them accountable for deception and, in the case of pseudonymously sponsored ones, try to unmask the funder.”³⁰ Howard and Wonderlich describe this as a problem of “algorithmic opacity, where the black box of the newsfeed, search algorithm, or ad segmentation prevents watchdogs or regulators from understanding what ads are being shown to whom and when.”³¹ When ads have infinite variations and go virtually unreported, accountability becomes impossible and the public loses essential information.

This complex, underregulated digital environment further compounds the challenges to transparency presented by dark money, allowing entire chains of political contributions and expenditures to go unreported.

III. The case for government regulation

As a growing share of political activity moves online and the digital media landscape becomes ever more byzantine, it is necessary and urgent that we update disclosure policies to ensure that political actors can be held accountable for their campaign activities and that voters aren’t left in the dark about who is seeking to influence them. Current laws and regulations, as we have shown, are significantly out of date and contain major gaps with regard to politics on the internet. We would argue that there is no compelling reason for paid digital advertising to be exempt from existing disclosure requirements for electioneering communications and standardized public filing of ad sales.

Disclosure policies do need to balance the needs and rights of multiple stakeholders: (1) voters and government watchdogs in whose interest it is to know who is spending political money and what they are buying; (2) campaigns and advocacy organizations that communicate messages

to voters; and (3) private political advertising providers—from social media platforms to digital ad consultants—that are in the business of marketing and innovation. However, at present, the regulatory balance is tipped far in favor of political campaigns and technology companies, whose interests do not align with the public’s need for information. Current law requires greater disclosure by political actors when they spend money on other media than when they purchase digital advertising—a glaring omission with no justifiable purpose.

Opponents of regulation see the internet as a force for innovation and democratization of politics via market forces. Republican FEC commissioner Lee Goodman, for example, argues that disclosure regulations would chill desirable online political speech.³² Goodman writes of the digital media environment, “What one hopes is emerging is a virtual free market of ideas and political causes.”³³ Such arguments privilege the interests of political actors with financial backing—including dark money groups—over the information needs of the public and a broader systemic interest in political accountability. This type of reasoning elides important distinctions in the types of political speech that take place on the internet, grouping content that is freely posted by individuals with paid advertising by coordinated, well-resourced campaigns.

Though the internet does increase the ability of individuals to freely exchange ideas, it is well-financed campaigns and organizations that benefit the most. As Ann Ravel has previously written, “Since its inception, this effort to protect individual bloggers and online commentators has been stretched to cover slickly-produced ads aired solely on the Internet but paid for by the same organizations and the same large contributors as the actual ads aired on TV.”³⁴ Indeed, research suggests that digital advertising tends to benefit traditional political actors over other groups.³⁵ As political scientists Erika Franklin Fowler, Michael Franz, and Travis Ridout observe in a textbook on political advertising, “[...] although the potential exists for nontraditional actors to be heard, many of the ads that go viral, whether designed for the web or not, are ones produced by the campaigns themselves or by more traditional outside groups.”³⁶

Another argument by skeptics of government regulation comes from legal scholar Nathaniel Persily, who contends that regulation cannot keep pace with technological change and would unduly burden the First Amendment. Persily writes,

[...] the task of “regulating campaigning on the Internet” is simply too large in scope and conceptually confusing to craft the kind of regulations that would be necessary in the area of political campaigns most sensitive to First-Amendment concerns. If regulation is going to occur, it will grow out of both the business necessity and sense of public obligation of the main portals.³⁷

He further notes that platforms already regulate speech via their terms of service, and so it would not be a huge leap for them to require transparency. Moreover, he suggests that, as private companies, they are not bound by the First Amendment and could potentially introduce more stringent rules than governments could.³⁸

However, we contend that relying solely on platforms to regulate themselves would not guarantee transparency for voters. Current efforts by platforms are inconsistent and do not satisfy the public’s need for transparency. Dykhne observes in her review that Snapchat requires political ads to disclose their purchasers and state their sponsors, and Twitter proactively labels all ads with a “promoted” icon—but Google and Facebook, which are by far the dominant platforms on the digital advertising market, do not currently have any specific

disclosure requirements for political advertisers beyond following the law (although Facebook now seems to be changing its policy in response to public pressure).³⁹

Companies do have some motivation to self-regulate and cooperate with the public interest. As Dykhne points out, platforms have an interest in building trust with their users, and “Consumers are likely to be unhappy with a platform that they feel facilitates deceptive advertising or, at the least, is not as transparent as its competitors.”⁴⁰ For instance, in the wake of outcry and political pressure following the company’s revelations about Russian spending in the 2016 election, Facebook CEO Mark Zuckerberg announced in September 2017 that the company would begin to ensure that ads link back to the pages that pay for them and that those pages would include a new feature showing all ads the page is running.⁴¹ This would be a material improvement, helping to eliminate “dark posts” and reducing the “algorithmic opacity” created by audience segmentation and microtargeting.

However, Facebook’s new policy lacks important information needed by voters to accurately assess ads. As depicted, the policy would show advertising paid for by individual pages on a case-by-case basis, improving transparency on the user-facing disclaimer end – but it would not allow for the types of systematic analysis that enable journalists and government watchdogs to do their jobs. Nor would it show the true funders of an ad or page; disclosing the names of vague front groups like a hypothetical “People for a Better America” are of little value to voters without also disclosing who is funding the front group.

Moreover, while Facebook holds a significant share of online advertising, it is only one platform. Not every company can be counted on to act out of a sense of public obligation, and even those that do will not adopt an adequate or consistent standard of information. The digital campaign experts we interviewed noted that implementing disclosure could present logistical hurdles for platforms that make it less desirable on their end, especially if they have to hire people to manually approve ads (thus also slowing ad buys, especially in the rush typical of the week or two before Election Day). Private companies will always balance the need for transparency against their interest in making a profit from selling political ads. Greater and more uniform transparency is needed from all major digital technology players. For this, we need government.

By updating campaign finance disclosure policies at every level of government, we can ensure that voters have the information they need to interpret political messages and make choices in their own interests and that reporters and government watchdogs can hold political actors accountable. Moreover, we can do so without posing undue burdens for campaigns, discouraging innovation, or becoming outdated the moment a rule is enacted. What is needed is a regulatory approach that emphasizes meeting the goals of disclosure rather than over-specifying the “how,” developing technologies that simplify compliance, and ensuring enforcement to incentivize openness.

IV. Recommendations

Our survey of the dark digital political landscape suggests that there are several measures that would, individually or in combination, significantly improve transparency and accountability.

1. **Regulate online electioneering.** There is no compelling reason to exempt online ads from the disclosure requirements that apply to electioneering communications on TV or radio. Eliminating this gap by applying existing requirements to the internet would result in greater transparency for a vast portion of online political activity.

2. **Require political committees to report subvenders.** When political actors only have to report the top layer of their spending, the public and government watchdogs do not get adequate information about where political money is being spent and what it buys. One way to shine a light on the full scale of digital political activity would be to require candidates, ballot measure committees, parties, PACs, and outside spending groups to itemize subvendor payments above a certain threshold in filings with the FEC and equivalent state and local agencies. California's Fair Political Practices Commission (FPPC) has a rule like this: all political committees in the state must report subvendor payments of \$500 or more made by vendors on behalf of the committee.⁴²
3. **Require platforms to report ad purchases.** Technology companies probably already track ad buys on their platforms in great detail, but if not, it is likely that they could easily start. It would, therefore, be feasible for a government agency to instate a disclosure rule similar to the FCC's requirement that TV and radio stations publicly file all political ad purchases. Platforms would be required to publish standardized records of purchases, including amounts, the candidate or issue being supported or opposed, the target audience, and other information to a publicly accessible database that is updated in real time. Democratic Sens. Amy Klobuchar (Minn.) and Mark Warner (Va.) have advocated for a similar proposal in a bill that would require platforms with more than one million users to maintain public records of political ad buys over \$10,000.⁴³ (It's worth noting that \$10,000 may be too high a threshold, as according to Facebook's investigation, 99% of the Russian ads cost under \$1,000 each.⁴⁴) Records could potentially even be submitted automatically via an API system maintained by the government to make compliance easier. Platforms should also be required to retain these files – and ideally, the ads themselves – for a certain number of years so that enforcement agencies can inspect and investigate as needed.

It may be impossible to enforce reporting of all buys, especially in the long tail of smaller websites that sell political advertising, but this approach would capture sales by companies that possess a bulk of the market share (such as Google and Facebook) and would help eliminate the black box of microtargeting for reporters and accountability groups. Though this solution requires the creation of new systems, the technologies and data collection methods to do so already exist.

4. **Require ads to be clearly marked as ads.** At a minimum, advertising disclaimers signal immediately to voters that they are encountering promotional material. Current federal regulations require that on-ad disclaimers be "clear and conspicuous." Disclaimer regulations should emphasize voters' interest in identifying paid political ads – reducing the chances of deception via native advertising. Sponsored content should be clearly highlighted as such in a large, contrasting font from the body of the ad. For smaller ads, such as social media posts, elections agencies could adopt Federal Trade Commission rules requiring the use of hashtags such as "#ad" or "#sponsored."⁴⁵
5. **Minimize the small-items and impractical disclaimer exceptions.** Current FEC policy allows exemptions from standard on-ad funding disclaimers on a case-by-case, advisory basis, when the disclaimer text would take up the entire space of the ad or otherwise be impractical. Agencies should instead establish a rule requiring that sponsorship and funding information be provided in an easy-to-access format on all ads, even those with size constraints. Insofar as companies can set the constraints of their ads, they can find

technical ways to accommodate disclaimers. The rule should focus on access to required information, rather than specifying all acceptable alternative disclaimers.

Dykhne, reviewing California's rules, offers one example of how this might work. Ads below a certain size, such as 200 characters, should be required to link clearly to a landing page with a disclaimer; at even smaller sizes or on mobile platforms such as Snapchat, options such as rollover text should be allowed.⁴⁶ California's regulation is written to be flexible, allowing sponsors to meet requirements using specified methods or "other technological means that provide the user with disclosure information."⁴⁷ This means disclaimer requirements would apply to any novel scenario.

If adopted, such policies would greatly increase transparency for digital political advertising and substantially benefit the public interest. However, these obstacles require attention from rule-making agencies:

1. **Lack of consistency.** Currently, disclosure laws and regulations vary greatly across jurisdiction, increasing legal costs and the risk of error for campaigns. As one of our interviewees noted, one measure that would greatly improve compliance is consistency across governments. If the FEC and the states were to adopt uniform disclosure policies, it would reduce the burden of compliance on political actors.
2. **Enforcement agency dysfunction.** At the federal level, the FEC has been deadlocked for years and routinely fails to come to a judgment on complaints of campaign finance violations. Other enforcement agencies may face similar dysfunction. Without a functioning body to administer rules and award fines, political actors have low incentive to comply. If the FEC remains unable to take decisive action, structural reform by Congress will be necessary to break the cycle of inaction.
3. **Investigating infractions.** Low barriers to entry and easy online anonymity mean that it could be difficult to track entities buying or selling ads. Anyone can set up a website; anyone – from anywhere in the world – can place a political ad. As Persily notes, "enforcement of virtually any rule that depends on establishing the identity of the actor becomes very difficult to implement in the context of online communication."⁴⁸
4. **Gaming the system.** As ever, political actors who do not wish their activities to be disclosed will continue to seek loopholes to avoid disclosure.

Aside from these challenges, more work remains to understand the full scope of dark digital politics – beyond paid online advertising – and the problems it poses for our democracy. Other reforms are also needed to ensure that voters can make informed choices and that political actors are held accountable to the people. Many states have only rudimentary disclosure laws that require significant improvement across all categories of political spending. Also, independent expenditures made using dark money present a challenge to identifying the true sources of political advertising both online and off. Policymakers will need to contend with these issues, but the result will be disclosure policy that adapts to the pace of technological innovation, promotes democratic speech, and protects the public interest.

Endnotes

- ¹ Isaac, Mike and Scott Shane. "Facebook's Russia-Linked Ads Came in Many Disguises." *The New York Times*, October 2, 2017, sec. Technology. <https://www.nytimes.com/2017/10/02/technology/facebook-russia-ads.html>.
- ² Schrage, Elliot. "Hard Questions: Russian Ads Delivered to Congress." *Facebook Newsroom*, October 2, 2017. <https://newsroom.fb.com/news/2017/10/hard-questions-russian-ads-delivered-to-congress/>.
- ³ Dwoskin, Elizabeth, Adam Entous, and Craig Timberg. "Google Uncovers Russian-Bought Ads on YouTube, Gmail and Other Platforms." *Washington Post*, October 9, 2017, sec. The Switch. https://www.washingtonpost.com/news/the-switch/wp/2017/10/09/google-uncovers-russian-bought-ads-on-youtube-gmail-and-other-platforms/?utm_term=.23fcd3bc109a.
- ⁴ Stamos, Alex. "An Update On Information Operations On Facebook." *Facebook Newsroom*, September 6, 2017. <https://newsroom.fb.com/news/2017/09/information-operations-update/>.
- ⁵ "Internet/Broadband Fact Sheet." *Pew Research Center: Internet, Science & Tech*, January 12, 2017. <http://www.pewinternet.org/fact-sheet/internet-broadband/>.
- ⁶ Gottfried, Jeffrey and Elisa Shearer. "Americans' Online News Use Is Closing in on TV News Use." *Pew Research Center*, September 7, 2017. <http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/>.
- ⁷ Miller, Sean J. "Digital Ad Spending Tops Estimates." *Campaigns & Elections*, January 4, 2017. <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.
- ⁸ "The FEC and the Federal Campaign Finance Law." *Federal Election Commission*, July 2014. https://transition.fec.gov/pages/brochures/fec_feca_brochure.pdf.
- ⁹ *Buckley v. Valeo*. 424 U.S. 1 (1976).
- ¹⁰ "FAQ on the BCRA and Other New Rules." *Federal Election Commission*, February 2005. https://transition.fec.gov/pages/brochures/bcra_brochure.pdf.
- ¹¹ Bauerly, Cynthia L. "THE REVOLUTION WILL BE TWEETED AND TMBL'D AND TXTD: NEW TECHNOLOGY AND THE CHALLENGE FOR CAMPAIGN-FINANCE REGULATION." *The University of Toledo Law Review* 44 (2013): 525-40.
- ¹² "11 CFR Parts 100, 110, and 114: Internet Communications." *Federal Register* (April 12, 2006), 18589. https://transition.fec.gov/law/cfr/ej_compilation/2006/notice_2006-8.pdf.
- ¹³ *Buckley v. Valeo*. 424 U.S. 1 (1976).
- ¹⁴ Torres-Spelliscy, Ciara. "Transparent Elections after Citizens United." *Brennan Center for Justice*, 2011. <https://www.brennancenter.org/sites/default/files/legacy/Disclosure%20in%20the%20States.pdf>: 4.
- ¹⁵ "Electioneering Communications." *Federal Election Commission*, January 2010. <https://transition.fec.gov/pages/brochures/electioneering.shtml>.
- ¹⁶ *Ibid.*
- ¹⁷ Watson, Libby. "FCC Votes to Expand Transparency for Political Ads." *Sunlight Foundation*, January 28, 2016. <https://sunlightfoundation.com/2016/01/28/fcc-votes-to-expand-transparency-for-political-ads/>.
- ¹⁸ Howard, Alex and John Wonderlich. "Technology Companies Should Publish Political Advertising Files Online." *Sunlight Foundation*, September 12, 2017. <https://sunlightfoundation.com/2017/09/12/technology-companies-should-publish-political-advertising-files-online/>.
- ¹⁹ Ravel, Ann M. "Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp." *Federal Election Commission*, February 2017. http://classic.fec.gov/members/ravel/ravelreport_feb2017.pdf: 15.
- ²⁰ Miller, "Digital Ad Spending Tops Estimates."
- ²¹ Kaye, Kate. "Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up." *AdAge*, January 3, 2017. <http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>.
- ²² Williams, Christine B. and Girish J. "Jeff" Gulati. "Digital Advertising Expenditures in the 2016 Presidential Election." *Social Science Computer Review*, September 8, 2017, 1-16: 7.
- ²³ Lieberman, Jordan. "The Absurdity of Tracking Political Digital Spends." *Campaigns & Elections*, January 10, 2017. <https://www.campaignsandelections.com/campaign-insider/the-absurdity-of-tracking-political-digital-spends>.
- ²⁴ Stein, Sam and Paul Blumenthal. "Potential 2020 Candidates Are Already Spending Big On Online Ads. Here's Why." *Huffington Post*, May 15, 2017, sec. Politics. http://www.huffingtonpost.com/entry/2020-democrats-spending_us_5919df4ce4b0809be156da65.
- ²⁵ Karpf, David. "The Internet and American Political Campaigns." *The Forum* 11, no. 3 (January 1, 2013): 1.

-
- ²⁶ Bauerly, "THE REVOLUTION WILL BE TWEETED AND TMBL'D AND TXTD."
- ²⁷ Dykhne, Irina. "Persuasive or Deceptive? Native Advertising in Political Campaigns." *Southern California Law Review* 91 (2018). Forthcoming.
- ²⁸ Isaac and Shane, "Facebook's Russia-Linked Ads Came in Many Disguises."
- ²⁹ Howard, Philip N. *New Media Campaigns and the Managed Citizen*. Cambridge University Press (2006), 132.
- ³⁰ Jamieson, Kathleen Hall. "Messages, Micro-Targeting, and New Media Technologies." *The Forum* 11, no. 3 (January 1, 2013): 433.
- ³¹ Howard and Wonderlich. "Technology Companies Should Publish Political Advertising Files Online."
- ³² Goodman, Lee E. "The Internet: The Promise of Democratization of American Politics." In *Law and Election Politics: The Rules of the Game*, edited by Matthew J. Streb, 45-70. Routledge, 2013.
- ³³ Ibid, 69.
- ³⁴ Ravel, Ann M. "Before the Federal Election Commission In the Matter of Checks and Balances for Economic Growth: Statement of Reasons of Vice Chair Ann M. Ravel." Federal Election Commission, October 24, 2014. <http://eqs.fec.gov/eqsdocsMUR/14044363872.pdf>.
- ³⁵ Ridout, Travis N., Erika Franklin Fowler, John Branstetter, and Porismita Borah. "Politics as Usual? When and Why Traditional Actors Often Dominate YouTube Campaigning." *Journal of Information Technology & Politics* 12, no. 3 (July 3, 2015): 237-51.
- ³⁶ Fowler, Erika Franklin, Michael M. Franz, and Travis N. Ridout. *Political Advertising in the United States*. Avalon Publishing (2016): 82.
- ³⁷ Persily, Nathaniel. "The Campaign Revolution Will Not Be Televised." *The American Interest*, October 10, 2015. <https://www.the-american-interest.com/2015/10/10/the-campaign-revolution-will-not-be-televised/>.
- ³⁸ Ibid.
- ³⁹ Dykhne, Irina. "Persuasive or Deceptive? Native Advertising in Political Campaigns."
- ⁴⁰ Ibid, 38.
- ⁴¹ "Mark Zuckerberg's Facebook Page." September 21, 2017. <https://www.facebook.com/zuck/posts/10104052907253171>.
- ⁴² "Campaign Disclosure Manuals." *California Fair Political Practices Commission*. <http://www.fppc.ca.gov/learn/campaign-rules/campaign-disclosure-manuals.html#title1>.
- ⁴³ Shaban, Hamza and Matea Gold. "Facebook, Google and Twitter Face Proposed Bill Targeting Shadowy Political Ads." *Washington Post*, September 22, 2017, sec. The Switch. <https://www.washingtonpost.com/news/the-switch/wp/2017/09/22/facebook-google-and-twitter-could-face-a-new-law-targeting-shadowy-political-ads/>.
- ⁴⁴ Schrage, "Hard Questions: Russian Ads Delivered to Congress."
- ⁴⁵ Martens, Lisa M. and Ilona M. Wheat. "Using Hashtag #Disclosures in Social Media Advertising." *The National Law Review*, January 13, 2017. <http://www.natlawreview.com/article/using-hashtag-disclosures-social-media-advertising>.
- ⁴⁶ Dykhne, "Persuasive or Deceptive? Native Advertising in Political Campaigns."
- ⁴⁷ Bauerly, "THE REVOLUTION WILL BE TWEETED AND TMBL'D AND TXTD," 534.
- ⁴⁸ Persily, "The Campaign Revolution Will Not Be Televised."